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, 2 March 2001, at 8:30 am
in Conference Room A of the Legislative Council Building

Members present	**:**	Hon SIN Chung-kai, (Chairman) Hon Margaret NG, (Deputy Chairman) Hon Eric LI Ka-cheung, JP Hon NG Leung-sing Hon James TO Kun-sun Hon Bernard CHAN Hon Jasper TSANG Yok-sing, JP Hon Henry WU King-cheong, BBS Hon Audrey EU Yuet-mee, SC, JP
Members absent	**:**	Hon Albert HO Chun-yan Dr Hon David LI Kwok-po, JP Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP Hon Ambrose LAU Hon-chuen, JP Hon Abraham SHEK Lai-him, JP
Public officers attending	**:**	<u>For Items I & II</u> 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 Y K CHOI Acting Deputy Chief Executive, Hong Kong Monetary Authority

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

For Item I

Ms Sherman CHAN
Senior Assistant Law Draftsman

Ms Vicki LEE
Government Counsel

Ms Beverly YAN
Senior Government Counsel

For Item II

Miss Ada CHEN
Senior Government Counsel

Attendance by invitation : For Items I & II

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

Ms Barbara SHIU
Senior Director, Intermediaries, Securities and Futures Commission

Mrs Alexa LAM
Executive Director, Securities and Futures Commission

Mr Andrew YOUNG
Legal Consultant, Securities and Futures Commission

Mr Joe KENNY
Consultant, Securities and Futures Commission

Mr Leo LEE
Director, Licensing Department, Securities and Futures Commission

For Item I

Mrs Yvonne MOK
Associate Director, Intermediaries Supervision Department, Securities and Futures Commission

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

Staff in attendance **:** Mr KAU Kin-wah
Assistant Legal Adviser 6

Ms Connie SZETO
Senior Assistant Secretary (1)1

主席：

首先，多謝各位出席法案委員會的會議。先請政府的代表人員進入會議室。由於今天早上10時45分在Chamber舉行關於財政預算案開支部分的會議，所以我們這個會議必須準時結束，使各位同事也能出席該會議。

另外，政府亦特別就我們在上次會議上還沒有討論完畢的事項，提交了兩份文件，即關於條例草案第V部事項。政府的代表人員稍後亦會於10時至10時25分與各位討論。另外，我亦會用5分鐘的時間檢討委員會的工作進度。

首先提醒大家，今天議程第一項是討論條例草案第VI及第VII部。有關文件的編號是CB(1)626/00-01(01)及CB(1)648/00-01(04)號文件，這些文件很早便已派發給大家了。

先請副局長區璟智女士為我們作簡單介紹，Mr Andrew PROCTER亦會協助她為我們作出介紹。區璟智女士。

財經事務局副局長區璟智女士：

各位早晨。多謝主席。正如剛才主席提到，今天我們計劃與各位議員討論條例草案第VI及第VII部。其實這兩部也是有關新發牌制度具關鍵性的部分。當中訂有一些條款，主要是針對被規管人士，尤其是中介人士的財政狀況、一般商業運作等各方面的要求。這些被規管的人士大致可分為3類：第一類是一般稱為"經紀行"的，即證監會規管的持牌法團及他的代表；第二類是由金管局規管的銀行證券部；而第三類是與上述機構有關的，而在現行條例草案中稱為associated entity，即我們嘗試翻譯作"有聯繫實體"，這些機構其實是指與經紀行有控權關係的公司。因為我們發現市場現時出現一個現象，就是有些經紀行可能將客戶的資產撥交另一間公司持有。在現行法例下，如果出現這種情況，證監會便無法規管這類與經紀行

有控權關係的公司。所以今次我們藉着這個法例改革的機會，將這些associated entity也納入規管範圍，以堵塞現有的漏洞。

或許我不再延誤大家的時間，以下請Mr PROCTER向大家介紹第VI及第VII部的規管內容。

Chairman:

Mr PROCTER.

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

Chairman, Parts VI and VII are mostly about giving the SFC rule-making power. I will come back and deal in a moment with the subject matter of that rule-making power, but it perhaps worth beginning by observing that the reason for dealing with these issues in this way - that is, providing for rule-making power rather than setting out the detail and substantive provisions in the ordinance - is essentially because many of these issues are detailed and technical, and most of them are also issues to which the regulator would wish to respond flexibly in order not only to facilitate business, but to best protect investors. So the intention is that although the rule-making power will, of course, be subject to negative vetting before Legislative Council, it would be a shorter, quicker, more flexible route to achieve that dual objective of administrative facilitation of business and investor protection.

Miss AU has touched on the concept of associated entities, and so if Members have before them the overview paper for Parts VI and VII, I will turn immediately then to paragraph 5, which is one of the key provisions, one of the key rule-making powers that is given to the SFC, not only under this Bill but under the existing legislative arrangements, and that is in respect of Financial Resources Rules. I think Members are generally familiar with the Financial Resources Rules and the fact that they are the rules by which the SFC not only

describes risk but also ascribes to that risk a certain weight, and says "Against that risk you need to hold certain liquid assets". They are key provisions to ensure the solvency and liquidity of the operations of those whom we register and license.

It has also been clear from the discussion in earlier Bills Committee meetings that these are one of the key sets of rules that apply only to SFC registrants, and not to exempt AIs. I think we have discussed at some length for that, and the reason in a nutshell that those exempt AIs are themselves subject to the HKMA's rules, which are an expression of the Basel Capital Accord as it applies to banks internationally. The difficulty under the existing arrangements in respect of Financial Resources Rules is that there are a number of sets of rules. In fact, we made some advance in that respect during the course of last year when we combined the Financial Resources Rules that applied to commodities dealers and securities dealers; and the intention is, under this rule-making power, to in fact produce one single set of Financial Resources Rules which would mirror the single licence concept.

There is a second difficulty, though, under the existing law, and that is that for the most part a breach of these financial resources rules requires that a business stop trading immediately. Obviously that can have very serious consequences, and it is not in all cases strictly necessary for the purposes of investor protection or the protection of market integrity. What the new provisions provide for is that in the event that a firm either cannot comply or cannot verify its ability to comply with the financial resources rules, it has a reporting requirement, and it must report to the SFC either that it cannot comply or that it does not know whether it can comply; and it should stop business. But importantly and in distinction to the current law, the SFC can allow it to continue to operate but subject to conditions. That is described in clause 142 and following of the draft legislation. A distinction is drawn between key provisions of the Financial Resources Rules and cessation of business is only required in respect of those key provisions, and thereafter the SFC may allow business to continue subject to conditions.

The next class of rule-making power is in respect of client assets. Client assets are

essentially defined as those assets that the intermediary obtains through its registered activity. It is a rule-making power that allows the SFC to make rules with respect not only to its registrants but also to exempt persons. As we have stressed in respect of Part V, for the most part the standard that has to be complied with by our registrants and exempt persons will be the same, and here is an example where rules will be made that will cover both our registrants and exempt AIs.

Clause 144 of the Bill, for example, allows the SFC to make rules prescribing the manner in which a licensed corporation or an exempt AI or, as ours foreshadowed, an associated entity, should handle clients' securities and collateral. There is a second and related rule-making power, and that is in respect of clients' money. Here, though, there is a distinction. Because of the nature of banking business as described in paragraph 9 of the paper, it was thought that the protections and safeguards in respect of the operation of the banks as they handled client money was sufficiently addressed under the Banking Ordinance, and under the other regulations and rules promulgated by the HKMA. It says that the Client Money Ordinance did not need to apply to exempt AIs, but that is clearly on the basis that there is already in place a sufficient safeguard and a sufficient regime to protect investors.

If I might ask Members to turn to what is clause 145(4), which is at page C1787, there is a small drafting matter I would bring to the attention of Members. You need in fact to look not only at page 1787 but also at page 1783. 1783 is the Client Asset Rules; 1787 is the Client Money Rule. You will see in subclause (4) on page 1783 that there is a reference to rules made under the section, and that they may provide for an intermediary and associated entity which, "without reasonable cause, contravenes any specific provisions". The expression "without reasonable cause" is obviously there a safeguard, to protect the inadvertent breach or breach where there is a proper basis for the conduct. That clause does not appear in the Client Money Rules subclause at page 1787, and we think on reflection that it should, and that the "without reasonable cause" provision should be added to the Client Money Rule as an additional protection for those who may have a proper justification, or at least in their subjective judgment, a justification for the conduct that might otherwise be in

breach of the rules. So one of the proposals will be an amendment to add the words "without reasonable cause" in respect of subclause (4) of the Client Money Rules under 145.

The next class of rules is a set of rules empowered under clause 147 and it concerns the keeping of accounts and records, and provisions of records to clients. This is discussed at paragraph 10 of the overview paper, and again this is a rule-making power that applies not only to SFC registrants but also to exempt AIs and associated entities. So again the same set of standards will apply across the industry. The provisions of clause 148 allow rules to be made in respect of the issue of contract notes, receipts, statements of accounts and notifications to clients. The combination of these account-keeping records and the disclosure requirements in respect of clients, I think, are pretty clear on their face, as to their effect, but the purpose, of course, is to allow the SFC not only to be able to inquire properly and to have access to records that will adequately allow it to understand the business of an intermediary, and for that matter, for the HKMA to do the same in respect of exempt AIs, but also to ensure that clients are in a position to understand their own affairs and circumstances, and to have a record of their dealings with an intermediary.

One of the difficulties that we often encounter is that clients are not given proper information about their dealings. Sometimes they do that of their own choice, rather unwisely. But at least in this situation the primary and the starting position is that certain information must be provided, according to these rules made under clause 148, to a client so the client is at least in a position to protect his or her own interests.

Clause 149 to clause 159 is the next class of powers. These are not rule-making powers. They are rather related to audit in the general sense. Some of them simply require that an intermediary – in this case a licensed corporation – should appoint an auditor. In that sense it is a parallel to provisions under the Companies Ordinance that would require the appointment of an auditor. Those provisions also apply to the associated entities of licensed corporations. This is another area where the provisions in respect of the appointment of auditors do not apply to exempt AIs, and again the reason is simply that there is, under the

Banking Ordinance and the banking regulatory regime, parallel requirements that auditors be appointed to banking institutions; and so it was clear to us that there was no need to replicate those provisions in this ordinance.

