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, 9 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 Albert HO Chun-yan Hon Eric LI Ka-cheung, JP Dr Hon David LI Kwok-po, JP

Hon NG Leung-sing Hon Bernard CHAN

Hon Jasper TSANG Yok-sing, JP Hon Abraham SHEK Lai-him, JP Hon Henry WU King-cheong, BBS Hon Audrey EU Yuet-mee, SC, JP

Members absent : Hon James TO Kun-sun

Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP

Hon Ambrose LAU Hon-chuen, JP

Public officers attending

For Items I & II

Miss Vivian LAU

Principal Assistant Secretary for Financial Services

Mr David CARSE

Deputy Chief Executive, Hong Kong Monetary

Authority

Mr Y K CHOI

Executive Director, Banking Supervision Department,

Hong Kong Monetary Authority

Mr Arthur YUEN

Division Head, Banking Supervision Department, Hong Kong Monetary Authority

Ms Sherman CHAN Senior Assistant Law Draftsman

Ms Vicki LEE Government Counsel

Ms Beverly YAN Senior Government Counsel

For Item I

Miss Ada CHEN Senior Government Counsel

Attendance by invitation

For Items I & II

Mr Paul R BAILEY

Member of the Commission and Executive Director, Securities and Futures Commission

Mrs Alexa LAM

Executive Director and Chief Counsel, Securities and Futures Commission

Ms Barbara SHIU

Senior Director, Intermediaries, Securities and Futures Commission

Mrs Yvonne MOK

Associate Director, Intermediaries Supervision Department, Securities and Futures Commission

Mr Leo LEE

Director, Licensing Department, Securities and Futures Commission

Mr Andrew YOUNG

Legal Consultant, Securities and Futures Commission

Mr Joe KENNY

Consultant, Securities and Futures Commission

Mr Eugene GOYNE Senior Manager, Enforcement, 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

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我們今天舉行第11次會議,首先歡迎政府的代表進入會議室,亦多 謝各位政府的代表出席。

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6 今天的第I項議程,主要是就有關第V、VI及VII部的剩餘文件進行 7 討論,包括政府分別在過往兩個星期內向委員會提交的文件。其中包括立 8 法 會 CB(1)569/00-01(01) 號 文 件 — 政 府 提 供 的 資 料 文 件 ; 立 法 會 9 CB(1)582/00-01(01)號文件一法律事務部提出的意見;立法會CB(1)648/00-10 01(01) 號 文 件 - 政 府 對 法 律 事 務 部 所 擬 備 列 表 作 出 的 回 應 ; 和 立 法 會 11 CB(1)648/00-01(02) 號 文 件 — — 份 由 政 府 發 出 有 關 "Involvement of 12 Authorized Institutions in the Securities, Insurance and MPF Businesses"的文 13 件上次會議席上已派發;立法會CB(1)648/00-01(03)號文件,是關於"Roles 14 Played by Authorized Institutions in the Insurance and MPF Businesses"上次 會議席上已派發。立法會CB(1)658/00-01(01)號文件,是關於政府對公眾人 15 士就第V部及Schedule 9提出意見所作的回應;立法會CB(1)725/00-01號文 16 件,是關於"Supervision of Staff Employed by Authorized Institutions for 17 Securities Business"的; 另外一份是立法會CB(1)741/00-01(02)號文件一 18 19 Information Paper provided by the Administration on the "Portability of a 20 Representative Licence",即有關在上次會議上受到爭議和關於人們轉換工 21 作的問題的文件,這些是屬於條例草案第V部的文件。也向大家派發了一些 22 有關第VI部的文件,包括立法會CB(1)626/00-01(01)、CB(1)648/00-01(04)、 23 CB(1)761/00-01(01)及CB(1)761/00-01(02)號文件。各位可按照這一系列的文 24 件提出問題。

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26 今天的議程分為兩部分。如果各位沒有問題,在第一部分結束後, 27 大約於9時45分,我們會邀請政府的代表介紹第VIII部。由於今天舉行財政 28 預算案的簡報及答問大會,今次的會議須在10時30分準時結束。

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政府的代表有沒有補充?如果沒有,請各位在這段時間就有關第

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1 V、VI及VII部的文件發問。有沒有提問?胡經昌議員。

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胡經昌議員:

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主席,我希望提出,根據參考資料,除了第V及第VI部外,我們亦 6 應討論Banking (Amendment) Bill的對應部分,對嗎?

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8 主席:

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胡經昌議員:

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我提出這個問題的原因,是在過往的會議上,大家亦可能認為,就銀行和經紀方面,有某些需要商権的問題。事實上,我或很多人士也會誤會,因何會出現這樣的情況。雖然Banking (Amendment) Bill的篇幅不算很長,但我亦把它閱讀完畢。我希望提出的第一個問題十分簡單,是有關金融管理專員職能的問題,即有關第3條或第C1454頁的問題。當我翻查在很久以前接獲的另一份資料的marked up copy時,發現該份文件已解釋金管局的功能。如果我沒有理解錯誤,金管局的主要功能是監管銀行進行的銀行業務。

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若我們參考第3(c)條,便會知道該條是新加入的條款,即"by adding (g) take all reasonable steps to ensure that any banking business..."。這部分並無問題,接着是有關"business of taking deposits",這部分也沒有問題。但據我的理解,"or any other business"的部分是針對證券業而作出的修訂。但為何當局要作如此廣泛的草擬,採用"or any other business"的字眼?這做法會否在日後造成問題呢?我先前亦提到,銀行亦會進行很多如樓宇按揭等業務,日後的情況會否因而有所轉變?這是完全關乎金管局或專員職能和權力的問題。我恰巧留意到這部分是採用"any other business"的字眼,其涵

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- 1 蓋範圍實在很廣泛。我們應將這方面的範圍擴大至這個程度,還是把範圍
- 2 縮窄呢?這是我觀察到的第一個問題。主席,可否請政府作出回應?

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4 Chairman:

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6 David.

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

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Thank you, Mr Chairman. I think the first point to make is that we were not actually convinced that we needed this provision. I mean it really arose items of discussion between ourselves and the SFC about the scope of the HKMA's part. It has always been our position that although our primary function under the Banking Ordinance is to promote the stability of the banking system and to provide the measure of protection to depositors. You cannot divorce that from all the rest of the business that banks are doing, I mean, Mr WU mentioned mortgage business, for example, we cannot really divorce the way the banks use deposits from the protection of depositors, because obviously, if we use deposits to make inclusive loss, then that will affect the interests of depositors. Therefore, as I say, there was a question as to whether this provision was absolutely necessary. But in the light of the discussion that we had with the SFC, we decided that we ought to put the matter beyond that and really have this general clarification that we believe that the HKMA does have an responsibility of all the business conducted by authorized institutions, because ultimately that feeds back to the protection of depositors and the stability of the system. The argument being, for example, in relation to securities business, the banks conduct their securities business in a way which damages their reputation of which causes them financial loss. That could undermine confidence in the banks, and therefore damage the interest of depositors. So I think that is the basic concept that we are trying to establish the general principle of the HKMA does have some responsibility for all the business conducted by authorized institutions because ultimately that feeds back to our primary function of the stability of the banking system and the protection of depositors.

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主席:

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4 這裏提到的,是金融管理專員的職能,而加入這兩句句子的意思, 5 是要求他履行這些職務。

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胡經昌議員:

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主席,我同意這些是他的職能。因為該條款提到"or any other business carried on by an authorized institution"。這意思其實是說AI可進行 11 任何業務。我不知道這是否主要的政策,因為我不太瞭解現時金管局的職 12 能。你明白我的意思嗎?

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

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It is not permissive in that sense, I mean, there is nothing in the Banking Ordinance that prevents banks from doing any particular type of business. I mean, obviously, what the licence is for is the taking of deposits, but obviously, as I have said, you cannot divorce the taking of deposits from the way which you use these deposits or other services which you provide for customers. So that is not what this provision is designed to achieve, it is not meant to be permissive in the sense that it allows banks to do other types of business because they are already allowed to do that. What it is saying is that the Monetary Authority's responsibilities are simply restricted to its deposit-taking business for which they are authorized, but extends to all the business that happen to be done by authorized institutions because ultimately, that feeds back to the stability of the banking system and the protection of depositors.

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Chairman:

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30 Audrey.

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1	
2	<i>余若薇議員:</i>
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4	主席,我可否就立法會CB(1)658/00-01(01)號文件提問?即有關Part
5	V的列表的編號5D/01號文件。
6	
7	<i>主席:</i>
8	
9	是哪一段?
10	
11	<i>余若薇議員:</i>
12	
13	主席,我建議go through Part V及Part VI等的列表。對於Part V,我
14	有一個問題。第一,有關第113(1)條所訂受規管職能的問題,英文是regulated
15	function。該條提到某些職能須受到規管,但"other than work ordinarily
16	performed by an accountant clerk or cashier"的職能則獲得豁免。我是否曾經
17	提出,在某些情況下,律師亦會進行某些屬於受規管的職能,而他們亦應
18	獲得豁免,對嗎?為何這條款沒有提及律師方面的問題?
19	
20	<i>財經事務局首席助理局長劉利群女士:</i>
21	
22	主席,我們訂有guidance note,提到incidental advice provided by
23	professionals such as lawyers and accountants是會獲得exemption的。這個
24	guidance note 已是published under the existing legislation,而在新的Bil
25	內,亦訂有相同的exemption。
26	
27	<i>余若薇議員:</i>
28	
29	主席,為何在受規管職能方面,沒有提到有關律師的問題?如果在
30	guidance note內訂明有關情況,是否也應載於這條文內?

