立法會
Legislative Council

Ref: CB1/BC/4/00/2

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

Verbatim transcript of meeting
held on Friday, 16 March 2001, at 10:45 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 James TO Kun-sun Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP Hon Ambrose LAU Hon-chuen, JP Hon Abraham SHEK Lai-him, JP Hon Henry WU King-cheong, BBS Hon Audrey EU Yuet-mee, SC, JP
Members absent	**:**	Hon Bernard CHAN Hon Jasper TSANG Yok-sing, JP
Public officers attending	**:**	Miss Vivian LAU Principal Assistant Secretary for Financial Services Mr Arthur YUEN Division Head, Banking Supervision Department, Hong Kong Monetary Authority Ms Sherman CHAN Senior Assistant Law Draftsman Mr Michael LAM Senior Government Counsel Ms Beverly YAN Senior Government Counsel

Attendance by invitation	**:**	Mr Paul R BAILEY Executive Director, Enforcement, Securities and Futures Commission
		Mr Andrew PROCTOR Executive Director, Intermediaries and Investment Products, Securities and Futures Commission
		Mrs Alexa LAM Executive Director and Chief Counsel, 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 LEE Yu-sung Senior Assistant Legal Adviser
		Mr KAU Kin-wah Assistant Legal Adviser 6
		Ms Connie SZETO Senior Assistant Secretary (1)1

主席：

我們現在開會，首先邀請政府的代表進入會議室。我們今天所討論的是《證券及期貨條例草案》第 VIII 部。今次會議共有 3 份文件，分別是 CB(1)770/00-01(01)、CB(1)802/00-01(01)及 CB(1)838/00-01(01)號文件。CB(1)802/00-01(01)號文件載述公眾人士提出的意見及政府當局所作的回應。CB(1)838/00-01(01)號文件是一份對比表，當中載述立法會法律事務部提出的一些意見。

我們歡迎政府的代表出席今天的會議。現邀請財經事務局首席助理局長劉利群女士先行介紹這份文件，而證監會 Mr Paul BAILEY 亦會協助我們進行討論。

Vivian.

財務事務局首席助理局長劉利群女士：

主席，Mr Paul BAILEY 稍後會向各位介紹這份文件。我們今天討論《證券及期貨條例草案》第 VIII 部，相關的條款是第 171 至 185 條。該等條文主要涉及證監會 3 項主要的權力，分別是調查上市公司涉嫌作出失當行為的初步查訊權力、證監會日常監管中介人及有關機構的權力，以及作出調查的權力。

請 Mr Paul BAILEY 為各位介紹文件。

Chairman:

Mr Paul BAILEY.

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

Part VIII contains the inquiry, inspection, surveillance and investigatory powers of the SFC. I think these powers are necessary for the effective regulation of our markets, and are essential to Hong Kong's economic prosperity as a commercial and financial centre; and very importantly, also for investor protection. They enable the Commission to ensure that intermediaries are conducting their business properly, and to investigate a variety of suspected malpractice that may occur in our markets. From the outset, I would like to say part VIII basically replicates the existing law. However, there has been some reorganization of the sections, and there have been actually some significant reforms. These reforms relate to enhanced powers in respect of preliminary listed corporation inquiries. That is clause 172. Supervision of licensed intermediaries and exempt persons, clause 173. And specific powers to investigate possible grounds for disciplinary action against licensed intermediaries and those involved in management. That is clause 175(1)(e).

Now, turning to the actual part, clause 172 provides the SFC power to require the production of records and documents concerning listed corporations. It is based on section 29 of the Securities and Futures Commission Ordinance, which was actually brought into being in 1994; and the purpose is to conduct discreet inquiries into a listed company, when there are various circumstances suggesting fraud, misfeasance in management, shareholders not being given all the information they may reasonably expect. It has been used very rarely, in fact only 13 times, since 1994. One has to realize that we do not enter into this type of inquiry lightly, because it has quite a lot of manpower implications for us, and we understand the effect of the power on the listed company.

In clause 172(1) the grounds have basically been replicated from the existing law. However, the opportunity has been taken to clarify that conduct whilst a corporation is listed can be examined, but not conduct while it is unlisted. Now, the existing law restricts the SFC to obtaining documents from a listed corporation or group corporation, and asking questions from directors and officers of such corporation, concerning those documents. Experience has shown that it has not been possible quite often to verify information obtained,

which has severely restricted the usefulness of the power.

The Bill remedies this. In clause 172(1)(iii) to (v) the powers are extended to obtain documents and explanations from persons closely associated with the listed corporation. They are banks, auditors, persons with whom the listed corporation has done business. The primary purpose of the extension is to verify information, and to forestall the need to pursue in some instances some lines of inquiry. When we were extending the powers we did realize they could be viewed as intrusive, so checks and balances have been built in clauses 172(vi) to (x). These checks and balances require certification by the Commission, including tests of relevance as to the affairs of a listed corporation or its group corporation, and as to the grounds of inquiry; and in the case of a person doing business with a listed corporation, that the information cannot be obtained from one of the other parties to which the clause applies. Finally, in regard to clause 172, 172(a)(ii) clarifies that the SFC may seek an explanation of not only the content of a document, but circumstances surrounding its creation.