There is a second type of section that is dealt with between clauses 149 and 159, and it begins at clause 155, which is at page 1811. I think I should take Members to that, very briefly, because it is a section that has attracted some comment. 155 and 156 empower the Commission to appoint an auditor for licensed corporations, essentially to conduct a forensic inquiry. The trigger for the appointment under 155 is set out in subclause (1), and you will see there that it is a series of failures on the part of the licensed corporation; failure to satisfy that it can comply with the Financial Resources Rules, a belief that there may be difficulties in the associated entity in complying with certain rules. Prescribed requirements referred to in subparagraph (b) are defined in subclause (6) below. Or it can be that we have a reasonable cause to believe that the licensed corporation has failed to submit financial statements, or that a written report has been lodged by a person under section 153 – that is an auditor, in the traditional sense of the auditor, the statutory auditor.

Subclause (1) described a variety of situations in which we might have basis for concern about the affairs of the licensed corporation, and in those circumstances we are empowered to appoint an auditor, and the operative words are "to examine and audit either generally or in respect of any particular matter, the accounts and records of the licensed corporation or its associated entity". That is not an action, obviously, that we can take lightly. In practical terms, what usually happens, in fact, is that where we have that kind of concern we discuss it with the licensed corporation, and there is almost invariably – in fact, in the last five years, invariably – an agreement between the SFC and the licensed corporation that an auditor should be appointed to undertake some kind of inquiry into the affairs and systems and controls of the firm.

However, where there cannot be that kind of consensus basis for the appointment, there is this power that would allow the SFC to appoint an auditor to undertake what I have

described as a forensic inquiry. The use of the words "examine" and "audit" caused some concern. It was thought that the use of the word "audit" was a term of art, and might imply a full audit of the corporation; but I think we are satisfied that the words that follow, "either generally or in respect of a particular matter", make it clear that it is not used in that sense; it does not require an appointment for a full audit of the corporation, although in some circumstances – they would be extremely rare – we might in fact require a full audit of a corporation.

Perhaps more troubling in terms of market comment has been clause 156. Clause 156 essentially allows the SFC to do the same thing, to appoint an auditor, to examine and audit, either generally or in respect of a particular matter, the accounts and records of a licensed corporation. The trigger is quite different. Subclause (1) sets out the trigger, and essentially it is a complaint from one of the clients of the licensed corporation. Some intermediaries have thought that this laid them bare or exposed them to malicious complaint on the part of former clients. The triggers in subclauses (1)(a) and (b) I think are pretty clear and pretty narrow – " for the failure to account to a client for assets held, or failure to act in accordance with instructions". Not only are those triggers quite narrow, but the person who makes that complaint must, by virtue of subclause (3) on page 1815, verify all those statements in a statutory declaration. As you see in subclause (3) they are required to set out the full particulars and circumstances of the allegations they make. Not only that, but the Commission itself must also be satisfied that the matters set out under subclause (4). "…were not to appoint an auditor under subsection (i) unless we are satisfied that the person making the application has a good reason for doing it" – in other words, that it is not malicious, frivolous or vexatious , and that it is in the interests of either the licensed corporation, "…that person or the investing public that an auditor be appointed. It is a pretty broad test, but at least it means that we are not to do it simply on a whim.

The Commission also, in respect of associated entities, cannot appoint an auditor over an associated entity that is an AI, without first consulting the Monetary Authority. That is subclause (5). Finally, subclause (6) provides for a form of procedural fairness in respect

of this kind of application, and it requires that before the appointment of an auditor in response to this kind of complaint from a former client or client of the intermediary, we must give that licensed corporation or associated entity a reasonable opportunity to be heard in respect of the application.

Although it has caused some concern to some intermediaries, and some intermediaries have expressed concern in the public comment, there are safeguards set into the section. In fact this is a section which is very similar to the existing law, except that the safeguards in respect of this provision are extended and expanded when compared with the existing law.

Chairman, that takes me then to Part VII, and Part VII begins with a long provision in respect of business conduct. I think again it is appropriate to take members to what is clause 163, beginning on page 1831. These business conduct rules again apply to SFC registrants and to exempt AIs, so again we have that repeated theme of the same standards applying across the industry. What clause 163 provides is for a long list of circumstances in which we can make rules that govern, essentially, the relationship between an intermediary and the intermediary's client. Very quickly moving through what is clause 163(2), you will see that we can make rules in respect of advertising, the terms of contract – and I will come back to that in a moment; the provision of information relating to the intermediary; the requirement to know your client – that is to obtain information about your client; the requirement to make proper judgments about the advice you give to your client – usually referred to in shorthand as "suitability requirements"; requirements to disclose risk in respect of investments; requirements to disclose any interests the intermediary may have in respect of advice given; requirements restricting transactions, for example, preference of one client over another client; requirements in respect of what is colloquially known as "front running" – that is using information about your client to advantage yourself as an intermediary; requirements – and here I am up to sub-clause (j) if you are trying to follow me – in respect of conflict of interest; requirements in respect of soft dollars, rebates and other commissions, and disclosure of those matters; requirements in respect of own account dealing or proprietary

trading and disclosure in respect of those matters; and requirements in respect of money laundering.

So essentially it is a list of pretty well all the circumstances, and you will see there is a compendious catchall at the end anyway. It is pretty well all the circumstances of the relationship between an intermediary and a client, allowing us to make rules that would better structure and govern that relationship for the benefit of investor protection.

I said I would come back to what is subclause (3), requirements in respect of the terms of the contract, because that has caused some concern to some industry participants who thought perhaps the SFC might impose upon them, for example, a remuneration structure as between themselves and the client. That certainly is not the intention. It is not the intention to interfere with the basic contractual freedoms between an intermediary and the intermediary's client. In fact sub-clause (3) provides a special safeguard in that respect – that those provisions and those rules made in reliance upon sub-clause (2)(b) must be in pursuit of one of the regulatory objectives or for the better performance of the functions of the Commission. Certainly, Chairman, the intention is not, as I say, to arbitrarily interfere with matters of contractual freedom, but rather to make sure that in areas such as the requirement to disclose risk as part of a term of a contract, the requirement that a contract actually be provided in a written form – those types of matters at a higher level are properly dealt with by an intermediary.

That is a long list of rule-making powers, and in fact, the SFC has never made rules in respect of any of those matters. In fact, the intention is, at least in the short term, that we will not make rules in respect of any of those matters. What we do at the moment is rely upon codes of conduct that in fact cover the same areas. That is why clause 164, which is the next clause, is so important. Clause 164 provides that in respect of exactly those same matters, the SFC can promulgate codes of conduct governing the conduct of business by intermediaries and their representatives. Again, it is intermediaries, and "intermediaries" is defined to include our registrants and exempt AIs; and the intention is that codes of conduct

would continue, for the time being, to be the basic way in which the SFC sets out its expectations in respect of these matters. But there is a practical limit in respect of codes of conduct, and it arises where there is a breach of those codes. Essentially codes of conduct, because they are not statutory, are an expression of best intentions, best practice, our expectation. Where an intermediary chooses to ignore a code of conduct, the range of things that can be done in response to that is quite limited. To over-simplify it slightly, we would have to demonstrate that by reason of ignoring the code of conduct on a particular provision, the intermediary had demonstrated that they were not fit and proper; and in fact you will see in what is clause 164(4) a specific provision that says that failure on the part of an intermediary to comply with a provision set out in the code might be a matter to be taken into consideration in determining whether or not the intermediary or its representative is fit and proper.

It is actually quite difficult in some cases to demonstrate that breaches or non-compliance with particular parts of a code really do demonstrate that someone is not fit and proper. There are circumstances where it would be better, faced, for example, with a widespread industry disregard of provisions of the code, to be able to make rules in respect of that provision – in other words, to be able to make subordinate legislation negative vetted by the Legislative Council, which prescribe as a matter of law what that conduct should be. Whilst not wishing to diminish what are extensive rule-making powers, the intention is to begin at least with code, to continue current practices dealing with things through codes, but to bear in mind that there have been cases in the past where we have been concerned that codes have not been adequate as safeguards. So far I think we have been fortunate that the intermediaries in Hong Kong have been prepared to abide by the provisions of the codes, and they have been persuaded by the SFC that that is a proper approach where we have a flexible basis on which to deal with these matters.

In some cases in the future that may change, and hence the rule-making power is extremely important. The advantage of codes, I think, particularly in the context of a jurisdiction like Hong Kong, is that there are such a large number of intermediaries spanning

such a large and various set of business models and sizes, that the kind of prescriptive language that would be necessary for rules sometimes makes it very difficult to flexibly and reasonably set down standards for codes of business in a way that can be done under codes of conduct, where one can apply relatively general language, and rely upon the spirit and intention of that general language as the basis for dialogue with an intermediary.

Part VII having dealt with business conduct under rules and codes, then deals with what might be called a miscellany of matters that do not fit anywhere else. They do not particularly follow from the business conduct provisions of 164 and 165. The first of those is in respect of short selling. These short selling provisions are provisions that are, I think in every material sense, exactly the same as currently appear in what is section 80C of the Securities Ordinance, and those provisions are in fact provisions that have recently been considered by the Legislative Council. They only came into effect in July of last year. Just for the benefit of Committee Members, I will take Members to what is clause 165(1) on page 1839, so that we can be clear on what is meant in this context by "short selling".

You will see there that contains the basic prohibition. A person is not to sell securities on or through a recognized stock market unless that person or that person's agent or principal has, or reasonably and honestly believes that they have, a presently exercisable and an unconditional right to vest the securities in the purchaser – which in lay language means that you have either got to own the thing or you have got to have an effective borrowing agreement that is unconditional and is being exercised at the time you enter into the sale or purchase agreement. That is what short selling is about. It is basically that you either own the shares or you have got them accessible to you through a borrowing agreement, and you have got to have that in place and unconditional, before you enter into your agreement.

Then the rest of the provision sets out firstly circumstances in which you might act in good faith and thereby avoid liability under subclause (1), and those circumstances are described in subclause (3); and in the following provisions, 166 in particular, describe reporting requirements. Basically what this is about is making sure that if you enter into a

short sell, then you disclose the fact that it is a short sell. That is, if you enter into a short sell that is to be satisfied by virtue of a borrowing agreement, then you have got to make that clear to those with whom you deal. The way in which you do that is simply to badge the order when you place it on the stock market or the stock exchange.