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2	財經事務局首席助理局長劉利群女士:
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4	對不起,你可否再問一次?
5	
6	Hon Audrey EU Yuet-mee, SC, JP:
7	
8	Section 113(1), under the definition of regulated function •
9	
10	財經事務局首席助理局長劉利群女士:
11	
12	讓我回答余議員這個問題。她提到第113條有關受規管職能方面。
13	剛才她說,如果律師或會計師在一般的工作情況下附帶提供這方面的意見
14	時,是會獲得豁免的。這方面是我們所指的regulated activities。在條例草
15	案附表6亦已清楚列明,由哪些人進行的哪些活動,不會被包括在條例草案
16	之內。換句話說,這裏涉及兩回事,一種是regulated function,而另一種是
17	regulated activity o
18	
19	<i>余若薇議員:</i>
20	
21	主席,對不起,我不太明白因何律師就regulated activity方面可獲豁
22	免,但卻沒有就regulated function獲得豁免,當局可否作出解釋?我提出問
23	題的原因,是在第113條的定義裏,提到受規管職能,其中特別指出會計師
24	及其它clerk or cashier獲得豁免,但偏偏沒有提到律師。我清楚記得在閱讀
25	有關regulated activities的文件,其中確實有提及律師,所以我不明白這條
26	款因何沒有提到律師。
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28	財經事務局首席助理局長劉利群女士:
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Regulated function是in relation to a regulated activity carried on as a

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- 1 business by any person。首先要視乎有關活動是否regulated activity,而倘若
- 2 這項regulated activity是exempted, or the other way around, 是沒有exempted
- 3 的,我們才研究有關的regulated function是甚麼。如果那項regulated activity
- 4 已是exempted,有關regulated function便已經獲得豁免。

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副主席:

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- 8 主席,第C2447頁Part II Schedule 6有關機構融資提供意見的部分,
- 9 即第(ii)和(iii)部分,也提到律師不會被包括在內。余若薇議員提出的問題
- 10 其實是很簡單的問題。既然第113條也有提到會計師、會計員、文員或出納
- 11 員等,為甚麼不加入律師?雖然妳提到沒有這個需要,但有否特殊理由不
- 12 包括律師在內?或是倘若包括律師在內便是不妥善的做法?我相信問題大
- 13 概是這樣吧。

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財經事務局首席助理局長劉利群女士:

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- 17 這個情況涉及兩方面的問題。關於regulated activities方面,剛才我
- 18 們已提到,該條款已把一些incidental to regulated activities 的professionals
- 19 從regulated functions中剔除,但沒有被剔除的professionals中,其中一些是
- 20 不包括在regulated function內的,即"relating to activity other than..."。即使
- 21 在regulated activities的範圍內亦有一些functions是pertaining to regulated
- 22 activities的。但一般來說,文員、accountant clerk或cashier or even in some
- 23 extreme cases, tea lady、messenger等的職能,則未必會受到規管。

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25 主席:

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27 我不太明白。

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29 副主席:

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1	我們會解決這個問題。
2	
3	胡經昌議員:
4	
5	主席,我可以幫忙。其實在Banking (Amendment) Bill 2000第C1459
6	頁已訂明"other than work ordinarily performed by a clerk, cashier or
7	accountant of the exempt authorized institution concerned in that regulated
8	activity"。據我理解,意思就是指這些人士,而不是一般的文員、cashier或
9	accountant ·
10	
11	<i>主席:</i>
12	
13	我明白了。每當提到accountants and lawyers時,便會發生這種情
14	况。人們會質疑因何只exempt accountant而不exempt lawyers。就好像提到
15	exempted functions performed by a clerk or cashier時,余若薇議員便會提出
16	問題,詢問為何提及accountant而沒有提及lawyer。
17	
18	<i>余若薇議員:</i>
19	
20	這個問題留待吳靄儀議員跟進吧,因為她是代表法律界的。我只是
21	發現存在這個問題便提出來吧。或許留待吳靄儀議員繼續跟進好了。我接
22	着是否可以提出其他問題?或是吳靄儀議員希望作出跟進?
23	
24	<i>主席:</i>
25	
26	我希望提出一個問題。簡單來說,regulated functions的意義,是否
27	可能是普通的工作及初級人員的工作?可能同事的理解,是會計不單是負
28	責ledger的會計,而是professional accountant,所以同事便會因而認為這類
29	工作應包括在regulated functions之內。
30	

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1	財經事務局首席助理局長劉利群女士:
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3	因為如果有關的regulated activity是無需受到監管的,例如我們剛才
4	提到的 professional incidental advice, 便已不會 trigger licensing
5	requirement °
6	
7	但是有些人已 trigger licensing requirement, 我不是指
8	professionals,而是指例如在dealer's operations的層面,有些人是基本上與
9	regulated activity無關的,例如普通文員、filing clerk、tea lady等。這些人
10	便不包括在內。
11	
12	副主席:
13	
14	我希望提出一個很簡單的問題。為何要加入accountant這個字眼
15	呢?
16	
17	財經事務局首席助理局長劉利群女士:
18	
19	這個原因很簡單,我們是指一些在back office的accountants,或是
20	從事accounts的人,因為跟着便會提到clerks or cashiers。
21	
22	Hon Audrey EU Yuet-mee, SC, JP:
23	
24	I do not care what follows, what is an accountant doing here? Why do you have to
25	put in accountants? Supposing you take out the word "accountant", what sort of harm would

28 Chairman:

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it do to you?

Would it be more appropriate -- are you talking about those accountants or some

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1	sort of accounts clerks, you know, those people who just keep the ledgers, the books?
2	
3	Hon Audrey EU Yuet-mee, SC, JP:
4	
5	More of the latter.
6	
7	Chairman:
8	
9	In such sense, people in this room will be more acceptable to exempt those junior
10	staff but not the senior ones, am I right?
11	
12	Hon Audrey EU Yuet-mee, SC, JP:
13	
14	Mr Chairman, I think I ask legal advisor to sort out whether it is a matter to be
15	drafted.
16	
17	<i>主席:</i>
18	
19	我相信accountant本身是一個profession
20	
21	李家祥議員:
22	
23	在法律上,professional accountant是有定義的,沒有professional
24	accountant資格的,便不可稱為會計師。有關的分別是很清楚的,他們會稱
25	accounts clerk為會計員。
26	
27	<i>副主席:</i>
28	
29	會計員便不是accountant吧,會計師才是accountant。
30	

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1	<i>主席:</i>
2	
3	好的,我們在字眼上稍作修訂吧。相信大家也明白中文的意思,用
4	會計員的字眼便很容易明白了。好的,Audrey,請繼續。
5	
6	<i>余若薇議員:</i>
7	
8	接着亦是關於剛才提到在立法會CB(1)658/00-01(01)號文件中的那
9	個列表。第2欄提到第114(6)條,政府就9個investment bankers提出的意見作
10	出解釋。但我不是很接受政府在這方面提供的解釋。不知可否再詳細解釋
11	第114(6)條?為甚麼政府認為這樣的草擬方法已經足夠,而不是跟隨建議的
12	做法?
13	
14	<i>主席:</i>
15	
16	好的,Vivian。
17	
18	財經事務局首席助理局長劉利群女士:
19	
20	因 為 Securities margin financing 是 有 關 providing financial
21	accommodation for the acquisition或continuous holding of the securities。如
22	果任何人進行這類活動,便會trigger licensing requirement。所以如果provide
23	financial accommodation的人士reasonably sure那位貸款的人士不是把有關
24	款項用作這個用途,便無須受到licensing requirement所管範。
25	
26	<i>余若薇議員:</i>
27	
28	主席,意思是否在貸款給別人時,必須清楚查問他借錢的目的,倘
29	若沒有查問或不清楚有關的目的,是否也會出現問題?
30	

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《2000年銀行業(修訂)條例草案》委員會

財經事務局首席助理局長劉利群女:	+	:
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如果你借錢給別人,而曾考慮他貸款的目的是購買股票或持有股票,那便可能會出現問題。

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余若薇議員:

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主席,我的問題是,如果你貸款給別人而不管他貸款的目的,但後 9 來才知悉他以該筆款項作觸犯法律的用途,你會否由於完全沒有查問他貸 10 款的目的而須承擔責任?換句話說,是否當你貸款給別人時,你已有onus, 11 所以必須清楚借款人貸款的目的才可借出款項,否則便會觸犯第114(6)條的 12 規定?

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財經事務局首席助理局長劉利群女士:

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因為有關的defence是"if the provider reasonably believes that the funding was not to be used to facilitate...",所以如果他相信借款人不是把款項用作有關用途,便能作為defence。

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Hon Audrey EU Yuet-mee, SC, JP:

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Mr Chairman, my question is very simple, if I lend some money to somebody, do I have the onus—the responsibility of trying to find out, and therefore reasonably believe it is not used to facilitate the acquisition of securities, or can I simply just lend money without having any belief or any suspicion or any inkling as to what he is supposed to do with the money. I mean, can I just simply lend money because I believe this person is going to repay the money to me? That is the question.

28

Miss Vivian LAU, Principal Assistant Secretary for Financial Services:

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I think it really depends on the circumstances. It is very hard to have a hardened
class answer for every single situation. If, for example, you are in the securities business,
and you are lending money in the course of securities business, there might be grounds for
saying that you might have reasonably believed that the person you provided financial
accommodation to might use proceeds for the acquisition or the continuous holding of the
securities. Now, there are other situations, for example, where the plain money lenders, for
example, where the providing financial accommodation could be for a variety of different
things-for cars, for consumer loans, and so on. And in those circumstances, I think the
defence that they reasonably believe that the person was not going to use the proceeds from
the financial accommodation for such activities would probably stand.

Hon Audrey EU Yuet-mee, SC, JP:

Mr Chairman, I think that the question is still not answered. My question is simply that I do not have any belief at all. I simply do not care what he is going to use the money for. Then can I say that "Well, I reasonably believe that the financial accommodation is not to be used for this purpose." I mean, if I simply say, "I don't care, I lend money to this person because he's my friend, because I like him, because I think he is going to repay money back to me."

The way this section is drafted and that is the point made in the submission by the group of nine investment bankers is that you place an onus to the person has to reasonably believe that the funding is not used for the purpose. What if that lender has no belief at all, because he simply does not care, is that sufficient? That is the point being made, and I do not think it is answered.

Miss Vivian LAU, Principal Assistant Secretary for Financial Services:

I think, first of all, it does not count as individuals, because securities margin finance has its sole business requirement, so it only catches a business. So when you look at

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- a business, then I suppose from a prudent point of view should a business, in the course of
- 2 lending money, ask what the proceeds is used for. There is a prudent element there as well.
- 3 But, also, as I mentioned before, it also depends on the type of business that the business is
- 4 into. For example, it is always providing financial accommodation in the securities area,
- 5 then that we would say perhaps you want to ask and be reasonably sure what the proceeds are
- 6 used for.