So, Chairman, I do not propose to go through those short selling provisions in any detail. We can, obviously enough, come back to them, but they were provisions that were recently considered by Legislative Council.

Clause 168 is another provision that is in the category of miscellaneous, and does not really fit anywhere else. It is about trading of exchange-traded options, and it is about over-the-counter trading of those exchange-traded options. At the moment there is a provision in the Securities Ordinance, section 76(1)(a) – and this is described in paragraph 16 of the overview paper – that prohibits options trading of exchange-traded options unless they are conducted in a manner prescribed by rules. Now, there are no rules under that section. In other words, you cannot trade over the counter in respect of these exchange-traded options, by reason of section 76(1)(a). The concerns are a little hard to get to grips with, but they essentially are about the exposure that over-the-counter trading of those exchange-traded options might cause for the intermediary that wrote those options.

There is a concern amongst the market practitioners who have considered this clause and its proposed analogue in the White Bill, that that is unnecessarily restrictive, that there is no clear case that allowing people to trade those exchange-traded options over the counter would in fact expose intermediaries to unacceptable risks. So clause 168 adopts a different approach. What it does effectively is turn the existing section 76(1)(a) on its head, and says you can do this unless it is prohibited by law. The intention is that we should facilitate that kind of trading unless and until we see that it becomes a problem; and certainly at the present time there is no intention to promulgate any rules that would prohibit that kind of trading.

Clause 169 is a new provision, although there are similar provisions in the existing law. It is the provision that, again and in colloquial lay language, is referred to as the "cold calling" provision. It is designed to prevent people being harassed by brokers and dealers who ring them essentially unannounced and unsolicited, and use pressure tactics to force them into a sale or purchase, and pressure tactics which might result in a hasty and ill-considered judgment about whether to enter into that sale or purchase of securities or futures contract. It might lead to the unsuspecting investor being ripped off. So clause 169 is designed to avoid the risk of that happening. It is modelled on a provision in the Leveraged Foreign Exchange Trading Ordinance, although there are some similar sorts of provisions in the Securities Ordinance although they are sometimes described as cold calling function in the share hawking provisions in that ordinance. This cold calling provision goes further than the share hawking provision, though, under the existing legislation. You will see that in 169(1) it prevents or prohibits an unsolicited call where the unsolicited call amounts to making an offer to another person to sell securities, futures contracts, or other fiduciary agreements; and the rest of the provision is basically an extension of that basic prohibition. In subclause (2) there are some exceptions to that. You can cold-call a solicitor or an accountant when they are acting in their professional capacity. You can cold-call another licensed person or an exempt person, or a money lender, or an existing client or a professional investor; and what that set of exceptions is essentially aimed at is allowing you to make cold calls that would naturally arise in the ordinary course of your business as a dealer, or make cold calls in circumstances where the risk of harassment or heavy pressure selling tactics are less likely to result in a hasty or ill-considered judgment – which is why there is a reference there to existing clients or professional investors.

We have discussed in previous Bills Committee meetings this notion of "professional investor" and the need for that notion to be expanded in accordance with rules that the SFC would make, and in accordance with the recently concluded consultation. The difficulty with this cold calling provision, to the extent that there is one, is that it is hard to know what is going to happen in the future, in respect of technology. One of the market observations has been "Yes, we can understand that a cold call might result in undue pressure

being exerted, where someone telephones somebody unannounced, or they know on the door unannounced, and they are actually having a face-to-face or real time discussion with them, which puts heavy selling pressure on them", but people argue that the definition of what an unsolicited call includes, that it would, for example, include push e-mail, or faxes or other forms of technology that amount to an unsolicited, unannounced exhortation. They say: "Well, in those circumstances it's hard to see how the pressure could be so overbearing as to overbear the will of the investor". There is something in that as a complaint and a concern. A similar issue has been wrestled with by the UK authorities, and what the financial services authority is doing is considering a notion of what they call "real time communications" to try and distinguish between communications which have that necessary sense of real time urgency which might give rise to pressure, and those that do not.

You will see that under subclause (3) we have a rule-making power to carve out from the definition of "unsolicited calls" certain conduct. The intention is that we should draw a similar kind of distinction and try and better identify those things that have that real potential to cause risk to investors. But we think that it is better to begin with a wide definition, because we simply cannot anticipate where technology is going, and we do not want to be in a position where we have to come back, with every new advance in technology, and say: "Yes. We think this is one that might lead to an over-borning of the will of an investor, and so we need to add that to the definition of what might amount to cold calling". It is a good example of when a rule-making power is specifically allowed for, to add flexibility and allow business to be facilitated without compromising investor protection.

Finally, before my voice gives out, there is a clause that completes Part VII in respect of certain representation. It essentially says that you should not represent, by reason of having been licensed or approved by the SFC, that that is an express or implied endorsement of your abilities or qualification by the Government or the Commission.

That completes what I want to say about Parts VI and VII. It does take me back, though, to this question of rule-making power, and just to complete that - because so much of

Parts VI and VII is about rule-making power, and to emphasize what I think will be well-known to Members of this Committee, but to remind them in this context – the rules the SFC makes are subsidiary legislation, so they do require negative vetting by the Legislative Council. They are not rules that the SFC can make of its own volition that come into effect without further checks and balances, and without the scrutiny of Legislative Council. Not only that; the SFC recognizes that it is not the source of all wisdom in respect of these matters, and that market consultation is absolutely critical in getting these rules right as they relate to business conduct.

So the practice that has grown up, and that is invariably followed now, and the practice that has already begun in respect of the rules under the proposed Part VI and Part VII, which are in draft, is to form working groups of industry practitioners who are specialists, who we consult in respect of these laws. The intention is that in preparing a preliminary draft we form a specialist working group that we consult; there is then public consultation for the wider market in respect of the draft of the rules; the Commission itself as a statutory body then approves the rules; and of course the rules come to the Legislative Council for negative vetting. In some exceptional cases, and in particular the Financial Resources Rules, there is a further safeguard in that those rules have to be the subject of consultation with the Financial Secretary.

The rule-making power is extensive, but it is not a rule-making power that is without checks and balances, and some real checks and balances.

主席：

我希望提醒遲來的同事，今天我們會議分為兩部分，我們在10時正會開始touch上次會議其中一個outstanding issue，是關於Part V，即rules making power。我首先希望提出少許comments。我看完這份文件後，亦翻到關於Rules by Commission的草案第384條。可能待我們討論第XVI部時，亦會有機會討論這個問題，但我現在遇到少許困難。文件第6頁note 5中註明，

"the Securities and Futures (Financial Resources) Rules, the Securities and Futures (Client Securities) Rules, the Securities and Futures (Client Money) Rules, the Securities and Futures (Keeping of Accounts and Records) Rules, the Securities and Futures (Contract Notes, Statement of Account and Receipts) Rules, and the Securities and Futures (Accounts and Audit) Rules."

這裏涉及的規則實在很多，所以編訂index實在很困難，即很難作出cross reference。例如第141條訂明有關Financial Resources的規則，但卻沒有在Bill內註明這正是Financial Resources Rules，而只載述證監會有權make Rules on Financial Resources。我不知道其他同事的意見如何，但其他人看到第141條後，亦不會知道這便是Financial Resource Rules，而翻至條例草案最後的部分時，亦沒有index或full list列明證監會擁有甚麼rules making power。我對這問題甚為着緊的原因，是由於根據第384(8)條，違反這些規則的懲罰是監禁2年及罰款50萬。所以人們須清楚知道這些規則。就cross reference方面，我希望證監會或金管局能編製一些index，例如倘若第384條便是一個full list時，大可就這條款編製index，最低限度使我們無需rely on這份paper第6頁的note 才可知道共有多少rules。這是我對這部的第一個impression。

財經事務局副局長區璟智女士：

其實我們已進行檢討，並已作粗略估計。在這條條例草案下須草擬約70份規則、守則及指引。就規則方面，博學德先生剛才已簡述了重要的規則，而我們亦正着手進行前期的諮詢及草擬工作。多謝主席剛才的提醒，或許我們也會編製一個目錄，讓議員有全備的概覽，知道在甚麼條款下須遵守甚麼規則、指引或守則。

主席：

好的，最低限度將來希望守法的人也必須清楚有關情況。共有70條

rules嗎？真厲害！

副主席：

其中一些是codes。

Chairman:

OK.

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

We are mindful of the large number of rules and regulations that a practitioner may have to have regard to. In fact we have just started a project that Ms LAM is heading, to put in place, in effect, a regulatory portal which will be real and virtual, so it will include access on a website in the internet, which would allow a single access point for all those rules and regulations, which would be extensively indexed and cross-referenced, and be in the sense that documents can be now on the internet and the web; interactive, so you can move from part to part, and so on. It will be an effort to make sure that practitioners have readily accessible to them the up-to-date set of the rules, that they have it in one clear location, and of course beyond that it is going to be our responsibility to make sure that we properly educate the market so they know exactly what is there, and that we keep them up to date.

In fact there is another initiative, which is to put in place a service to intermediaries which would provide them with an alert system, an alert through push email, telling them about any changes and variations in the law.

主席：

我忽發奇想，但只是開玩笑吧。單就這可面也有足夠資料出版一本multiple choice textbook，就如選擇填充題一樣，讓人知道他們是否符合規定。或許我們可跟大學商議，單是出版這本書籍也可致富。各位同事有沒有問題？胡經昌議員。

胡經昌議員：

今天我會簡單地發表意見，因為我嗓子不適。首先多謝剛才政府提出有關加入without reasonable excuse的字眼。今次大家只提出了其中第145條，但其實我們發現還有很多相同的情況，我們稍後會為你們編製一個列表，表明哪些條款需要加入without reasonable excuse的字眼。

主席，其實我首先希望發問，在文件第9段提到，AI將會獲豁免受到有關client money的規則所規範，而associated entity亦會獲得exempt。我希望知道現在的做法。現時附屬銀行的證券公司也受監管嗎？如果情況是這樣，為何將來不受監管呢？

主席：

第145條及第144條……

胡經昌議員：

不是，當局無須就第145條回答。我只是多謝他們接受第145條存有問題吧。我希望他們就第9段作出回應。

財經事務局副局長區璟智女士：

我邀請金管局的同事回答這個問題。

香港金融管理局署理副總裁蔡耀君先生：

我希望回應胡議員剛才提出的問題。如果有關證券行是AI的subsidiary，據我的understanding，該證券行本身便不會是associated entity，因為它本身已是licensed corporation，所以應受到條例的監管。

胡經昌議員：

主席，是否可以這個方法理解？將來的情況亦會是這樣嗎？

主席：

你不應問我是否可以這個方法理解，而是應向政府提出這個問題。

胡經昌議員：

對不起，主席。

主席：

政府。

香港金融管理局署理副總裁蔡耀君先生：

胡議員的問題是如果證券行是AI的附屬公司，在條例草案下，這間公司本身已是licensed corporation，所以它應受有關client money的規則所規範。但根據第9段這句，如果該認可機構本身是exempt AI或associated entity，便無需受有關client money的規則得規範。所以對你所提出問題的答覆，是如果AI本身either是exempt AI或associated entity，便無須受到有關client money的規則所規範。

主席：

我也希望就這個問題作出跟進。有關client money的情況很清楚，因為其實要界定本身的存款和客戶的款項可能較難，但證券的情況又如何？

香港金融管理局署理副總裁蔡耀君先生：

那應屬client assets，第8段已就這方面進行討論。認可機構須就有關client assets方面接受規管。

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

I think the problem about the difficulty of distinguishing client money from client deposits is exactly why the Client Money Rules do not apply to exempt AIs. That is the business of banks – taking money – and so I think what Mr CHOI has said is right, in response to Mr WU's question, and your explanation for it is exactly right as well. It is why the distinction is drawn between money and assets in this context.

主席：

胡經昌議員。

胡經昌議員：

主席，我尚希望提出一個問題，因為我認為業界人士也很憂慮有關"cold calling"的問題，我們亦知道政府希望放寬這方面的規管。但如果我們參考第169(2)(b)(i)條，該條訂明，銀行，即exempt AI可以獲得豁免，而exempt person仍受到這條款的規管。為何AI會獲得豁免呢？

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

I'm not quite sure which clause you are referring to. Are you referring to …

胡經昌議員：

第169(2)(b)(i)條，即C1851頁。

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

I think the difference is – but I am happy to be corrected, or helped – that the primary prohibition is in respect of an exempt person, which is an AI, but the reference in 2(b)(i) is to an authorized financial institution, and so it says: "…by reason only that an authorized financial institution makes a call". So an exempt person would be covered. Sorry; and it is in respect of margin financing.

主席：

我亦希望提出一個關於cold call的問題。根據個人經驗，有很多cold call也是海外的來電。你們是沒法管制那些情況的，對嗎？

財經事務局副局長區璟智女士：

我相信這條條例草案的精神，是無論是從何處的來電，只要是針對本地投資者及香港產品的買賣，便應被包括在內。

主席：

香港產品的買賣？

財經事務局副局長區璟智女士：

對，即在本地上市的產品的買賣、涉及本地投資者，或用港元結算的買賣便應包括在內。當然，如果是從海外的來電，在執法上必定存有困難。

主席：

如果是從海外的cold call，並涉及購買海外的資產，便不包括在這部分內，對嗎？

財經事務局副局長區璟智女士：

就這方面，或許我們要聽取SFC現時在執法方面的經驗。

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

Colloquially they are referred to as boiler room operations and quite regularly we have reports of people who set themselves up in overseas jurisdictions and make phone calls into Hong Kong to put pressure on people. The distinction to be drawn is between whether they are caught by the legislation and whether we can do anything about it. If they are caught by the legislation, they are doing something that would be called, in fact not only in respect to cold-calling but quite likely in respect of dealing with securities as well. But the enforcement of the provisions is the real problem and normally what you have to do is rely upon the regulators in the other jurisdictions to try and deal with those people. But almost invariably what you find is that it is very hard to trace where the call has come from and by

the time you have done that and achieved some measure of assistance from the overseas regulator, the person who made the call is gone and there is nothing much you can do about it. Not so long ago we had to issue a press statement warning people about a particular boiler room operation of that sort just so that the investors in Hong Kong were alert to the risk. Increasingly that is the way in which we deal with it, by investor education and public announcements because although they are caught by the law, there is not a lot you can do about it.

主席：

胡經昌議員。

胡經昌議員：

我剛才可能聽得不太清楚。究竟AI可以獲得豁免受到規管的理由何在？因為第169(1)條已清楚訂明，任何持牌人或獲豁免人士不應吸引市民買或賣any securities、futures contract等，而AI則可獲得豁免。這不單是有關margin financing的情況。由於我剛才聽不清楚，只聽到數句。可否再加解釋？

財經事務局副局長區璟智女士：

或許請金管局的蔡先生再作補充。

香港金融管理局署理副總裁蔡耀君先生：

就第169(2)(b)(i)條方面，其實認可機構共有二百多間，但並非所有也是exempt person。根據我們的紀錄，只有110間是exempt person，其餘的百多間又怎樣呢？這條法例應否延伸至包括所有機構，使並非exempt person的機構也須遵守有關規定呢？我相信第169(2)(b)(i)條的意思是，由於

銀行還進行很多其他的業務，在進行其他業務時應與證券無關，便無須受到這條條例所規範。在那個情況下，銀行便應受到《銀行業條例》或Code of Banking Practice中有關cold call的規則所規範。所以我希望清楚指出，如果有關機構不是exempt AI，便無須受到這條款所規範。

Chairman:

Yes.

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

Just to supplement Mr CHOI's question, I think I have finally got this. I was struggling a moment ago. You see, what happens in 2(b) is that b(1) and (2) have to be read together. So it is an authorized financial institution making a call, and it is in respect of an agreement referred to in subsection (1)(a)(ii). You need to go back to (1)(a)(ii), which is in respect of securities margin financing. Now, securities margin financing is a defined term, and it involves putting in place an investment arrangement to finance the purchase of securities; and there is a carve-out in respect of securities margin financing, as provided by banks and authorized institutions. In fact you could probably get the same result, even if that clause you are concerned did not exist, but the fact is that a bank cannot, by definition, provide securities margin financing as defined. So it cannot be said to make a cold call in contravention of the section where the cold call is an attempt to provide securities margin financing. It is only in respect of that type of agreement, and that is because banks lend money all the time, secured against shares and so on. That is why the original carve-out exists. For all the other types of agreements that are covered by this provision, banks, as exempt persons, are covered.

主席：

胡經昌議員。

胡經昌議員：

主席，我希望就這個問題作出跟進及澄清。在前陣子地鐵招股時，有銀行公開邀請客戶透過它們進行買賣。如果這條條例草案得以實施，銀行是否不能再進行這類活動呢？

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

Well, let me be very careful about answering that. The question of whether what they did amounted to any contravention of existing laws would be something we would have to consider in much more detail. So far as it concerns this provision, if the call was unsolicited in the sense that it is defined here, and it was an unsolicited call in that sense, to have someone enter into an agreement to sell or buy securities, then yes; they would be caught by this section, unless they could bring themselves within one of the carve-outs.

主席：

李家祥議員。

李家祥議員：

主席，其實我希望就剛才提及的Section 154提問，即關於核數師無須就他向證監會傳達的某些資料承擔法律責任。第一，我希望詢問，如果核數師在未有機會向證監會傳達任何信息前，其作為核數師的職務已被終止，即當他尚未或只是剛開始傳達有關信息時，已不再擁有核數師的身份，在這情況下，他會否仍然擁有這項豁免權呢？如果會，在條例草案哪部分可反映出這項豁免權呢？

財經事務局副局長區璟智女士：

或許請陳女士解答這個問題。

高級政府律師陳潔儀女士：

多謝主席。第154條第(2)款第(a)段特別聲明，這條條文除適用於現職核數師外，亦適用於過往曾擔任核數師，但職務已終止的人。

主席：

對，所以這款就已作出解釋了。

李家祥議員：

主席，我希望提出的第二個問題也是關於這條條款的。可能我不太懂得理解中文法例，第154(1)條開始的部分訂明“no duty which a person may be subject to as an auditor appointed.....”，我看不到在中文版哪部分可反映出“no duty”的意思。我希望請教法律顧問，中文版在這方面的譯意是否相同？

主席：

是。

李家祥議員：

或許法律顧問需要稍作考慮。

高級政府律師陳潔儀女士：

我們暫時看到，該部分最後一句，即"他不得因此被視為違反他作為核數師須履行的責任"，已表達了這個意思。

李家祥議員：

我也有在這句下面劃線，但在我看來，這兩個意思好像不大相同。或許我稍後再作研究吧。即在154(1)(b)條最後部分吧。或許我稍後再仔細閱讀吧，亦請法律顧問研究兩者的意思是否相同。這兩句放置的位置不同，context也好像不一樣。我需要再清楚研究兩者有否差異。

如果其他同事不作提問，我還希望再就第156條提出問題。只是關於第156條的字眼方面一個很簡單的問題。第156條第(1)款，即在(b)(ii)款後的context，根據英文本，開始時提到"the Commission may appoint an auditor to examine and audit, either generally or in respect of any particular matter."。在會計界當中，"examine"和"audit"這兩個字眼包含很多不同的規例。我希望理解為何證監會要同時運用這兩個字眼，而不是只用一個字眼？

這情況會使會計師在執行職務上感到有些混淆，因為"examine"和"audit"是兩個不相同的技術性字眼。我希望瞭解證監會期望我們進行甚麼工作。因為這些是我們較為熟悉的範圍，我們當然會特別關注。

主席：

區璟智女士。

財經事務局副局長區璟智女士：

或許請Andrew解答。

主席：

好的。

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

Chairman, I mentioned in passing that there was this industry concern about the scope of the word "audit" and whether it implied a full audit. It was suggested that we thought that the words that followed qualified it to make it clear that it was not a full audit. So far as the difference to be drawn between "examine" and "audit" is concerned, I do not think there would be any concern if the word "and" were to be replaced by "or". In fact, "and" is the existing language. The existing language is "examine and audit", and what it means and what it is taken to mean in the language that is used, is to ask an auditor to undertake a forensic inquiry which involves an examination and some limited auditing of some part of the business, in some respect.