7 8

主席:

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- 10 如果我沒有看錯,第114(6)條應是舊有的條文,對嗎,Vivian?我
- 相信這應是Securities(Margin Financing)(Amendment)Ordinance中剛經修訂
- 12 的條文。這條條文應是在剛過去的立法年度由立法會修訂的。倘若我的理
- 13 解錯誤,請政府加以糾正。修訂這條條文的原因,是在正達事件後,當局
- 14 發現有需要對經紀的借貸進行嚴格規管。不知可否作這樣的解釋? Vivian,
- 15 你可否加以解釋嗎?即立法會在上年度剛就這條條文進行研究。我留意到
- 16 有 一 份 文 件 提 到 , 這 條 條 文 是 從 Securities(Margin
- 17 Financing)(Amendment)Ordinance原本的第121(c)(iii)條轉載過來的。

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財經事務局首席助理局長劉利群女士:

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- 21 主席,這項條文是跟據舊有的法例而修訂的,即從現有的法例中修
- 22 改過來的。

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副主席:

- 26 主席,我可否就這個問題作出跟進?據我理解,第114(6)條的條文
- 27 是很清楚的。貸款人是有這樣的責任的。他必須有理由相信,亦必須曾經
- 28 考慮他借出的款項是不會用作這些用途,即他必須符合A和B的規定。條文
- 29 的擬本很清楚地表明他必須這樣做,但唯一的問題是為何要求他這樣做。
- 30 條文為何要作出這樣的要求?立法會去年已通過這條條文,那麼政府便可

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更清晰地作出解釋,為甚麼要求貸款人有理由相信借款人借貸的目的不是

2	用作該等用途?
3	
4	財經事務局首席助理局長劉利群女士:
5	
6	因為在發生正達事件後,那些從事securities margin finance的人士
7	便被納入監管的範疇,而當時我們認為,倘若那些人貸款給第三者從事這
8	些活動,便應符合licensing的要求,以及在licensed之後,須遵守條例內其
9	他的規定。
10	
11	Deputy Chairman:
12	
13	Mr Chairman, what I hear is that there is a positive burden on this person to check
14	so that he reasonably believes that the financial accommodation is not to be used to facilitate
15	A and B. He has a positive duty to do so. If he has not fulfilled this positive duty, then he
16	would fall within (1)?
17	
18	Miss Vivian LAU, Principal Assistant Secretary for Financial Services:
19	
20	I think for the person to reasonably believe that unless there are other grounds for
21	him to reasonably believe, for example, the company that lends money for this sort of thing,
22	otherwise, I agree that there are steps to be taken so that he can state why he reasonably
23	believes that A and B is going to be there or not.
24	
25	Deputy Chairman:
26	
27	So, Miss EU is quite correct. If he has not thought about it one way or another,
28	then he would be caught. He would have to positively considered it and come to a
29	conclusion that he not only believes it but has reasonable grounds to believe it.
30	

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

《證券及期貨條例草案》及

1	Miss Vivian LAU, Principal Assistant Secretary for Financial Services:
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3	I can think of, for example
4	
5	Deputy Chairman:
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7	Please do not think of anything else. I mean, this is a very simple question, you
8	do not place such a burden on him. If you agree that this is so, as it seems to be so, then the
9	question is simply, "Why do you do so?
10	
11	Chairman:
12	
13	Yes, please.
14	
15	Mr David CARSE, Deputy Chief Executive, Hong Kong Monetary Authority:
16	
17	The regulations, the provision is phrased in this way to place an obligation on the
18	person who is conducting a business of lending money. It is not to deal with an individual
19	who lends money to a friend. So where there is a business of lending money, there is an
20	obligation imposed to make sure that the money is not to be used for the acquisition of
21	securities. The reason that the positive obligation is imposed is because otherwise, the
22	Commission would have to prove, in each case, that the person lending money is by way of
23	business knew that individual would use the money to buy securities.
24	
25	<i>主席:</i>
26	
27	余若薇議員,我相信這條文應與第114(1)條一併考慮。
28	
29	Hon Audrey EU Yuet-mee, SC, JP:
30	

Securities and Futures Bill and Banking (Amendment) Bill 2000

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Mr Chairman, I understand. I raise this question because this is in one of the comments given by the group of nine investment bankers. I mean, they obviously have a reason to raise this query. Then I looked at the response from the Administration, and I do not think the Administration's response has addressed the question, because the Administration's response is that "Well, they take the view that the lender can easily take steps to find out." I agree, of course, that the lender can easily take steps to find out. The question is not whether they can take steps to find out that whether in fact it is normally done, whether it should be done, whether there is a policy reason behind it. As you said, maybe there is a history behind the reason for this Administration and in fact, the aim is rightly placed on these companies because of public policy reasons. In which case, I think what the Administration should do is to state that policy reason and respond to the submission accordingly and say "Well, yes, there is an onus placed upon you, but then, there is a good reason for this onus and that is because of 1, 2, 3, 4." Then I think we can deal with it, but otherwise if you just look at the comment and the response, the response does not answer the comment. I mean it just simply makes the point, "Yes, you can find out, so the question still remains: "Why should I find out?" If I am carrying on this business, is there simply a commercial reason I lend money to people because I think the money can be repaid? should I take the extra step to find out what the money is used for? But obviously the legislation requires the lender to assume this obligation. So I think if the Administration can, for example, state the reason behind this special onus, and then respond to the nine investment bankers accordingly. They think it is all right, then of course we do not need to go further. If they think, "Well, in fact, it is not practical, it is not fair, and it is not just." Then we will have to look at it.

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財經事務局首席助理局長劉利群女士:

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主席,我們在會議結束後提供補充資料吧。

28

29 主席:

Securities and Futures Bill and Banking (Amendment) Bill 2000

《證券及期貨條例草案》及

1	好的。有沒有其他問題?
2	
3	Audrey, 請繼續提問。
4	
5	<i>余若薇議員:</i>
6	
7	主席,如果其他議員有提問,我願意讓他們先提問。我仍然希望就
8	Part V該部分提問。
9	主席,亦是有關同一個列表的第13頁第一欄的問題。HKSbA, their
10	comment of section 127(2). If you look at the column under "respondent's
11	comments". It is actually the third comment where it is not clearly
12	understood, under subparagraph (d)(ii), why the fitness of the corporation
13	should be affected by the reputation of any officer of the corporation. That
14	comment actually, I believe, relates to section 128(d)(ii) instead of 127(2).
15	
16	My question relates to the Administration's response in that column, the last
17	paragraph where "it is the conduct of the regulated activities is the core business, if not the
18	sole business of a licensed corporation, such as not the case for exempt AI apparently.
19	Therefore the assessment of their fitness and properness is accordingly confined to top
20	management and the executive officers involved in the conduct of regulated business." My
21	question simply is that although at the moment, the exempt AI's core business is not the
22	regulated activities, but then one would imagine that fitness and properness of one of their
23	officers can also affect the reputation of the bank. Why therefore is the same provision not
24	applicable to banks?
25	
26	Mr David CARSE, Deputy Chief Executive, Hong Kong Monetary Authority:
27	
28	May I respond, Mr Chairman?
29	
30	Chairman:

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

《證券及期貨條例草案》及 《2000年銀行業(修訂)條例草案》委員會

1	
2	Yes, please.
3	
4	Mr David CARSE, Deputy Chief Executive, Hong Kong Monetary Authority:
5	
6	We have tried to reproduce, within the context of the Banking Ordinance, the spirit
7	of what it is in the Securities and Futures Bill. The relevant individual who will be taken
8	into account would be audit directors of the bank, the chief executive, the alternate chief
9	executive or the managers. The managers of an authorized institution are those who are
10	basically be the second tier of management underneath the chief executives, whom would
11	include people like the head of retail banking, the head of corporate banking, those in charge
12	of the accounting functions, etc, within a bank, plus of course the executive officers which is a
13	new context that we are introducing to the Banking Ordinance. So, in effect, you will have
14	all the senior management not simply the chief executives and the directors of the bank, and
15	not simply those are involved in regulated activities.
16	
17	I mean, as I said, a manager of an authorized institution could be involved in retail
18	banking or corporate banking. So I think, in practice, we are picking up all the senior
19	management whose activities would principally affect the reputation of the authorized
20	institution. I think if you extend that cover to every officer of the bank, I mean, if you talk
21	about HSBC or Bank of East Asia, then you are talking about a colossal number of people.
22	You are really getting into an area which is unreasonable in relation to a bank, given that
23	securities business is not the principle activity of the bank, but it is largely incidental. That
24	is the thinking behind it.
25	
26	<i>主席:</i>
27	
28	還有沒有就其他部分的提問?
29	
30	Hon Audrey EU Yuet-mee, SC, JP:

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

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Mr Chairman, page 14 on section 131, it is a comment from Charles Schwab. It is about SFC's power to grant waivers and modifications. The suggestion seems to be the SFC should explain the purpose of reasoning of such waiver and modification. That seems to be a very good suggestion. I mean, would it be to include, for example, in the legislation the requirement of the SFC, every time they grant a waiver or modification should explain it because the response is simply that: "Well, the SFC may publish summary information where appropriate." Sometimes, I mean, a lot of public disquiet is engendered because there is suspension of favouritism. If the SFC has such a power to grant waivers and modifications, should they not at least be subject to some transparency and should give reasons for granting such waivers and modifications?

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Chairman:

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Barbara.

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證券及期貨事務監察委員會中介團體高級總監邵蓓蘭女士:

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在某種情形下,證監會是基於個別的情況給予個別公司waivers and modifications的。如果證監會須要披露所有有關那些個別情況的資料,便可能會影響個別機構的商業運作。因為有關modification可能是關於他們在operation某方面很特別的情況的。但我們也明白透明度方面的問題。如果我們可summarize the situation而不會泄露個別機構的商業confidentiality,我們也會將資料publish。

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主席:

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28 但你們在法律上並沒有責任這樣做,這只是出於自願。但余若薇議 29 員的意思是,當法律上要求你們在給予waiver時有義務作出解釋時,那會否 30 有很大的困難?

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證券及期貨事務監察委員會中介團體高級總監邵蓓蘭女士:

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如果有關要求是須就個別情況作出解釋,在商業上可能會出現不公平的情況。因為若disclose一些個別情況,有關資料可能會屬於個別機構的 commercial secrecy。

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8 主席:

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10 讓我作出跟進。一般來說,在甚麼情況下才會給予這些豁免或寬11 免,或這些豁免或寬免一般是屬於甚麼性質?

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證券及期貨事務監察委員會中介團體高級總監邵蓓蘭女士:

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例如對於最近通過有關share margin financing的修訂,業界亦就其中有關stock loan concentration的計算法作出反映。可能在某種情況下,intermediary具有一個很大的客戶,而該客戶持有很好並屬很高concentration的股票,但涉及的risk卻不是很高。在這類情況下可否放寬discount factor呢?我們現正研究有關在某種情況下放寬discount factor的做法。

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但如果真的要publish有關原因,而publish時亦要詳細提到grant waiver給那一名人士,便會將有關公司的information泄露。讓我再作補充,當我們給予這些個別waiver,而又認為其他intermediaries也有可能出現同樣情況,我們便會 consider turning it into a class exemption,使某些intermediaries遇到同樣情況時,class exemption便可使他們獲得豁免。

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余若薇議員:

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29 主席,我希望大家參考第131條。這是有關對規定作出修改或寬免 30 的條款,並且篇幅很長。這條款提到證監會對很多條款亦可作出修改或寬

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- 1 免。我所擔憂的,是業界會否懷疑證監會會有選擇性地優惠或偏待某些人
- 2 呢?我不太清楚當局對於這樣廣泛的權力有否制訂監察措施,或許胡經昌
- 3 議員或對業界的情況較為熟悉的人士可就這可面作出諮詢,研究需否在條
- 4 例內訂明一些制衡措施,還是應完全讓證監會決定在何種情況下作出修改
- 5 或寬免、在何種情況下作出公布,或是何種情況應為class exemption或應作
- 6 特別處理。

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證券及期貨事務監察委員會中介團體高級總監邵蓓蘭女士:

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倘若證監會已grant modification,業界是必定會知道的,問題只在於披露information的範圍。至於check and balance方面,我們internally當然會有control。首先,我們會參考precedent system,其次,某些豁免是不可delegate的,而是必須在executive director的level才可作出批准的,所以我們內部設有check and balance的機制。但我認為最重要的,可能是我們現時正set up的PRP,即Process Review Panel,因為Process Review Panel將負責review the procedure,研究我們有否follow the procedure,以及我們因何作出某個decision,決定給予或不給予豁免或寬免,或給予class exemption或個別的modification。

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財經事務局首席助理局長劉利群女士:

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22 主席,我希望稍作補充。程序覆檢委員會在去年11月已開始運作, 23 亦於最近舉行的會議上討論來年的工作計劃。該委員會稍後也會提到我們 24 現在討論有關證監會在發牌方面可作出寬免或豁免的問題,以確保證監會 25 在作出寬免或豁免時,內部的運作一致及合理。

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27 主席:

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29 我明白,但我認為同事的意見是由於這條款訂明的寬免十分廣泛, 30 會否包括一些並不屬太sensitive,即並不涉及商業敏感資料的情況?當局可

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- 1 否訂明須就那些情況作出解釋?你剛才提出有關stock concentration的例子
- 2 可能較為敏感,但有否其他不屬敏感性的情況是可以作出公布的呢?即監
- 3 察措施涉及兩個層面:首先是由程序覆檢委員會進行監察,但該委員會所
- 4 監察的是程序而不是個別case。但對於個別個案會否出現不公平的情況,證
- 5 監會是無法進行監察的。我認為我們的問題,是可否把該部分的範圍收窄,
- 6 找出一些情況,要求證監會必須說明就該等情況解釋作出寬免的理由。

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吳靄儀議員。

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副主席:

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我認為證監會應就這方面作出考慮,因為當證監會不批准或不給予 寬免時,也應解釋原因。如果證監會不作解釋便給予寬免;不給予寬免時 也不作解釋,並且沒有責任作出解釋,怎能使人信服呢?過往亦有一些有 關申請人不信服證監會所作決定的例子,結果他們便在報章上公開討論有 關問題,經過很長時間的討論後,證監會才作出解釋。這做法給別人的感覺是證監會對很多事情也不願意作出解釋。所以我認為證監會應考慮如何 在這情況下作出適度的解釋。

19

證券及期貨事務監察委員會中介團體高級總監邵蓓蘭女士:

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當我們就豁免申請作出決定後,也會告知申請人有關結果,並會說明作出有關決定的理由。我現在只是簡略地閱讀這些條文,便發現雖然不是所有情況也appealable,但第115條是appealable的,即如果我們不給予豁免,申請人有權提出上訴。但我對這情況不太肯定,需要於會後查證才可。

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財經事務局首席助理局長劉利群女士:

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我希望補充一點,議員可參考第C2471頁有關Securities and Futures Appeals Tribunal ("SFAT")的部分。該部分載有一個列表,內容提到可向

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- 1 Tribunal就證監會的決定提出上訴的情況,其中第35項訂明,如果證監會拒 2 絕作出寬免或豁免,有關人士可向Tribunal提出上訴。
- 3
- 4 副主席:

5

6 主席,可否讓我作出跟進?

7

8 主席:

9

10 可以。

11

12 副主席:

13

14 妳只可以這項解答我所提出問題的一部分,即當證監會不予批准 15 時,即不給予豁免時,申請人可以提出上訴,因此證監會不會無理拒絕申 16 請。但當另一名申請人獲得豁免而證監會卻無須解釋時,這個申請人便會 17 有所質疑。證監會可能認為他們無須向申請人解釋不給予豁免的原因,而 18 如果申請人不信服證監會的決定,便可提出上訴,至於證監會因何給予其 19 他人豁免,則與申請人無關。這正是使人們認為證監會的做法很不公允的 20 原因,並使人認為證監會特別優待某些人士。香港社會人士最不喜歡的情

22

21

況,是擁有權力的人特別優待某些人士而無須作出解釋。

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余若薇議員:

27

28 我認為我們於現時討論第131條甚為困難。我建議向業界作出特別 29 諮詢,讓他們考慮這情況是否存有問題。如果他們認為這不成問題,或許 30 我們也會同意這做法沒有問題。但如果他們也認為存在厚此薄彼或權力過

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1 大的情況,並應制訂多一些制衡措施,我們可再考慮修訂有關的草擬。

2

3 其實我已完成就第V部的提問,或許其他同事還會提出其他問題。

- 4 就第II部也有類似的情況。即有人就該部提出意見,而政府也就這些意見作
- 5 出回應,但所作的回應令人不太滿意。我不知可否讓提出有關意見的人士
- 6 取得政府的書面回應,然後待他們把有關問題的範圍縮窄後,再供我們參
- 7 考,因為我不知業界是否接受政府現時作出的解釋。最簡單的方法,是待
- 8 政府向業界作出解釋後,讓業界再發表意見,對嗎?

9

10 .Chairman:

1112

Vivian.

1314

財經事務局首席助理局長劉利群女士:

15

16 主席,在藍紙條例草案刊登後,我們從未間斷向業界作出諮詢。例

- 17 如我們一直以來亦與中小型經紀有密切的溝通,亦有舉行會議。我們已舉
- 18 行數次會議,在下週也會舉行會議。我們會繼續與他們商討,尤其有關一
- 19 些較技術性的條文。

20

21 主席:

22

- 23 我相信我們已把有關文件上載互聯網,各團體亦可參閱這些paper。
- 24 但我們卻沒有途徑主動通知各團體有關政府作出的responses。就這點我們
- 25 需與秘書處商討,當我們接獲政府提供的所有文件後,把文件送交有關團
- 26 體是否一項很繁複的工作。或許我稍作考慮吧。

27

28 胡經昌議員。

2930

胡經昌議員:

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《2000年銀行業(修訂)條例草案》委員會

1	
2	主席,我也同意政府有繼續諮詢業界,但倘若業界不滿意政府作出
3	的解釋,而再與政府商討後,政府還是不同意,正如余議員剛才提出的情
4	況,我們應怎麼辦?這是否代表政府的意見便是正確?我們還需否再進行
5	商討呢?
6	
7	<i>主席:</i>
8	
9	胡經昌議員,我在2月3日的會議上也曾提到,希望業界亦明白,他
10	們在直至進行三讀前的任何時間內,亦可提出意見。我們亦會收集他們提
11	交的書面意見。但我認為未必需要另外舉行會議,聽取團體的意見,因為
12	個別的意見可能會有關條例草案的細節。他們在任何時間也可以書面形式
13	提交意見。事實上在過去的時間內,我們偶爾也會接獲一、兩份補充意見,
14	而我們亦會即時把所有的意見書circulate給各位。
15	
16	香港金融管理局銀行監理部助理總裁蔡耀君先生:
17	
18	我希望補充一點。如果胡經昌議員有一些很強烈的觀點,而政府亦
19	未能作出充分的解釋,或有關解釋不被接受,我們可繼續進行商討。如果
20	議員到最終仍感到不滿,便可提出委員會審議階段修正案,政府便必須決
21	定是否支持有關修訂。
22	
23	<i>主席:</i>
24	
25	陳智思議員。
26	
27	陳智思議員:
28	
29	多謝主席。因為我亦是程序覆檢委員會(即PRP)的成員,或許我可

30

向其他議員匯報我們過往的工作。Vivian剛才提到,我們從十一月開始,已

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- 1 舉行了兩、三次會議。副主席也提到,我們不會就每個case作出調查,因為
- 2 我們不是appeal panel。程序覆檢委員會的職能,與上市公司的internal audit
- 3 committee的職能相同,負責有關程序上的事宜。覆檢委員會也有兩位來自
- 4 業界的成員,而委員會其中一個功能,是研究有關公司在程序上有否出現
- 5 錯誤或未如理想的情況。我們也曾討論,程序覆檢委員會其中一個可能的
- 6 function,是當我們接獲很多業界人士提出意見時,便會考慮在程序上有否
- 7 厚此薄彼的情形出現。但我們不會特別就有關公司和另一間公司的問題進
- 8 行研究,而只會研究在程序上有否出現不正常的情況,然後我們會到證監
- 9 會抽查有關file進行研究。當然,我們現在還沒有正式開始這項工作,所以
- 10 也不太清楚具體的做法。我們或許會selectively, randomly pick一些個案, 研
- 11 究有否出現這樣的情況。

12

13 我們也曾討論另一些問題。由於有關情況涉及公司的機密,所以我

- 14 們不能作出公開調查,因為這做法可能會影響有關公司的股價及觸及其它
- 15 敏感的範圍,而我們亦須保障投資者的權益。覆檢委員會正準備進行以下
- 16 工作:第一,我們會研究有關公司在程序上是否可作改良;第二,就業界
- 17 方面,我們已知道須就兩、三個課題進行研究,但由於覆檢委員會只成立
- 18 了很短時間,我們還未正式開始進行,相信我們會在一、兩個月內正式展
- 19 開這項工作。

2021

財經事務局首席助理局長劉利群女士:

- 23 主席,關於程序覆檢委員會方面,我希望提出一點。政府和證監會
- 24 向來亦持很開放的態度。倘若覆檢委員會希望研究個別個案的紀錄,我們
- 25 會按證監會在過往曾就有關方面處理的個案,為委員會準備一張清單。無
- 26 論委員會選擇研究哪一宗個案進行研究,我們亦絕對歡迎。剛才議員提到,
- 27 證監會會否以一套方法處理一宗個案,而採取另一個方法處理另一宗類似
- 28 的個案,以致得出完全不同的結果,並在運作上出現不一致的情況,而考
- 29 慮的因素亦各異?我相信證監會必定會認真處理每宗個案,因為程序覆檢
- 30 委員會可抽取任何case file進行研究,如果發現其中有不一致的地方,他們

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1	將會向財政司司長作出報告。
2	
3	Chairman:
4	
5	Margaret.
6	
7	副主席:
8	
9	主席,可否提醒我程序覆檢委員會產生的方法?
10	
11	<i>主席:</i>
12	
13	程序覆檢委員會是由政府委任的。
14	
15	財經事務局首席助理局長劉利群女士:
16	
17	程序覆檢委員會是一個由行政長官委任的非法定組織。
18	
19	<i>副主席:</i>
20	
21	主席,覆檢委員會的程序、會議紀錄等是保密的還是公開的?
22	
23	財經事務局首席助理局長劉利群女士:
24	
25	覆檢委員會從去年十一月開始運作。據我所知,他們的會議紀錄是 """
26	非公開的。
27	
28	<i>副主席:</i>
29	
30	我們正是討論這方面的問題。市民仍會認為這委員會是黑箱作業。

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- 1 我們明白,當證監會作出詳盡報告時,必要作出保密。因為如果不能保密,
- 2 便不可作出詳盡的報告。雖然覆檢委員會由行政長官委任,並向財政司司
- 3 長負責,但這並不等於委員會能對市民作出適度的並具透明度的交代。所
- 4 以,我仍然認為不能以覆檢委員會代替把審批豁免申請理由公開的機制。
- 5 我不是反對成立覆檢委員會,或許覆檢委員會的工作會令人感到很滿意,
- 6 但我們如何能監察覆檢委員會的工作?所以,當局最終仍要考慮,如何在
- 7 可能的範圍內經常表明審批豁免申請的理由,即證監會應具有法定責任公
- 8 開有關理由。

9 10

財經事務局首席助理局長劉利群女士:

11

12 我們會慎重考慮議員在這方面提出的意見。

13

14 主席:

15

16 我希望提問,其他監管機構會否經常運用這項豁免的權力。例如SCC 17 或FSA等,會否經常運用這項權力?它們有否這項waiver?