I cannot see any particular concern. If there is a technical distinction to be drawn as a term of art between "examine and audit", I do not imagine it would cause any difficulty to substitute "or" for "and".

主席：

或者可以用"and/or".

Hon Eric LI Ka-cheung, JP:

Maybe it is something I would go back and consult the professional body, and see if they can come up with alternative drafting, but the scope is very, very wide as drafted. It is

almost anything under the sun or as directed. Would the Commission always, as a matter of practice, issue a scope, an initial appointment which would define clearly what this meant?

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

Yes. In fact, it is invariably the practice that there are clear terms of reference that set out the scope of the inquiry. Not only that; in fact we usually pay $1 to become a party to those terms of reference, so that we are actually contracted as a matter of contract in the terms of reference.

Chairman:

Ada.

高級政府律師陳潔儀女士：

多謝主席。或許讓我作少許補充。關於"examine and audit"這個概念，在現行法例中向來亦有採用，我們其實也曾參考一些現有的條例，該等條例也是一致地採用這個概念。多謝。

李家祥議員：

可否向我們提供那些reference？

高級政府律師陳潔儀女士：

可以。

李家祥議員：

或許可在稍後才向我們提供，好讓我們作參考。

高級政府律師陳潔儀女士：

我現在也有帶備這些參考資料，如果有需要，我也可以現在提供。

李家祥議員：

如果可以把有關條例讀出，我們便可作紀錄。

主席：

請講。

高級政府律師陳潔儀女士：

第250章第53條。

主席：

那是甚麼條例？

高級政府律師陳潔儀女士：

這是Commodities Trading Ordinance。

主席：

好的。

高級政府律師陳潔儀女士：

接着是Securities Ordinance第91和121(a)(x)條，以及Leveraged Foreign Exchange Trading Ordinance第34條。

主席：

即有很多條例也採用同樣的概念。

李家祥議員：

讓我稍後研究這些context是否相同。有些情況是雖然概念相同，但卻用於不同的context。

財經事務局副局長區璟智女士：

如果大家發現這個概念不太清晰，我們也可藉這個機會一併改善，但如果會計界認為這兩個字已運用多年，大家亦明白它們的含意，或許沿用這個概念會具有好處。我們會先聽取會計界的意見。

Chairman:

Audrey.

Hon Audrey YU Yuet-mee, SC, JP:

Thank you, Mr Chairman. Can I ask three questions? The first one is in relation to section 169(6). This provides that the person who enters into an agreement after a cold call can rescind within 28 days after the date on which he becomes aware of the contravention, obviously subject to the question of subsequent purchase in good faith. This time period,

within 28 days after the date on which he becomes aware of the contravention: that, in my understanding, if it is correct, can be a very long time afterwards, because while you may be aware of the facts of the solicitation, that it is a cold call, you might not know that it gives rise to an offence. Does that mean you can in fact rescind, provided you do not know that it amounts to an offence, and then a long time thereafter you realize it is an offence, and 28 days after you realize it is an offence, you can rescind? That is my first question – that it can be in fact many months later, in other words – and whether this will cause difficulties. I know that in fact there is already a proviso that if the subsequent purchase in good faith for value it would be an exception. My second question is.....

Chairman:

One at a time.

Hon Audrey EU Yuet-mee, SC, JP:

Yes.

主席：

第169條第(6)款好像是新訂的，對嗎？

財經事務局副局長區璟智女士：

首先多謝Audrey提出這個意見，這是一個很好的意見。其實我們在諮詢的後期也接獲這個意見，我們亦計劃稍後引進一項修訂，limit計算該28天的辦法，是在訂立合約後的28天，讓業界也可明確地知道這28天怎樣計算。

Chairman:

Second question.

Hon Audrey EU Yuet-mee, SC, JP:

My second question is in relation to section 163. This deals with business conduct of intermediaries and their representatives, and talks about prohibition on advertisements and all sorts of things. Does this apply to authorized institutions?

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

Although they are not registrants, they are exempt AIs. The distinction, just to track it through, is this: you pick up a distinction in these provisions between intermediaries on the one hand, and licensed corporations on the other. Where intermediaries are used, its licensed corporations and exempt AIs and their representatives; and where licensed corporations are used, it is only our registrants. So this one does apply to the whole of the industry.

Chairman:

Third question.

Hon Audrey EU Yuet-mee, SC, JP:

My third question is about the point I think Mr Chairman raised, that there are so many rules, I think you said 70 sets of rules or something like that. Last time when we mentioned this question of examination, you said it was going to be provided twice every month. It gives me the impression that it is not a very difficult examination. Then I now hear that you have 70 sets of rules. I always knew that there were going to be many rules, but 70 sets of rules sounds really quite phenomenal. I mean, is somebody who is going to

write these exams required to know all these rules? The reason I ask is that there are provisions in this Bill that once you realize you have contravened certain rules you have to report to the SFC within sometimes even one day or three days, or five days. Is it really practical, when you have 70 sets of rules, to require there to be immediate reporting, and if you fail to do so it gives rise to contravention or even offence?

There is also, in connection with that, the question of complaint or an application in writing, a complaint against licensed corporations under section 156. Is there some way that the public can know, at least have some notion of what these rules require, so that they know when to complain that there is in fact contravention or suspected contravention, and they can complain to the SFC? Thank you, Mr Chairman. That is the question.

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

Perhaps I can start with the final question first. There is actually quite an extensive investor education program that the SFC runs, in order to educate the public about their rights in respect of their intermediaries. It is done, again using the Internet and using pamphlets and so on, and there is a very good investor resource centre which is on the Internet. It has, I think at last count, about 600 links to other sites, but as its primary aim it is to tell investors about what their rights are vis-à-vis themselves and their intermediaries. So I do not suppose it is perfect as a resource and as a source of information, but it is pretty good.

There is a bit of confusion, Chairman, in respect of the number of sets of rules. I think as best, we can ascertain here – and we can verify this figure for next week – there are in fact 25 sets of rules, I think, not 70.

財經事務局副局長區璟智女士：

容許我稍作補充。剛才我提及的70套，其中大概包括二十多套規

則，待我們編製目錄後，大家便會瞭解。其餘約40套是指引及守則。其實市場現時亦正運用其中大部分的指引及守則，由於我們計劃制訂新的法例，所以才須作出整合和更新的工作。其中大部分的指引及守則已是現時沿用的，而不是新訂的。或許請Mr PROCTER繼續發言。抱歉，interrupt了你。

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

Picking up from there and coming back to Miss YU's question about how difficult it would be to pass the exam, there are many exams, in fact, not just one exam. There are exams that cover the different industry sectors and types, so there are, as you know, seven types of licence. Many of the rules are specific to a licence type and would not need to be understood. You would not even need to have a general familiarity with many of them. If you are a dealer you obviously do not need to understand the takeovers code, which is one of the guidelines.

I think it is, as you would expect, not easy to get a licence, but it is by no means impossible.

Deputy Chairman:

Probably more difficult than being a lawyer…

Chairman:

Or more difficult than being a legislator. Margaret.

Deputy Chairman:

Just to follow on, this large number of rules and codes of conduct, and so on all the time we are bearing in mind effectiveness and whether we are over-regulating. How do we compare in this area with other jurisdictions? Do they also have to have resort to so many sets, and stuff?

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

Let us take the US and the UK. You look at a US rule; it will invariably be far longer, far more detailed, far more technical than an SFC rule or code. You will have hundreds of footnotes. It will extend over 50 or 60 pages; and frankly it is impenetrable, and they have far more of them than we do. The UK actually I think write their rules and their codes in a far friendlier way. They are far easier to comprehend, but there are many more of them than we have, as well. They, if anything, have gone a little too far in the cause of transparency and in the cause of setting out their approach to regulatory issues. We have a lot, but it is a very broad industry. There are seven industry types which do pick up most of the financial sector in one way or another, if you include in that the collective investment side, the leveraged foreign exchange, futures, securities, takeovers and different types of products which have, in some cases, specific rules, like the code on unit trusts.

So I think we actually compare quite favourably, even though it looks a daunting thing if you just put them on the table in front of you. Certainly they are far easier to read and far friendlier. The market feedback from international practitioners is that this is actually a better place to do business from their perspective; they are clearer and have a better understanding of what is expected of them than they would in those other jurisdictions.

Deputy Chairman:

Mr Chairman, when rules are impenetrable then people have some way of getting around them, you know. I am sure that because life has to go on and be possible, when rules

are shot through with footnotes, people must find some way of simplifying or dealing with it. How is that done in the US and the UK?

Chairman:

They have a lot of in-house lawyers.

Deputy Chairman:

So maybe, Mr Chairman, you should support this. This is very valuable.

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

Actually, though, it does come back to the observation I made about the difficulty of drafting rules in strict black letter law terms that cover the industry. It is exactly why we use codes for a place like Hong Kong – because you can be clearer and shorter, and rely upon intent and spirit, without attaching criminal sanctions to those codes. It is a much better way of striking a balance between business facilitation and investor protection. It is why we use codes and have always used codes in preference to rules; but as I said, the rule-making power, although we do not intend to use it or exercise it in the foreseeable future, is an important fallback for cases where the code approach falls down.

主席：

待Audrey跟進完畢後，再讓胡經昌議員提問，好嗎？Audrey.

Hon Audrey EU Yuet-mee, SC, JP:

Speaking about all these rules, is it one possible way of getting around them simply

not to become an intermediary yourself, but to be the shadow person behind it, and to get front people doing it? Then you would never be de-registered, punished or suspended. Is that a possible way of getting around your 70 sets of rules and codes of conduct?

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

Of course it is in the sense that if you did not disclose your interest, it may be difficult for us to discern it, but the requirements in respect of approval of those who have a significant or material interest in a firm mean that we have to be satisfied that they themselves are fit and proper if they hold a material interest in the firm – more than 10 per cent, that actually have to be approved in advance. In fact the requirements for the licensing and registration of those who de facto – not necessarily as a matter of law or status – hold managerial positions as such, those who de facto control the operations will also trigger licensing requirements. So of course in answer to your question, you can avoid that if you do not declare your interest and you remain truly a shadow, but in fact as a matter of law there would be obligations that would require you to be approved and indeed licensed.