18

財經事務局首席助理局長劉利群女士:

20

19

其他監管機構亦具有這項權力,但情況未必與我們相同,例如它們 22 可能並無Financial Resources Rules,但它們也訂有其他modification or 23 waiver。

24

25 主席:

26

27 首先,他們有否作出解釋的慣常做法?第二,在法律上他們須否作 28 出解釋?

2930

財經事務局首席助理局長劉利群女士:

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4	主席:	
3		
2		我不知道在法律上他們須否作出解釋,但我們可就這點翻查資料。
1		

5

6

7

8

9

據我對剛才同事所提出意見的理解,較為理想的做法,是使有關制度容許在很特殊的情況下,可向財政司司長提出保密的要求,否則證監會便必須把所有理由公開。即制訂一個可申請把理由保密的制度,勝於現有的制度,即把所有理由保密,遇到可作解釋的情況時才加以解釋。

1011

財經事務局首席助理局長劉利群女士:

12

13

14

主席,在不違反條例草案關於保密方面的規定的情況下,我們是會 在證監會的年報內,公開程序覆檢委員會向財政司司長提交的報告的。

1516

主席:

17

我明白這個情況,但余若薇議員所提出有關第131條的問題,是 18 19 Charles Schwab希望證監會就審批豁免申請的原因作出解釋。事實上,現時 20 的潮流亦流行這個做法。我曾擔任數個法案委員會委員的工作,發現當政 21 府擁有這些豁免權或特別的酌情權時,亦須在運用有關權力時公開解釋理 22 由,使監察不但來自政府內部或來自某些覆檢委員會,更來自公眾人士, 23 以加強透明度。剛才Vivian也作出解釋,並承諾作進一步的跟進。首先,希 24 望妳能把這個做法與外國的做法作出比較,即與SCC或FSA的做法比較。其 25 次,即使有些特別敏感的情況,亦希望妳能就這些情況修改第131條的內 容。或許可行的做法是在某些情況下無需行使酌情權,而在另一些情況下 26 27 則需行使酌情權,以及向公眾解釋一些即使公開了也不會造成很大問題的 28 理由。

29

30

財經事務局首席助理局長劉利群女士:

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1	
2	主席,剛才余議員也提到,或許我們可與業界商討,聽取他們的意
3	見,以瞭解他們認為這是否一個問題,因為最終有關modification and waive
4	也是grant給他們的。
5	
6	何俊仁議員:
7	
8	主席,我希望提問。據我瞭解,無論有關申請是否獲得批准,證監
9	會也會通知申請人審批的決定,並向他們解釋理由。雖然理由不會公開,
10	但決定會否公開?
11	
12	<i>主席:</i>
13	
14	有關決定是公開的。
15	
16	何俊仁議員:
17	
18	決定是公開的,但其他人並不會知悉有關理由,對嗎?那麼我的問
19	題是如果某人不信服有關決定,向上訴審裁處
20	
21	<i>主席:</i>
22	
23	不一定可以的。抱歉,打斷你的話。當我將第131條和上訴委員會
24	的列表作出比較時,發現很多地方也不overlap,甚至大部分的情況亦屬於
25	不可覆核的。我不知道有否理解錯誤,第115條、第117條、第128條、第141
26	條、第144條、第145條、第147條、第148條、第146(3)條、第168條及Viviar
27	所提到的第247(1)條,亦沒有overlap的,即可予上訴的情況不多。

- 31 -

29 財經事務局首席助理局長劉利群女士:

28

Securities and Futures Bill and Banking (Amendment) Bill 2000

《證券及期貨條例草案》及

1	主席,你可否重覆一次。
2	
3	<i>主席:</i>
4	
5	好的。我只是將兩個列表作出對比,即將第C1749頁和第C1751頁比
6	較。這兩部分訂明可"grant a modification or waiver in relation to the
7	applicant",接着又訂明"any of the requirements of (i), (ii), (iii)",接着便列
8	出包括sections 115(2)(c)、117(2)、128等。另外,剛才Vivian提到,證監會
9	所作的很多決定亦可予上訴,而上訴委員會須處理的特別決定,載列在第
10	C2469頁和第C2471頁內。但在第C2469頁和第C2471頁載列的大部分可予上
11	訴項目中,並不包括現時的豁免項目,對嗎?我有否理解錯誤?
12	
13	財經事務局首席助理局長劉利群女士:
14	
15	主席,你可參考第C2471頁第131條,即第35項:第131(1)(a)、(b)、
16	(e)、(f)、(g)、(h)、(i)或(j)條提到,如果證監會拒絕做出修改或寬免時,受
17	屈的人可就證監會的決定提出上訴。可能我剛才的解釋不太清楚。
18	
19	<i>主席:</i>
20	
21	可能是我理解錯誤。第131(1)(a)、(b)、(e)、(f)、(g)條。被拒
22	絕申請的人士,即不獲waiver的人士可以提出上訴。但如果有人因認為證監
23	會優惠某些獲得waiver的人士而不信服,他們也不能提出上訴,對嗎?
24	
25	財經事務局首席助理局長劉利群女士:
26	
27	你可以這樣說,但這情況便要依賴覆檢委員會處理了。
28	
29	何俊仁議員:
30	

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可否讓我完成我的提問? 1

2

3 主席:

4

可以。對不起。 5

6 7

何俊仁議員:

8

9 這正是問題所在。例如我向上訴委員會提出上訴,表示我有需要獲 得豁免,但證監會不接受我就申請豁免提出的理由。但由於證監會會公布 10 11 審批的結果,我知道另外兩間公司卻獲得豁免,而批准的理由與我所提出 的理由沒甚麼分別。所以,我提出上訴的其中一個理由,是不明白因何該 12 13 兩間公司可獲豁免。在這情況下,不知上訴委員會可否要求證監會作出解 釋?如果可以,便會出現保密的問題。或是證監會只會向上訴委員會解釋 14 15 原因,而卻不會向上訴人作出解釋?我希望瞭解證監會會如何處理這類問 題。 16

17

財經事務局首席助理局長劉利群女士:

19

18

20 我相信這個問題有兩個解決方法。第一個方法是透過你剛才提到的 21 上訴委員會作出解決。上訴委員會可要求我們解釋他們希望知道的理由, 22 或解釋有關個案與其他個案不同之處。另一個方法是透過覆檢委員會作出 23 解決。覆檢委員會要求我們以同一把尺作為衡量標準。換句話說,雖然覆 檢委員會不會研究證監會的decision,但他們會研究證監會怎樣arrived at the 24 25 decision,即證監會是否consistently decide on某類事情。如果出現這種情 況,覆檢委員會必定會研究,因何3個cases的情況好像很相似,而其中兩個 26 cases獲得豁免,一個case卻不可獲得豁免。 27

28

29 何俊仁議員:

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1	主席,我並非對覆檢委員會不敬,他們有本身的運作方式。但外人
2	不會知道他們的運作方式,亦不可輕易向覆檢委員會尋求幫助。我們可假
3	設它是另一個制衡的機制。每名業界人士均有權提出上訴,但不是每人均
4	有權向覆檢委員會的成員尋求幫助。如果我向上訴委員會提出上訴,表示
5	提出上訴的理由,是認為出現不公平的情況,例如因為ABC獲得豁免,但
6	DEF不獲豁免,但我卻認為有關情況並無分別。我希望詢問,在這情況下,
7	倘若上訴委員會要求證監會作出解釋,那麼證監會便無法達致保密的目
8	的,因為你剛才提到證監會須作出保密
9	
10	<i>主席:</i>
11	
12	我恐怕上訴委員會不會處理這宗個案。試想如果你的申請個案被拒
13	絕而證監會並無作出解釋,上訴委員會便須處理你提出的上訴;但你現在
14	提出的情況,是申請人就其他人的個案提出上訴,
15	
16	何俊仁議員:
17	
18	我不是就其他人的情況提出上訴,我只是把其他人的情況作為比
19	較,表明證監會的做法不合理及不一致。最低限度,有關情況看來明顯是
20	相同的情況,但因何其他人獲得豁免,而我卻不獲豁免?上訴委員會可能
21	會就這種情況詢問證監會。
22	
23	Chairman:
24	
25	Mr BAILEY.
26	
27	Mr. Paul R BAILEY, Member of the Commission and Executive Director, Securities and
28	Futures Commission:
29	
30	Can I just answer that on the Appeal Tribunal - and this is subject to clarification

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and with me checking – from memory would be able to consider, if they are looking at a waiver, any material; and if you take past experience of the Security and Futures Appeal Panel, when we have had disciplinary appeals they certainly ask for precedent cases. So if you had a modification or waiver that was in dispute before the SFAT under Part XI, although I cannot speak for the tribunal itself, I would envisage that if you have a modification, the commission would be asked for precedent cases where modifications have been granted, and they would have to take that into consideration.

On the question of confidentiality, this Securities and Futures Appeal Tribunal, under the schedule, has the right on its own accord on the application of the parties involved to hold the appeal in private. It does not have to be in private, and normally it would probably be in public, although they do have the option to hear the whole thing confidentially. So if, for instance, on a modification or waiver, there was confidential material, as Barbara I think has pointed out quite correctly, this could relate to quite confidential material. Then there are options for the party involved to be able to ask for the hearing basically to be held in camera.

I think you can rest assured that they are dealing from past experience on discipline, and the tribunal would have to take into account similar modifications. If there was no consistency in the approach, then that would be a subject of concern, I think, of the tribunal. But of course, as far as the PRP is concerned, if there is no consistency in approach there, that would also be the subject of the scrutiny of the PRP. There has to be a consistent approach on similar-type cases, so as Barbara has mentioned, as far as modifications and waivers are concerned, we have a database of precedent cases. The same applies, in fact, to disciplinary cases against intermediaries. I hope that would clarify your point, Sir.