Hon Audrey EU Yuet-mee, SC, JP:

Can I ask Mr PROCTOR just to point out those provisions, because I hear this is what people are doing. Can you tell me the provisions that would catch people in the shadow and actually substantively controlling the company?

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

Yes. They are in Part V. If I cannot find them straight away, maybe it would be simpler and save time if I just provide a list. They are basically Part V provisions.

副主席：

或許請陳女士解釋，在定義方面，我們如何能嘗試把這些人納入規管範疇內。

主席：

好。Ada.

高級政府律師陳潔儀女士：

多謝。附表1亦載有有關董事的定義。董事的定義包括所謂shadow director的人，以及任何行使director職權的人。抱歉，由於我正參考英文本，所以我採用"shadow director"的字眼。附表1亦再就shadow director作出界定。

主席：

對不起，請慢一點，請問是哪頁？

高級政府律師陳潔儀女士：

有關解釋董事定義的部分載於英文本第C2383頁。

主席：

Sorry，請稍候。第C2383頁嗎？

高級政府律師陳潔儀女士：

對，第2383頁，"Director—Includes a shadow director and any person occupying the position of director by whatever name called."。

主席：

對，在中間的部分。

高級政府律師陳潔儀女士：

然後再翻到第C2399頁，該頁中間的部分亦載有shadow director的定義，即幕後董事的定義。

主席：

胡經昌議員。

胡經昌議員：

多謝主席。我相信很多人對證監會某些權力過大亦感到擔憂，包括律師公會，剛才政府亦已解釋有關的理由。但若翻閱有關文件第3段，該段提到證監會很多現有的權力，亦是以negative vetting的程席通過的附屬法例。但根據這份文件，現在的情況是這樣的，讓我讀出來，"adopted the same approach and extended it to some additional types of requirements currently dealt with in the primary legislation"，即現時的主體法例中已訂有這些規定，只是打算在日後作出修改。

主席，向來的情況是對於採用主體法例的形式通過的規定，我們在進行審議工作時會較為審慎。但如果是以subsidiary legislation的形式通過，第一，時間可能很短促，以及在實際審議工作上亦較為不便。其實現在文件提到訂有additional requirements，由於現時已沿用這些規定，證監會會否

編製列表，指出打算修改哪些規定，以及其理據何在？即當局可否逐一解釋，為何須要從主體法例中抽出其中一些規定？

財經事務局副局長區璟智女士：

或許讓我舉一個例子。目前處理客戶資產的規管要求載於《證券法例》的主體法例內。據我們的規管經驗，加上市場人士及證監會亦時常向我們反映，在很多情況下，由於市場的變化，既定的規則亦要修改。如果我們把這些規則載於主體法例，我們必須與其他修訂的工程競爭有限的草擬法例資源和時間，才可作出修訂。所以在掌握時間方面會較差，彈性亦較少。所以我們是根據過往的規管經驗採用這個做法。市場人士亦向我們反映，當他們發現某些條款存有問題，而他們希望我們作出修改時，他們亦希望可盡快完成有關程序，以免妨礙市場的運作。

Maybe I should also invite Andrew to explain to Members what the regulatory experience is, if we put some of the proposals back into the primary legislation.

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

I do not have anything to add, actually. I think you have covered it.

Chairman:

Yes, Margaret.

Deputy Chairman:

Mr Chairman, I am a bit concerned about this, subject to further particularized study. Generally as a matter of principle things should go into subsidiary legislation if it

deals only with details, or if the details are practical arrangements which should not clog up the primary legislation, or if you want to preserve flexibility. But I find that just because of the procedure of having to wait for a legislative slot, this sort of thing is not the right principle to apply. I invite you to look at it again, to see your reasons for removing it from the primary legislation to regulation. If it is a matter of flexibility and practical detail which can be completely non-controversial as to its relationship with the primary legislation, then that would be proper; but if it is a matter of circumventing a procedure because the procedure takes time, then it is not the right principle. If we get into too much of that problem, that means LegCo working as a whole has to somehow change its management of its business.

主席：

我明白你的問題。

財經事務局副局長區璟智女士：

我明白妳的看法，剛才我所提出的意見，只是其中一個考慮因素。在我們決定前，主要須通過兩個測試點。第一，這條款是否技術性的條款；第二，有關條款是否涉及一些手續上的仔細程序。這兩個是基本的考慮因素。

主席：

我只明白其中一部分，例如倘若把FRR，即Financial Resources Rule載於主體法例，便會帶來很多麻煩。所以我絕對同意我們要在兩方面取得平衡。胡經昌議員所raise的問題也很好。妳剛才已提出會在文件中加上目錄，其實在該目錄上加上notes便可。

財經事務局副局長區璟智女士：

好。

主席：

那個note已可使我們清楚知道，有關條款是從主體法例抽取出來的。如果我們很清楚認為不應抽取有關條款，我們便會再提出。

關於這部分，大家有沒有其他具體的問題？李家祥議員已退席，不知他對有關auditor的問題是否已得到解決？如果大家沒有特別問題，我希望討論我們在上次會議席上花了很長時間提出有關第V部的問題。首先將時間交給區璟智女士。

財經事務局副局長區璟智女士：

主席先生，我們在上次會議席上曾承諾就兩個課題再提供一些資料給大家參考，大家可能已接獲兩份文件，第一份文件的編號是5E/01。這份文件主要是再詳細闡述有關金管局對銀行證券部的規管，即究竟如何確保銀行證券部前線工作者遵守證監會頒布的規則，例如適當人選守則等。

另一份文件的編號是5F/01。這份文件詳細探討，在持牌代表轉工的情況下現時建議的申請程序，或上次會議席上提出有關牌照可攜性的問題。或許讓我們先討論第5E/01號文件。請金管局的同事解釋有關文件的主要論點。

香港金融管理局署理副總裁蔡耀君先生：

多謝主席。金管局建議就每名從事受規管業務的exempt person的員工，備存一份名冊。這份名冊亦可供公眾查閱。所以，如果公眾懷疑某獲豁免機構中某名員工有否認可資格，他們可透過查閱名冊，找出有關機構的員工有否認可資格。在銀行獲認可資格期間，金管局會引用證監會訂定

的適當人選指引，要求銀行的高層人員確保所有員工必須符合有關要求。

但除此以外，金管局收到名冊後亦會進行調查，例如與證監會聯絡，查證建議名列於名冊內的員工，有否在證監會存有不良的紀錄。

此外，金管局到每間獲豁免機構進行實地查察時，亦會審查該機構有否按照金管局規定的程序，審核員工的適當人選資格，並會審查有關員工有否違規的情況。倘若我們發現個別員工在操守或資格方面出現問題，我們有權要求該機構將這些員工從名冊上除名。

如果這些機構本身在沒有足夠理由的情況下，不按照金管局的要求將這些有問題的員工於名冊上除名，這亦會成為金管局就有關銀行高層人員是否執行審核工作的適當人選的考慮因素，而金管局亦會採取相應的行動。

跟證監會實行的架構比較，我們發現有兩方面的分別。第一，證監會在考慮licensed representatives是否適當人選方面，由證監會本身進行評審及批准。另一方面，這些licensed representatives亦須向證監會支付費用。

就評審方面，我剛才亦已提到，過往就銀行監管方面的做法行之以久，亦相當有效，即由金管局負責審批銀行高層的任命，包括董事、行政總裁等。根據現時的建議，在銀行的證券業務中，負責證券業務的兩位executive officers，即行政管理人員，也是由金管局直接審批的。至於其他支援性員工或在業務上中下層次的員工，我們向來亦要求銀行本身的高層人員制訂聘用適當員工的系統。這做法行之有效，我們認為在證券業務方面，亦可沿用這個制度。

至於費用方面，將銀行與證券公司所支付的費用直接比較其實甚為困難。在我們提供的文件中亦附有一些資料，說明銀行每年也要向金管局繳付牌費，有關款額是四十七萬四千多元，其他機構，例如有限制牌照銀

行或接受存款公司亦要繳付年費。這份文件的附件也有清楚顯示。

另外，每間分行亦須每年向金管局繳付費用。如果我們將這些費用跟獲證監會認可人士須向證監會繳付的費用作出比較，其實這些費用的款額也分別很大。我認為甚難直接作出比較。但最重要的，是銀行在向金管局繳付牌費方面的營運成本已頗高。我們向來的做法是採用"機構性"的方式收費，即按機構收取牌費，而並非按機構聘用員工的多寡決定收取的牌費。所以大家可從這個角度理解費用方面的問題。多謝主席。

主席：

好像還有一、兩份關於portability的paper，對嗎？

副主席：

另外還有剛才向你提及的那一份文件。或許請Mr PROCTER簡單介紹那份paper。

主席：

好的。

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

Chairman, I was not here for the discussion last week, so I apologize if I repeat anything that was said then. As I understand it, this paper arises out of members' concern that there should be no unnecessary impediment to a transfer of employment, and certainly that is a position with which we would agree. The paper describes at the outset the distinction between a granting of a representative licence and a transfer of accreditation, but I

want to take members straight to paragraph 6 of the paper, to make a preliminary point that in fact in the great majority of cases, in about 95 per cent of cases, applications for a transfer of accreditation are simply waived through, and there is no impediment at all to that transfer. It is simply a matter of notifying the Commission and the Commission being satisfied that there being no circumstances of which it is aware that could cause it to object to the transfer, and being satisfied that there is no material change in the responsibilities the person is to have in the new employment they are transferred. That, as I say, happens in 95 per cent of cases, and in the majority of cases it happens within 10 days. In fact it only takes 10 days because in some cases people do not provide us with the information that we need at the outset, to make the judgment. But generally speaking, it is a very quick process and almost invariably it is a process of approval and a simple waive through.

So we are talking about a small minority of cases and a consideration of whether or not in that small minority of cases, of about 5 per cent, the question is when it is that we think there is a basis for us to interfere with the transfer or question the transfer. What we tried to do in paragraphs 9, 10 and 11 is to set out some circumstances in which that might be necessary. Actually they are not in order of importance, but I will take them in the order in which they appear.

It is not unusual in this 5 per cent of cases for someone to say to us "I'm going to a new employer and these are my responsibilities", and for us to make a judgment that in fact their new responsibilities move them into a new licensing category. We give an example here of the difference between advising on securities and marketing securities, which would be a difference between one licence type and another licence type, the advising category and the dealing category. Sometimes the differences are less subtle indeed than that, and as you can imagine, the applicants and their future employers tend to take a fairly robust view, an expansive view, of the licensing conditions.

There is a case in some of these instances for the SFC to say "We are better able to make an objective judgment about this, and whether or not you are in a new licence category

and whether or not in fact that means there is a different question of fitness and properness that arises in respect of that new licence category". So there are cases like that where notification of the transfer of accreditation and asking the SFC to approve it gives us an opportunity to bring an objective judgment to bear in respect of the new responsibilities – not in many cases, but we are only talking about 5 per cent of cases anyway.

The second category of suspected misconduct is in fact the most important of the 5 per cent and would take up the bulk. It is the most important not only because it takes up the bulk of that 5 per cent, but because it raises the most important investor protection issues. The circumstances in which people leave one broking firm and go to another broking firm of course vary, but there are cases – and they are not rare – of people being suspected of misconduct by one employer and being quietly asked to leave, and go and find work somewhere else.

In some cases we have been quite badly caught out, and investors have been exposed to risk, in cases where people have left one employer and gone to work for another employer, where we have had no inkling of the fact that in fact they have been suspected of quite serious misconduct by their previous employer. Clearly enough that exposes the investment community to risk. What we try to do in the accreditation process, therefore, is to get some basic understanding of the circumstances in which the person is leaving one position to go to another. It is not a perfect way of detecting these kinds of misconduct cases, but at least it is an extra protection for investors that applies in a subset of this small minority of cases.

We are basically saying: "What are the circumstances?" We have a basic inquiry into those circumstances, and sometimes we can pick up the fact that someone is, in fact, suspected of misconduct. Indeed, there is a related sub-category to this aspect of our concern, and that is where we in fact have some direct first-hand report of misconduct, and a person who is suspected of misconduct is then asked to leave, and that is all within our knowledge and purview.

In either of those two cases, the case where we hear about it or we find out about it, the question arising on a transfer of accreditation is whether in fact someone should simply be waived through, or whether or not there is an investor protection issue that arises, where we should say that either the accreditation transfer should not take place at all, or if it takes place, there should be additional conditions placed upon a license for the person whose transfer is being approved. That is, in fact, not uncommon because in cases where we suspect misconduct and we may indeed have begun an inquiry, it is sometimes clear enough that the misconduct either will not result in suspension or revocation, or it will take a very long time to find out and determine whether that is the likely penalty range.

In some of those cases we judge that it is an acceptable risk to allow someone to transfer their accreditation, but subject to some new conditions; sometimes conditions on what work they are allowed to do, and sometimes conditions or undertakings from their employer as to what work they are allowed to do, or the way in which the new employer will supervise them. Certainly in every case, making sure that the new employer is properly informed about our concerns and about the nature of the allegations that are being faced by the person who is transferring to that firm. So again, within a small group of cases, of 5 per cent, there is a significant number of cases that arise on accreditation, where we want to do one of those things. We want to say: "You can't simply be waived through into your new employment. We need an opportunity to put in place a couple of extra investor protection safeguards". In the more extreme cases, of course, we would say: "You are not being transferred at all. We think the allegations are so serious that it is an unacceptable risk to allow you to be transferred. You're out of the industry".

The alternative of simply allowing someone to transfer and then report to us is to open up a window of opportunity for further misconduct – maybe not a big window, but at least a window – and our judgment, at least in the past, has been that it is a reasonable thing to allow us that opportunity to inquire into the circumstances of transfer.

The third category is where, by reason of the transfer, we think again about the license conditions that might attach either to an individual or to a firm. We give an example in respect of a corporate finance adviser. You can imagine a situation in which a large firm has many people who are competent to advise on corporate finance activities, and where an individual can be allowed to provide and participate in the provision of those services, without a particular condition attaching to their license. The circumstances might be quite different when they go to a small firm where they may be the only person who has the relevant endorsement on the license.

That might cause us to reflect that that firm should not in itself be permitted to be the sole adviser, for example, on takeovers matters; and to complicate things further, we give the example of the situation where, in a small firm again, the person who is transferring is a replacement for someone who previously provided that kind of service within the firm. So the firm may have an unconditional endorsement on their license to provide corporate finance advice, based on the expertise of one particular individual. That individual leaves and is replaced by someone, the person who wants their transfer accreditation approved, and that person does not have the same level of skill. That might very likely cause us to reflect on the conditions that attach not only to that individual person's license but to the license of the firm as a whole, and to say: "Well, we're prepared to transfer your accreditation, but there are these new conditions in respect of your and the firm's license. For example, you can't be the sole adviser on the takeovers matters".

So there are three situations in which, in that little 5 per cent minority of cases, we think that there is enough to be done by way of investor protection for this to be the better process, for the process to be one in which approval is sought and given in a very short space of time, in 95 per cent of cases, and withheld only in exceptional cases. We think that is better than saying after the event "Yes. We've got your notice. We've had a look at it. We now think it's okay" or "not okay", because it opens up a window of risk.

There are some procedural safeguards, and one in particular, that are described in

paragraph 16 of the paper, at clause 137. That is: where it is intended that a transfer of accreditation should be refused, the person who is affected, whose rights, expectations or interests are affected by that decision, has a right to be heard in respect of that application.

There is a short discussion of international experience. In the UK context, the position as I have described it here in Hong Kong is the position as it pertains in the UK at the moment. It is also the position that we expect will continue in the UK. In the US it is a slightly different situation, as often in the US, conditioned by the different nature of the market, particularly the risk of threat of litigation.

What happens in the US is that there is a much wider public disclosure of information about individuals, and a much greater obligation to disclose information on the part of the individual, and so a much greater exposure to risk of litigation if appropriate responses are not made to that information. In fact in the US there has been some controversy about the extent to which this information about a dealer's disciplinary record should be publicly available, and the time after which, for example, disciplinary action should be expunged from their record.

That is the way they do it. They have everything out in the open. They have positive obligations on prospective employees to disclose information about themselves, and then they leave it to the litigious market forces to sort things out. First of all, we do not think that is the environment in Hong Kong, and secondly, we prefer the model we have, and in the case of the UK at least, they seem to have adopted the same approach.

主席：

Thank you. 胡經昌議員。

胡經昌議員：

我希望討論關於剛才政府提到證監會和金管局在審批代表上的問題。剛才政府表示，每宗有關證券公司認可人士的申請均須獲得證監會批准，但就銀行方面，有關人士將來只須由銀行兩名負責人員認可。這其實已產生一個問題。其實現在所有證券公司的dealing director也須由證監會審批。如果日後的情況確實如此，是否表示經證監會審批的人員，跟經銀行審批的executive director有不同之處？為何這些高層人員可具有這項職權，決定誰人符合獲批准的資格，而證券經紀卻不能具有這項職權？

第二，關於費用方面，我相信現時銀行向來也須繳交費用。為何要使銀行在日後節省這項開支呢？由於證券從業員以個人身份申請牌照，他們須自行繳付費用，即他們在每年續牌時亦須要自行繳付費用，但如果有關公司願意替他們繳付費用，則作別論，但我相信如果對銀行採取同樣的做法，有關職員便會鼓譟，因為他們會質疑因何他們每年也須繳付費用才可續牌。當局是否基於這個原因，不要求銀行的證券從業員繳交牌費？

主席：

蔡先生會作出回應，對嗎？

香港金融管理局署理副總裁蔡耀君先生：

第一點，其實銀行的executive officer也須獲得金管局批准，但executive officer轄下的職員便可由銀行的高層人員，包括executive officer參照證監會發出的指引，判斷有關員工是否符合這些指引的規定。這個做法跟銀行本身向來經營銀行業務方面的做法一致，例如現在銀行聘請櫃位員或具有審批權力的貸款審批員工，也無需獲得金管局的批准。所以我們也是按照現時監管銀行的做法作出建議。

關於費用方面，剛才我已解釋，例如在監管銀行方面，我們不會按銀行聘用executive director和員工的人數而收取費用，因為我們徵收的牌費

已頗高。倘若再按照人數收費，很可能會引致業界的經營成本上升。所以在收費方面，現行的做法已跟證監會的做法有所不同。

主席：

有沒有跟進？

胡經昌議員：

剛才我已提到，由於證券公司的從業員須自行繳費，而不是由該公司代為繳付，但在銀行方面，銀行只須向金管局提交有關人員的名字，而有關人員卻無須繳付費用，這些費用亦與銀行無關。現時銀行從事的業務，與將來從事的業務不同，例如證券及期貨業務，所以須受到另一套規管原則所管限。在這種情況下，並無理由厚此薄彼。我不是指對不同規模的公司厚此薄彼的問題，而是對金管局及證監會厚此薄彼的問題。我認為這是很重要的問題。除費用和審批程序外，executive director或dealing director也是經證監會審批，但他們卻沒有銀行的executive officer所擁有的權力，指派兩名職員進行證券業務有關的工作。這做法並不合理，也很不公平。

主席：

這個意見是好的。涂謹申議員。

涂謹申議員：

主席，其實我希望提出的問題也很類似。在我閱讀這份文件後，我也希望提出一些問題，但假設我被你說服，我認為在銀行的證券業務方面，也須實行相同的制度，即有關職員由A銀行轉至B銀行工作時亦須獲得批准。因為你所提出的理據亦適用於全部情況，倘若有關職員在操守上出現問題，當他被一間銀行解僱而任職於其他銀行時，其他銀行便會受害，對

嗎？

我首先提出這個比較的問題，因為我一直以來也關心這情況是否公平。根據現在提出的建議，只是銀行最高層的數位人員具有有關權力，對嗎？相對之下，證券公司方面是否也應由最高層的數位人員擁有有關權力呢？

我還有第二個問題，或許我稍後再發問。

香港金融管理局署理副總裁蔡耀君先生：

讓我回應涂議員的問題，在新的條例下，每間銀行也須向我們提交一份名冊。如果某名從事證券業務的職員在從事證券業務期間出現一些操守方面的問題，而該名職員離開這間銀行而轉到另一間銀行從事證券業務，我們當然會跟其新僱主商討，確保新的僱主瞭解這名新僱員在過往任職的銀行出現的問題，即研究該人是否適當人選。若發現該名職員本身出現操守的問題，而並不是適當人選，我們亦可要求其新僱主把該人從有關名冊上除名。