Hon Albert HO Chun-yan:

Yes. Chairman, if the tribunal is entitled to look into precedent cases, even in sittings held in private, then I suppose the reasoning behind some of the precedent cases

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1	would be made known, at least to defendants. Using it, would it, to a certain extent, defeat
2	the purpose of confidentiality?
3	
4	Miss Vivian LAU, Principal Assistant Secretary for Financial Services:
5	
6	Because the panel is also subject to confidentiality requirements under section
7	
8	Hon Albert HO Chun-yan:
9	
10	I see; including the panel?
11	
12	Miss Vivian LAU, Principal Assistant Secretary for Financial Services:
13	
14	Yes.
15	
16	Chairman:
17	
18	Yes, please.
19	
20	Deputy Chairman:
21	
22	When the tribunal considers a precedent, it may come to the conclusion in favour of
23	the appellant - in which case, fair and good. But supposing the tribunal comes to a
24	conclusion which is adverse to the appellant. Then the appellant will say: "Well, why?"
25	The appellant must be allowed to be in possession of all the facts which led the tribunal to that
26	conclusion. It is only fair. So if you are going to have a point challenged, you are going to
27	do that kind of disclosure anyway. Do you not think there is plenty of room for you to
28	consider a statutory requirement to give reasons?
29	
30	<i>財經事務局首席助理局長劉利群女士:</i>

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1	
2	當 appeal panel 聆 訊 完 畢 後 , 亦 須 遵 守 現 行 section 59 的
3	confidentiality agreement。而當上訴委員會回應上訴人時,或上訴人希望知
4	道另外兩間公司可獲豁免,而他自己卻不獲豁免的原因時,倘若另外兩間
5	公司是由於很特別及具商業機密的理由獲得豁免,上訴委員會未必會向上
6	訴人提供有關資料。所以,我們很難確定上訴委員會是否必須向上訴人提
7	供所有資料,因為如果有關資料涉及其他商業機構的機密,便會涉及
8	confidentiality的問題。
9	
10	副主席:
11	
12	主席,情況看來十分簡單。現時證監會事實上不會解釋所有理由,
13	而剛才何俊仁議員表示感到滿意的機制,其實亦並不能令人感到滿意。我
14	認為現時的做法其實更為複雜。證監會會表示,他們已研究其他個案,而
15	其他人士實在可獲豁免,而申請人卻是不獲豁免,並且由於涉及商業秘密,
16	證監會不可告知申請人有關的原因。這豈不是一樣
17	
18	何俊仁議員:
19	
20	他們可能是指Tribunal亦可能會向appellants披露多一些原因,而
21	appellant亦須遵守秘密。
22	
23	<i>副主席:</i>
24	
25	這只是其中一種情況,而另一種情況是某一類資料是上訴人不可得
26	知的。
27	
28	Mr. Paul R BAILEY, Member of the Commission and Executive Director, Securities and
29	Futures Commission:

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Perhaps I can clarify that, Mr Chairman. That is Part XI of the Bill provides for the creation of the Securities and Futures Appeal Tribunal. Under the schedule relating to that – and I do not actually know the precise number of it, but I believe it is Schedule 7 – the functions of the tribunal are provided for "Generally proceedings will be in public, with a discretion in the interests of justice for parts of those proceedings to be heard in private".

Part XI Schedule 7 does not actually provide for the disclosure obligations in relation to discovery and so forth, during tribunal proceedings. However, using the existing provisions of this model in relation to the Securities and Futures Appeal Panel, which does not have jurisdiction in relation to modifications at present, except in certain areas of licensing, what would typically be the case is that parties, both the SFC and the other side, would be required to disclose all material relevant to the matter that had been relied upon in making the decision.

So the appellant would have available to it, as would the tribunal itself, all the material the SFC had relied upon, and which was relevant to that matter. Now, if a question of confidentiality arose, or public interest immunity, for any reason such that the commission thought, in preparing for proceedings, that it was not appropriate to disclose information, it would take that under advisement and would seek legal advice as to whether it was appropriate to disclose that.

Now, that aside, if there were commercial information perhaps, which was perhaps prejudicial to an individual licensee who had applied for modification or waiver, or somebody else within the industry, but was not subject to a valid claim of privilege or public interest immunity that would permit its withholding, what perhaps could occur would be that the SFAT would hear the matter in private, in the interests of justice, if it is concerned that the general interests of public and transparent justice did not override any commercial confidentiality. It could then perhaps, at its own discretion, make an order to suppress publication to the public of details relating to that matter.

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Deputy Chairman:

Mr Chairman, I am grateful for that answer, and I am familiar with that. I do not want to prolong the discussion unduly, but the context of this discussion is merely that there should be a statutory requirement for the SFC to give reasons. This suggestion was resisted on the basis that that can be dealt with by other means – for example, on appeal the appellant will be given the reasons. They will have the opportunity of considering why waiver or modification is granted in another case. My point is then that this cannot deal with the question, the requirement, of public disclosure of reasons satisfactorily, for all those reasons that we gave.

So we go back to the point that I would still invite the Administration to consider: the statutory requirement of disclosure of reasons.

15 主席:

17 林太。

證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士:

多謝主席。讓我回應剛才副主席提出的問題。證監會是非常樂意把給予waiver的決定及為甚麼我們會作出這項決定完全公開。我們對於這個做法並沒有異議。那為甚麼剛才我的同事提出有一個concern?其實這個concern是要平衡兩方面的事情;第一,公眾要求盡量使資料透明,這是我們很同意的;第二,基於商業機密的理由,個別中介人士會要求我們在某些情況下保守資料的秘密。這兩者之間必須取得平衡。當然,這個平衡應由立法會決定。如果最後的決定,是在法律上容許我們並要求我們進行disclosure,我們是沒有異議的;而問題只是如何balance兩方面。還有另外一個問題。剛才我的同事Barbara也提到,如果中介人士向我們申請waiver,而他知道有關這個waiver的資料必定全部被公開,其中包括所有商業秘密,

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1 或許他根本不會向我們作出申請。這情況會防礙某方面的發展。所以,這 2 是甚難釐定的balance。 3 主席: 4 5 6 好,或許請Vivian再作研究。關於第V、VI及VII部,大家有沒有其 7 他跟進問題?Audrey剛才提出的問題是挺好的。這問題是就政府對業界所 8 提出意見作出的回應,我們會採用甚麼渠道讓提出意見的人知道有關回 9 應。政府會否已將這些回應分發給曾向立法會提出意見的人士?或有其他 的處理方法? 10 11 財經事務局首席助理局長劉利群女十: 12 13 14 基本上我們現在是與他們進行討論。由於他們的意見是呈交立法會 的,所以我們沒有將列表送交他們,但我們在討論時會以這個列表作為基 15 礎。 16 17 主席: 18 19 20 胡經昌議員。 21 22 胡經昌議員: 23 24 主席,有關上訴方面,我希望提出一個問題。剛才主席提到的 schedule列明,並不是全部證監會所作的決定均可予上訴的。我希望詢問政 25 府,條例草案的其他條文有否涉及一些特別決定,例如涉及監禁一類的刑 26 事責任的決定?在那些決定中,有否一些是不可予上訴的? 27 28

- 40 -

財經事務局首席助理局長劉利群女士:

29

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1 主席,我希望更清楚地瞭解胡議員提出的問題。

2

胡經昌議員:

45

6

7

8

3

由於很多決定也不可予上訴,使業界感到憂慮。他們認為如果每項 決定均可予上訴,大家便可安心。這是最理想的情況。但由於很多決定均 不可予上訴,我相信業界現時最大的憂慮,是會否由於有些決定涉及刑事 罪行而不可予上訴?

9

10 主席:

1112

其實問題很簡單,即在證監會的懲處權力中,哪方面是刑事.....

1314

財經事務局首席助理局長劉利群女士:

15

讓我首先回答胡議員的問題,然後在有需要時再作補充。附表7列 16 出六十多項證監會的決定,這些決定是可予上訴的。我相信議員的憂慮, 17 是在這64項決定以外,有否其他證監會的決定應可予上訴,但卻沒有被包 18 19 括在內。倘若沒有被包括在內,便成為不可予上訴了。我希望回答這個問 20 題。第一,如果議員認為在這64項決定以外尚有其他的證監會決定應同樣 21 訂有上訴機制,我們會很樂意作出考慮;第二,我相信是關乎做法的問題。 22 議員可能不肯定,較佳的做法,是將可予上訴的決定清楚列明在表內,還 23 是不以列表說明,但使一切決定均可予上訴。我們曾經向業界作出解釋, 24 若採取所有決定均可予上訴的方法,其實沒有那麼大的certainty,因為在某 25 些情況下,很難界定何為證監會的決定。證監會的決定可能是一個過程, 26 譬如證監會向申請人發出一封信,表明證監會的看法,並詢問申請人有甚 27 麼意見。那並不是最後的決定,而只是初步的想法;如果申請人尚有資料 28 向證監會提交,證監會會再作考慮。這是否一項決定呢?所以我們的憂慮 是對於決定的定義沒有肯定性。我們徵詢律政司的意見後,認為清楚列明 29 哪些決定可予上訴,其實對雙方也有好處,對將來的審裁處也有好處,因 30

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1 為這做法可決定審裁處的職權範圍。我重申,如果議員有其他建議,認為 2 應把其他決定加入附表內,我們是很樂意作出考慮的。 3 主席: 4 5 6 胡經昌議員。 7 8 胡經昌議員: 9 10 主席,我只希望簡單提問。是否在條例草案中所有涉及刑事責任的 11 決定,均已包括在該64項內? 12 13 主席: 14 林太。 15 16 證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士: 17 18 19 主席,讓我再作補充。證監會的決定完全是行政方面的決定。如果 20 有關人士不信服這些行政方面的決定,可向上訴委員會提出上訴。至於刑 21 事方面的決定,證監會是並無這方面的權力。讓我重複這點,在法律上, 22 我們並無權力判處刑事罰則,因為但凡所有刑事案件,均須交由法庭審理。 23 當然, 法庭本身亦設有上訴的渠道。 24 胡經昌議員: 25 26 主席,有一些情況是無須由法庭審理的。如果我沒有錯誤理解,FRR 27 以往不是法例。但一旦把FRR編成法例,任何人觸犯有關規則時已屬違法, 28 29 並須受這項條文管範。我提出這項意見的原因...... 30

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1	· 主席:
2	
3	證監會有權要求律政司提出檢控,若檢控後被告罪名成立,便成為
4	刑事個案。如果被告不服,可向高等法院提出上訴,然後又可到終審法院
5	提出上訴。對嗎?
6	
7	胡經昌議員:
8	
9	主席,對於這麼冗長的條例草案,我仍要逐一閱讀,原因是在上次
10	會議上,大家亦很關注證監會可委任核數師的問題。其中第158(3)條,即第
11	C1823頁訂明,讓我讀出英文本,"a person, who without reasonable excuse,
12	fails to comply with any requirement imposed on him, including the
13	requirement to answer any question put to him"。即除了auditor本身外,他屬
14	下的工作人員亦可提出問題。如果有關人士fail to comply with any
15	requirement,他們便會commit an offence and be liable to一些罰則。主席,
16	你找到有關部分嗎?
17	
18	<i>主席:</i>
19	
20	我找到了。第182(3)條。
21	
22	胡經昌議員:
23	
24	在這情況下,大家憂慮到的問題是:第一,由政府委派核數師,然
25	後由核數師委派屬下的人員向有關人士提出問題。雖然我們並不知道,如
26	果有關人士找不到答案,是否一個reasonable excuse,但由於有關人士未能
27	遵從有關要求,便已是commit an offence。

29 主席:

28

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1	我希望林太再作解釋。就這類法例,證監會只是負責搜集所有的證
2	據,然後透過律政司提出檢控,然後再由法庭決定是否判處有關人士入獄,
3	對嗎?證監會是否只負責搜集證據,林太?
4	
5	證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士:
6	
7	凡出現"offence"這個字眼的情況,也是須由法庭審理的情況。
8	
9	<i>主席:</i>
10	
11	簡單來說,證監會並無權力判處監禁的刑罰。
12	
13	證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士:
14	
15	是的。我們只負責搜集證據。
16	
17	財經事務局首席助理局長劉利群女士:
18	
19	跟據《基本法》,刑事檢控屬Secretary for Justice的權力。讓我答覆
20	議員剛才提到有關委任核數師的問題。任何人士對於證監會就委任核數師
21	方面所作的決定有異意,亦可提出上訴。附表內亦有提到這個情況。
22	
23	<i>主席:</i>
24	OK. 胡經昌議員。
25	
26	
27	<i>胡經昌議員:</i>
28	
29	是否authorized institution的情況也是這樣,即金管局是否也採取這
30	個做法?

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1	
2	財經事務局首席助理局長劉利群女士:
3	
4	主席,如果是涉及獲豁免機構的上訴程序,金管局的程序是有所不
5	同的。有關人士不是向上訴委員會提出上訴,而是向行政長官會同行政會
6	議提出上訴。有關的決定已在附表7第3部內列明。
7	
8	主席:
9	
10	這是由於金管局並沒有設立上訴委員會。
11	
12	胡經昌議員:
13	
14	其實我不是希望提問有關上訴的問題,我只是希望就委任核數師的
15	程序提問,即第155(4)條,第C1813頁。在委任核數師後,接着的程序便是
16	支付審查和審計的全部或部分費用及開支。我同意有關人士可就該筆費用
17	提出上訴,但在實際情況下,當核數師完成核數工作,而找不到任何証據
18	時,有關費用會由誰來支付?
19	
20	Chairman:
21	
22	Barbara.
23	
24	證券及期貨事務監察委員會中介團體高級總監邵蓓蘭女士:
25	
26	主席,那筆錢,即那筆費用是由Commission,即證監會direct的。
27	我們現在正討論第155條,即有關人士是intermediary。這個決定也是可予上
28	訴的,因為有關第155(4)條的決定是可予上訴的。
29	

30 *主席*:

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- 2 胡經昌議員的問題是,例如當局委任核數師調查某個經紀,而調查的結果
- 3 發現存有問題。在這情況下要求經紀支付核數費用的做法尚可接受。但倘
- 4 若核數完畢後找不出任何問題,那麼從有關經紀的角度來看,當局無故派
- 5 人作出調查,還要求他支付一筆幾百萬或幾十萬的龐大費用。他應如何處
- 6 理?他可能會認為這做法不公平。或許他會認為那筆費用不應由他支付。

7

胡經昌議員:

9

- 10 主席,在一般情況下,當局會委任較大規模的會計師行進行審核工
- 11 作,所以有關費用可能是數百萬,甚至數千萬。那麼有關人士應怎辦?我
- 12 同意如果真是發現存有問題,有關經紀確實犯錯,由該經紀支付費用是合
- 13 理的。而當那筆費用並不合理時,亦可予上訴。這個機制是可以接受的。
- 14 現時的假設是經紀必定犯上錯誤,所以必須支付費用。但如果他實在沒有
- 15 違規,應由誰支付這筆涉及數百萬的龐大費用?

1617

主席:

18 19

銀監會有否委任核數師的權力?

2021

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

2223

24

25

26

27

28

Yes. I mean, we have the power under section 59(2) of the Banking Ordinance to require an institution to appoint an auditor to report on various issues relating to the state of affairs or the profit and loss of the institution, or on whether it has got proper systems of control in place. The cost of that report is borne by the institution because the report is commissioned by the institution on our instructions. So the authorized institution does end up paying the cost of it. There is no provision in the Banking Ordinance about what happens if the report turns out not to uncover any problems. The institution still pays.

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1	<i>主席:</i>
2	
3	銀監會的情況也是一樣。
4	
5	胡經昌議員:
6	
7	主席,如果我沒有誤會,情況似乎是就證監會進行調查方面,核數
8	師由證監會委任,而就金管局進行調查方面,金管局會要求銀行聘任一名
9	核數師。
10	
11	<i>主席:</i>
12	
13	可否澄清兩者的情況有沒有分別?
14	
15	Mr David CARSE, Deputy Chief Executive, Hong Kong Monetary Authority:
16	
17	Because there is a provision about the auditor being approved by the Monetary
18	Authority, so we would obviously want to have a say in who the institution appointed, and we
19	would want to be satisfied that the auditor who was appointed by the institution was capable
20	of doing the job.
21	
22	胡經昌議員:
23	
24	主席,這便是分別所在。就金管局而言,金管局可決定是否贊成聘
25	用某一名核數師,但就證監會而言,有關經紀必須聘用某名核數師。至於
26	費用方面的問題仍未獲解決。
27	
28	.Chairman:
29	
30	Barbara.

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1	
2	證券及期貨事務監察委員會中介團體高級總監邵蓓蘭女士:
3	
4	我希望補充一點,由於在現行法例內已載有這項條文,所以證監會
5	已具有這項權力。我們多年來亦沒有行使這項權力。我們在每次委任核數
6	師前亦會跟中介人士商討。所以在實踐方面,我們會討論有關委任甚至terms
7	of reference的問題。
8	
9	胡經昌議員:
10	
11	主席,這正是業界向我多次提出的問題。由於有關規定過往是一項
12	rule,所以證監會與經紀仍可互相商討。雖然政府一再強調,並希望業界相
13	信不會出現問題,但當涉及法例時便是另一回事。
14	
15	<i>主席:</i>
16	
17	請證監會作出澄清,這規定向來也是以法例的形式制訂的,對嗎?
18	
19	證券及期貨事務監察委員會中介團體高級總監邵蓓蘭女士:
20	
21	對。
22	- w ·
23	<i>何俊仁議員:</i>
24	
25	由於現時已草擬新的條例草案,我們可重新作出研究。倘若把有關
26	條款草擬成使證監會的做法與金管局一致,即由證監會決定是否同意由中
27	介人士聘任的核數師,亦即是使有關法例正確地反映實際的執行方式,證
28	監會在原則上會否反對?
29	

30

主席:

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1	
2	即提供level playing field。但如果是這樣,我們便無須再商討有關
3	費用的問題,而中介人必須支付有關費用。
4	
5	證券及期貨事務監察委員會中介團體高級總監邵蓓蘭女士:
6	
7	主席,我們須加以考慮。
8	
9	<i>主席:</i>
10	
11	請妳們加以考慮。但金管局表示,無論情況如何,有關費用亦必須
12	由銀行支付。
13	
14	<i>副主席:</i>
15	
16	主席,處方在考慮時可否加以解釋,證監會或銀監會根據甚麼因素
17	決定委任或是否接受聘用某名核數師?例如當局會否擬備一份名單,只接
18	受名單上的核數師,而不接受名單以外的核數師?其實在法律界亦存在這
19	個問題。當你聘用律師行辦理某些事情時,有人會認為只有大規模的律師
20	行才可受聘。這情況會引致兩個問題:第一,律師行不能平均分配工作;
21	第二,如果你只聘用大規模的律師行,費用必定會增加。所以,我亦希望
22	當局可就如何決定批准哪些人士作出解釋。
23	
24	Chairman:
25	
26	David, can you explain the normal practice?
27	
28	Mr David CARSE, Deputy Chief Executive, Hong Kong Monetary Authority:
29	
30	Well, there are two options. I suppose the normal practice would be that we

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1	would use the auditor already appointed by the institution for the purposes of preparing the
2	annual accounts. I suppose if we had any doubts about that auditor in terms of past
3	performance or in terms of competence, then we would ask the institution to nominate another
4	auditor for the purposes of our approval, and I think the way we get around the problem
5	identified by the Vice Chairman is that it is possible for the institution to nominate more than
6	one firm of auditors from whom we would select one to be approved. So there is an element
7	of choice on the part of the institution as to which auditors they present for our approval.
8	There can be more than one.
9	
10	Chairman:
11	
12	Ok. Barbara.
13	
14	證券及期貨事務監察委員會中介團體高級總監邵蓓蘭女士:
15	
16	我希望稍作補充。第125條對於保障投資者的利益方面,是十分重
17	要的條文。我們不可在任何情況下亦委任核數師,而只是在第125(1)條第
18	(a)、(b)、(c)及(d)款中訂明很多有關可能導致嚴重問題的情況下,才可委任
19	核數師。例如違反Financial Resources Rules或prescribed requirement,即未
20	能清楚分配客戶資產的情況。即在一些與保障投資者有關的嚴重情況下,
21	我們才會行使這條文賦予的權力。所以,這方面的彈性十分重要。
22	
23	<i>主席:</i>
24	
25	好的。胡經昌議員。
26	
27	<i>胡經昌議員:</i>
28	
29	主席,這回應也不能解答這個問題,因為金管局也正進行同樣的工

30

作,難道金管局不須保障投資者嗎?所以這是不合理的解釋。但既然她承

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(三) () 一致门来(沙山/林川千木/女女)

諾作出研究,或許可讓她先作考慮。 1 2 3 主席: 4 5 好的。 6 7 胡經昌議員: 8 9 主席,我希望先提出一個問題。請參考第143條,即第C1777頁。第 143條各部分也訂明,證監會會以書面形式發出notice等,即notice in 10 11 writing。但第143(4)條卻出現"whether orally or in writing"的字眼,即口頭 通知也可。當我再參考白紙條例草案時,也發現並沒有採用"orally"的字眼。 12 13 我希望詢問,既然整條條文也只是提到書面通知,因何這款會提到口頭通 14 知也可? 15 Chairman: 16 17 18 Barbara. 19 20 證券及期貨事務監察委員會中介團體高級總監邵蓓蘭女士: 21 22 這個情況是pursuant to第143(3)(b)條的。這裏提到有關中介人士的 23

這個情況是pursuant to第143(3)(b)條的。這裏提到有關中介人士的 financial resources已經出現問題,而證監會也不信納他的financial resources 可符合要求,但證監會沒有要求有關中介人士停止營業,而只是對該中介人士 impose一些 conditions。如果該中介人士已是不能符合 financial resources的要求,而我們仍容讓他繼續營業,當我們對他提出一些conditions時,我們也可要求他即時符合這些條件。

28

29 *胡經昌議員:*

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主席,許多辦法也可使該中介人即時實行有關規定。如果只是作出口頭通知,例如以電話方式作出通知,會產生很多爭拗。我認為無須採用"orally"這個字眼。

4

1

2

3

證券及期貨事務監察委員會中介團體高級總監邵蓓蘭女士:

6 7

8

9

5

那個做法實際是給予brokers flexibility,否則,譬如規定notice in writing,brokers便須待接獲我們的通知,即接獲我們impose的condition後,才可繼續營業,不然便要停業。

1011

胡經昌議員:

12

主席,最主要是凡涉及"以口頭方式"進行的做法,便會令大家感 14 到憂慮。所謂"口講無憑",出現問題時豈不是要再作處理嗎?我沒有參 15 考其他條文,但有許多方法也可instantly serve the notice,例如fax。電話與 16 fax這兩個方式也只是涉及按鍵的程序,分別何在?