涂謹申議員：

但我希望瞭解有關程序是否與證監會的序相同。就證監會而言，該人須作出申請，而涉及的費用亦有所不同。所牽涉的問題，是有關費用須由誰支付，是由銀行或由當事人支付呢？這亦是需要處理的問題。如果你能證明有關制度並沒有不公平的情況，接着便須按步就班地解決其他問題。但按我的理解，證監會與金管局一直以來亦是以不同的方式進行批准，而在現時這條新的條例草案下，亦涉及證監會與金管局以不同方式進行批准的問題。

這亦涉及由誰作出申請的問題，在審批方面，這宗個案由僱主作出

申請，所以應向僱主查核資料，但那宗個案可能由僱員作出申請，便需向僱員查核資料。讓我舉出簡單的例子，譬如銀行職員A轉到銀行B工作時，你應否詢問該職員為甚麼要轉到銀行B工作，而並非詢問其前僱主為何職員A會到銀行B工作？亦即是說，若制度有所不同，令人產生的感覺亦有所不同，以及該人應否遭到盤問，或有關制度所賦予的權力是否過大等情況，亦會有所不同。最低限度，我認為厚此薄彼的意思，正是由於不同制度造成不同的結果，最低限度，在由誰支付有關費用方面，已有所不同了。

財經事務局副局長區璟智女士：

我認為最主要的考慮因素，是所造成的結果是否相同，以及有關結果對投資者的保障是否合理。

涂謹申議員：

不對，這條條例草案除了考慮投資者外，另外尚須考慮員工的權益，而不應單考慮投資者的利益，對嗎？

財經事務局副局長區璟智女士：

或許請蔡先生講解有關現時銀行行之有效的規管安排。其實這些規管安排不單為規管證券部而設，即使是現有其他部門的員工在轉工時，若金管局認為存有問題，亦會與個別銀行商討。

香港金融管理局署理副總裁蔡耀君先生：

這亦是現時的做法。倘若個別銀行透過不同途徑，例如透過公眾投訴，發現某位員工在操守上出現問題，經我們調查後發現屬實，我們亦會就這事與銀行溝通。若該名員工在離職後到另一間銀行工作，我們亦會與其新僱主溝通。

主席：

陳智思議員。

陳智思議員：

多謝主席。主席，或許讓我解答同事提出的問題。我在銀行及證券行兩方面的工作上也有參與。我不明白同事為何那麼憂慮。甚麼是公平呢？坦白說，我受到兩個監管機構所監管，我可保證若要把兩者作出比較，金管局的監管比證監會為多，即銀行受到的監管、規範及所須獲得的批准等，比證券界為多。

剛才胡議員提到dealing director的問題，我相信胡議員最憂慮的，是那些中小型企業的情況。我絕對不相信一間機構會出現擁有多於2、3名dealing director的情況。

剛才蔡先生亦提到，銀行的高層人員又豈止4至5名呢？由銀行批准的人數較你們的人數還要多。所以將兩個不同的制度作出比較十分困難，但我絕對認為最重要是從保障市民的角度出發。但如果仍要將兩者作出比較，實在極為困難。我見到副主席正在搖頭，但只有行內人士才會明白兩個監管制度實在不同。但若有需要，我稍後仍可作出補充。多謝主席。

主席：

我希望提醒大家，時間實在很逼切，因為我們需要在10時45分到樓下聽取開支預算。我容許各位提出最後一輪問題。余若薇議員、涂謹申議員及胡經昌議員。待他們發問後，請作出回應。好嗎？

余若薇議員：

多謝主席。我希望詢問關於文件第15段的數字。我相信該段的意思是有關的百分比很小，因為在1999年及2000年那麼多人要求轉工，而只有很小的百分比的情況出現問題。但我則會看實際的數字。對我來說，那數目也頗大，因為在1999年有96宗個案，而在2000年亦有182宗個案尚在調查中，不知當局就這些個案已調查了多久。但這令我產生的感覺是證券從業員轉工時會出現問題，因為他們須重新通過資格審查。這做法一方面會對轉工者造成壓力，另一方面，我不知這情況是否反映出證券行業其實存有很多問題，或是審查的程序存有很多問題。由於該數字顯示從業員的轉工率頗高，要不是從事該行業的人出現問題，便是審查的要求過高，而由於不知道on-going inquiry需時多久，而導致從事該行業的人因轉工而失去工作。我不知實際情況是怎樣。

主席：

接着是涂謹申議員。

涂謹申議員：

主席，我希望就第9及10段提問。其實整個概念基本上只有兩方面。第一，證監會不清楚轉職人士是否會從事其並無資格擔任的工作。如果情況是這樣，證監會所指的單一牌照實際上並不是單一牌照。例如，我不知牌照上會否註明是type four或type six的牌照，但假設證券從業員由從事type four的工作轉到另一間公司而同樣從事type four的工作，倘若他清楚知道他所從事的工作會是完全相同，他須否再經審批呢？所以，對於第9段整個概念方面，我認為證券從業員由從事type four工作的職位轉到另一間公司而同樣是從事type four工作時，不應重新經過審批，因這是多此一舉的bureaucracy，並會構成一些無形的壓力。這做法實在沒有意思。

第10段提到懷疑市場失當行為。整個概念是只向有關從業員作出詢

問，其實在文件前數段也有提到，證監會只會詢問有關證券從業員轉工的原因。我相信沒有其他行業會詢問其從業員因何轉換工作，因為這會涉及很多複雜的問題。就銀行而言，若員工出現問題，證監會便會向銀行詢問，而倘若銀行不想表明員工離職的真相，便會三緘其口。但當證監會詢問證券行時，便會造成很多問題。例如，倘若轉職員工與僱主出現爭拗的情況，有關職員便會遭僱主誣陷。這情況會導致很多麻煩，而該職員亦會因轉工而負上很多複雜的因素。

所以，我懷疑是否必須透過這種方式才能找出該職員轉工的主要因素。可否跟隨美國的做法，只要求該職員知會當局有關轉工的事宜？如果當局認為情況存有問題，才向他進行詢問，而不是向每名轉職員工詢問其轉工的原因。因為即使他願意回答有關轉職的原因，也不知從何回答。他或許只表示希望轉換環境，又或許表示跟別人發生爭拗，這是否可以接納？而若當局會由於他與別人發生爭拗便進行調查，則日後因人事上的爭拗而轉工的人便須承受很大的壓力。不知過往的案例中，有關職員曾提出甚麼轉工的原因，以及導致甚麼問題呢？

主席：

胡經昌議員。

胡經昌議員：

我不會就陳智思議員的意見作出回應，因為其實他可能對我某些意見有所誤會。

我只是希望提出很簡單的問題。剛才區局長提到，最終的結果也是保障投資者。我很同意這點，但我只希望提出公平的問題。局長可否告訴我，如果銀行跟隨這個做法，即與經紀一樣須經審批或須付款，投資者的保障是否便會減少？

主席：

由於時間所限，並因為我們在下星期仍會繼續就第V部進行討論，請大家再蒞臨討論這部份。但我相信主要有兩方面的關注，除了對投資者的保障是否相同外，另一方面是員工、證券業與銀行間是否具有公平競爭環境的問題。

我很抱歉不能再讓你們解釋。將在3月9日舉行的下次會議上，我們仍會討論第V、VI及VII部，對嗎？

財經事務局副局長區璟智女士：

可否讓Mr PROCTER以2分鐘的時間發言？

Chairman:

OK. Two minutes.

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

On fees, let me make a couple of quick points. Most firms in Hong Kong have fewer than 5 employees. If you look at the fee structure, in fact most firms therefore would incur fees under the SFC system of under 30,000 per year – so significantly less than the banking sector. In fact it is less by a factor of many.

Mr WU said in respect of fees that the onus is on the individual registrant. The onus is not placed on the individual registrant under the legislation. The legislation requires that a fee be paid. It is a question of whether or not the employer chooses to pay it on their

behalf, or not. There is no obligation on the individual.

Paragraph 15 of the paper is the paragraph to which Miss YU referred, and it could be clearer. What it is about is: those 96 and 122 cases are in fact the cases where we had disciplinary concerns, where by reason of information that has come to us either from the previous employer or from other sources, we think that these people who have applied for accreditation should be the subject of a disciplinary inquiry. So the ongoing inquiry is as a disciplinary matter. Then the judgment call is whether we transfer the accreditation subject to conditions, or we say "These concerns are so serious that we can't run the risk. We are not going to transfer it at all" – which takes me to Mr TO's question.

Obviously a type four to type four transfer, with nothing else, no suggestion of misconduct, no suggestion that the wrong subjective judgment has been made about the new responsibilities, should go straight through. That is exactly what happens in the 95 per cent of cases. It is straight through; but where there is a concern of the sort in those 96 and 122 cases in the last 2 years, about misconduct, then I think the answer is "No. It should not go through". There is an investor protection issue that ought to be addressed. That is why we say we should get notice of these changes, so that in that small minority of cases we can make that judgment call.

Of course there may be malicious gossip and rumour. Of course there are motivations that cause some people to say things about their previous employees and employers. We have to make a judgment about those things, and say: "Okay. There doesn't appear to be anything to verify this. It's a subjective judgment, but we can say there's no objective information that supports it". It is not something that is strange to us. We have to do that kind of thing all the time, and we have to make a call about whether or not there is any apparent veracity to the allegations that would cause us to reflect upon whether or not a transfer should go through straight away.

主席：

下次會議將再就第V、VI及VII部進行討論。關於AOB的問題，請余議員參考立法會CB(1)/544-00-01號文件，我們現在的進度跟原定的計劃相同。好了，下次會議再行討論吧。

余若薇議員：

主席，他們是否每次也會就法律顧問提供的table作出回應？

主席：

對，每次也會。

余若薇議員：

每次也會？

主席：

對。

余若薇議員：

我們是否每次也需要就他們先前所作的回應進行討論？

主席：

可以，你們在任何時間也可以提出問題。當你閱讀完畢後便可提出問題。

副主席：

多謝各位。

m2731