17

18

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

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Can I just give an explanation? I think, Mr WU, this is probably in the interests of your constituents, because if you, for instance, had a technical breach of the Financial Resource Rules occurring overnight, and let us say at 9 o'clock in the morning and the market was opening up at 10.00. One of the brokers suddenly realized it, and it was quite a complicated issue in relation to maybe receivables or something like that, which, if the SFC were aware of it, would give a waiver. Because it might require quite a complicated notice in writing, it gives flexibility for someone in the SFC to give an oral notification, so that the intermediary then would be able to carry on business immediately on the receipt of that oral confirmation. So to a certain extent it is actually to benefit the intermediaries. I think that would be a fair answer. In many ways it is to the benefit of the market and intermediaries.

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1	
2	胡經昌議員:
3	
4	主席,如果證監會可透過電話作出口頭通知,當然已把有關資料準
5	備妥當,才致電經紀,通知他可以繼續營業。
6	
7	<i>主席:</i>
8	
9	胡經昌議員,我的理解是,證監會認為刪除"orally"這個字眼沒有問
10	題。但聽過Mr BAILEY的解釋後,在做法上,經紀可在接聽電話後,即時
11	以memo確認。在Memo上可寫上"I refer to our conversation,你已批准我
12	繼續營業。"
13	
14	胡經昌議員:
15	
16	由經紀發出memo?
17	
18	<i>主席:</i>
19	
20	對。我相信經紀的憂慮是別人故意作弄。即雖然證監會已明確作出批准,
21	但其後卻否認,對嗎?你大可就取消"orally"這個字眼,諮徵詢你的同業。
22	我們接獲的意見書有否就"orally"這個字眼提出 comment?就第VI部提供
23	的意見中有否提到這方面的問題?
24	
25	副主席:
26	
27	新接獲的意見書中有提到這個問題。
28	
29	<i>主席:</i>
30	

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1	最新接獲的意見書中其中一份提到這個問題。可否告訴我是哪一
2	份?
3	
4	經紀有否特別提出這個問題?或許這樣吧,無論如何妳們稍後也會
5	再跟經紀開會,妳們可徵詢他們對刪除"orally"這個字眼的意見。事實上,
6	擬備一份note也只需很短時間。即使要保留"orally"的字眼,採用"whether
7	orally followed by等"會否較為妥善?
8	
9	Mr. KENNY.
10	
11	Mr Joe KENNY, Consultant, Securities & Futures Commission:
12	
13	It is in subclause (5), Sir.
14	
15	Chairman:
16	
17	Pardon?
18	
19	Mr Joe KENNY, Consultant, Securities & Futures Commission:
20	
21	It is in subclause (5).
22	
23	Chairman:
24	
25	Subclause (5)? Can you help, please.
26	
27	Mr Joe KENNY, Consultant, Securities and Futures Commission:
28	
29	Yes. It is where the conditions have been imposed orally under subsection (3)(b).
30	the Commission then issues as soon as reasonably practicable a written rendition of the

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1	conditions. That is to ensure that there is no confusion about the conditions that have been
2	imposed, and that is to make sure that all sides know what it is, the basis on which they are
3	allowed to continue business. Without this flexibility, the licensed corporation would have
4	to cease business, and that would affect the perception of its strength in the markets, and it
5	would affect the confidence of investors. So the flexibility is entirely for the benefit of the
6	brokers.
7	
8	胡經昌議員:
9	
10	如果在oral和written notice間出現差異而產生問題時,會如何處理?
11	或許你會認為我的提問涉及技術性的問題。舉例來說,證監會以口頭形式
12	表示有關中介人士可繼續營業,但須符合5項要求。但有關中介人士可能只
13	聽到4項要求,而沒有聽到第5項要求。倘若在這個情況下出現問題,應如
14	何處理?
15	
16	Chairman:
17	
18	Margaret.
19	
20	<i>副主席:</i>
21	
22	主席,我有個提議。我明白胡經昌議員的憂慮。一些先以口頭形式
23	提出,然後才寫下來的事情,在過程中可能會出現差異。但最切實的問題
24	是可否刪除"orally"這個字眼。對於這個問題,除諮詢政府外,還須徵詢業
25	界的意見。所以,或許我們今天不再討論這個問題,先讓胡經昌議員與業
26	界再進行討論。
27	
28	<i>主席:</i>
29	
30	業界也許可討論,刪除這個字眼會否對業界有所幫助。

1

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2	<i>副主席:</i>
3	
4	其實這是一個平衡的問題。倘若硬性規定,便不會發生爭拗;但硬
5	性規定亦可能會導致損失。
6	
7	<i>主席:</i>
8	
9	就第V、VI及VII部,還有沒有問題?我們今天亦應就第VIII部進行
10	討論,但由於有些同事就第V、VI及VII部的提問較多,所以我們未能就第
11	VIII部進行討論,真是抱歉。
12	
13	請大家參考餘下的幾份文件。有沒有其他問題?或許我們簡略地研
14	究這些文件,即有關政府對公眾就第VI及VII部提出的意見所作的回應,包
15	括立法會CB(1)761/00-01(01)和CB(1)761/00-01(02)號文件。其中一份文件篇
16	幅較長,請大家先簡略閱讀,我們尚有少許時間進行討論。我們在下次會
17	議上才就第VIII部進行討論吧。
18	
19	余若薇議員是否希望提問?
20	
21	<i>余若薇議員:</i>
22	
23	其實我沒有舉手表示希望提問,但在我閱讀的過程中,我不太明白
24	一個字眼的意思。第165條的列表內提到有關"naked short selling"的字眼。
25	我不明白何為"naked short selling"。
26	
27	Chairman:
28	
29	Mr BAILEY.
30	

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1	余若薇議員:
2	
3	有關文件是立法會CB(1)761/00-01(01)號文件的英文本第3頁第165
4	條。該部分提到業界提出有關short selling的問題,而政府在回應時提到有
5	關"naked short selling"這個名詞。我只是不太明白這個名詞的意思吧。
6	
7	Chairman:
8	
9	Mr BAILEY.
10	
11	Mr Paul R Bailey, Member of the Commission and Executive Director, Securities and
12	Futures Commission:
13	
14	"Naked short selling" is basically the terminology used for a short sell of securities
15	when you have not got any exercisable right to settle that transaction. Basically you have
16	not got the shares to deliver to settle the transaction, so it is purely selling without being
17	properly able to settle.
18	
19	Hon Audrey EU Yuet-mee, SC, JP:
20	
21	What is the difference between naked short selling and short selling? I thought the
22	answer you gave relates to short selling.
23	
24	Mr Paul R Bailey, Member of the Commission and Executive Director, Securities and
25	Futures Commission:
26	
27	Short selling - and again I actually have not been responsible for this part if
28	you are purely naked short selling, it actually is an offence, but there are provisions under the
29	legislation that if you had a presently exercisable right or an honest belief that you could settle,
30	then you would not be guilty. So you would not necessarily be guilty of short selling if you

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1 had a belief that, say, you had promised to lend me shares or I had some shares I thought were 2 available, to settle. You would have to look at the context of each case, but naked short 3 selling is when you clearly have not got any shares to settle that transaction. 4 answers your question. 5 6 Hon Audrey EU Yuet-mee, SC, JP: 7 8 Thank you very much. It simply means that my original perception of short 9 selling was incorrect, because I thought short selling encompasses also that you have not got 10 an exercisable right to the shares, but your explanation tells me that in fact short selling 11 simply means you do not have the shares right now. 12 13 Mr Paul R Bailey, Member of the Commission and Executive Director, Securities and 14 Futures Commission: 15 16 Say, for instance, you had a stock borrowing and lending agreement in place, 17 whereby you had agreed to borrow shares off someone – and that has to be in writing – and 18 you had that before you sold. As long as you had an agreement in writing to borrow, then 19 you would not be guilty of short selling if that person then did not turn up with the share, because you had an honest belief at the time. When you go into a short sale with absolutely 20 21 no agreement, no shares, and purely sell without being able to cover it on T+2 – except that 22 you could buy back, of course. 23 主席: 24 25 就立法會CB(1)761/00-01(01)和CB(1)761/00-01(02)號文件,大家有 26 否其他問題?關於cold call方面,大家在上次會議上亦曾作出提問,政府亦 27 已提供一些response。大家可參考立法會CB(1)761/00-01(02)號文件中有關 28 政府就第169條作出的回應,看看是否滿意有關的答覆。 29

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1	<i>余若薇議員:</i>
2	
3	主席,我記得我在上次會議席上也曾提出這個問題。政府回應時亦
4	表示會就第169條作出修改。
5	
6	主席:
7	
8	如果大家沒有其他問題,我們便可暫時結束就V、VI及VII部的討
9	論。我們在下次會議上會就第VIII部進行討論。有關文件已向大家發出,各
10	位同事於下次會議上便可開始討論。
11	
12	余若薇議員。
13	
14	<i>余若薇議員:</i>
15	
16	主席,就會否向所有提出有關意見的人士發出政府所作答覆的問
17	題,我們有沒有得出結論?政府會否處理這件事情?
18	
19	<i>主席:</i>
20	
21	政府會處理這件事情嗎?好的,那便不用秘書處處理了。政府會將
22	答覆分發給提出意見的有關人士。多謝。
23	
24	
25	m2737