Clause 173 deals with the supervision of intermediaries and their associated entities. It is essential, of course, to have such a power, and similar powers are available to regulators in all major financial centres. The primary aim is to ensure compliance standards by intermediaries, and maintain them through inspections. These inspections ensure that intermediaries are complying with various laws pertaining to their business, and 173(2) basically sets out the scope of the inspection.

Schedule 1 defines an intermediary as a "licensed corporation or exempt person". Under the existing law, section 30 does not cover "exempt person". The change is consistent with the regulatory scheme which has been described to you, under Parts V and VI. Clause 173(1), (3) and (4) extends the power to licensed corporations' exempt persons, associated entities – and that is defined in clause 1 of Schedule 1 – of a related corporation, which is defined in clause 3 of Schedule 1; and third parties, when for example, a transaction could affect an intermediary.

I would stress that this is actually a clarification of the existing law under section 30 of the SFC Ordinance. The power, however, is restricted in regard to access to third party information. Besides a test of relevance, clause 173(7) and (8) require that persons conducting the inspection must have a reason to believe the information documents sought cannot be obtained from another entity to which clause 173 applies. In the new regulatory framework the Hong Kong Monetary Authority is the relevant authority to conduct inspections of exempt persons. That is covered in clause 173(17), and the SFC for inspections of licensed intermediaries. Each has power to authorize a person for the purpose of this section.

Finally, it has been a practice in the past to ask questions during an inspection. Indeed, it is not practical to do an inspection without such an ability, and we do appreciate the cooperation of all intermediaries in the past, who have always answered the questions by our intermediaries division. The Bill now actually formalizes this practice. This can be seen by reading clause 173(1)(b) in conjunction with (3)(ii), and 173(1)(c) in conjunction with (4)(b).

Clause 174 replicates section 31 of the Securities and Futures Commission Ordinance, and section 42 of the Leverage Foreign Exchange Trading Ordinance, and provides the power to the SFC to require information about transactions. It is primarily used in market surveillance. For example, every year we issue 2000 to 3000 letters under section 31, asking for details of dealings on the Stock Exchange. There are no major changes to the provision, except that 174(1) extends the section to all financial products the SFC regulates; and 174(2) updates information that the SFC can obtain – for example, e-mail addresses.

Clauses 175 to 177 actually replicate existing section 33 of the Securities and Futures Commission Ordinance, and section 44 of the Leverage Foreign Exchange Trading Ordinance, and is the main power of investigation available to the SFC, and includes the power to require a person to attend an interview, answer questions and produce his documents.

There are, however, a few minor changes. In clause 175(1) the threshold for commencing an investigation is generally increased to "reasonable cause to believe". The grounds for commencing an investigation have been expanded. Clause 175(1)(c) covers market misconduct, to cater for investigating this civil option dealing with market misconduct covered in Part XIII. 175(1)(e) gives an express power to investigate misconduct by, or fitness or properness concerns relating to licensed persons or persons concerned in their management.

Finally, 175(1)(f) gives an express power to investigate whether or not conditions imposed in relation to collective investment schemes or invitations, offers and advertisements relating to such, which are processed under Part IV, are being complied with. The remaining provisions, save for some reorganization, remain unchanged, save for an express provision allowing for the right to legal representation, which has been excluded. This is provided for in the Basic Law and the Bill of Rights. In practice, even though the person under investigation was previously the only person allowed legal representation, we have allowed anybody who wants legal representation witnesses - a person under investigation to have legal representation. This will, of course, continue. Clauses 178 to 185 are provisions which cover matters ancillary to the exercise of other powers in the part, and cover such matters as certification to the High Court for non-compliance – clause 178; assistance to regulators outside Hong Kong – clause 179; the privilege against self-incrimination – clause 180; and the production of computerized records – clause 182. There have been some minor changes to the existing law.

Clause 180, relating to self-incrimination, makes it clear that information obtained under clauses 172 and 176 may be used in market misconduct proceedings and other civil proceedings, even if privilege is claimed. Clause 181 is new. It provides that a lien over documentary materials sought under Part VIII is not an excuse for failing to produce such material. It provides that such production would not prejudice a lien with respect to any other party. Clause 184 deals with search warrants. It is identical to the existing law, save that documents seized can now be retained for six months for any proceedings under the Bill.

Previously the retention was restricted to criminal proceedings. Clause 185 reproduces an existing offence, but now places the onus of proof of intention on the prosecution when alleging the falsification, destruction, etc, of documents required to be produced under the part.

One matter I think is worth-noting is penalties. The criminal penalties for failure to comply are now tiered, with penalties designed to reflect the gravamen of the conduct. The tiers are a mere failure without reasonable excuse. Providing material which is false or misleading in a material particular, or providing material with intent to defraud: the examples of this are in clause 173(13) to (15); 174(14) to (16); 175(7) to (9); and 177(1) to (3). This approach is taken from the Leverage Foreign Exchange Trading Ordinance. As far as market comment is concerned, this is covered in paragraphs 25 to 30 of the paper. Initial concerns expressed by auditors appear to have been resolved. We have now included a definition of "audit working papers" in clause 171, and checks and balances on the exercise of powers under clause 172(7). We certainly appreciate the very constructive dialogue we had with the Hong Kong Society of Accountants, and we have also offered assistance in the production of guidelines on members' compliance with any SFC request under the limited company inspection powers.

The comparisons with overseas are covered in paragraphs 36 to 39, and I think as can be seen, the powers we are seeking are broadly similar to those jurisdictions. That basically is an outline of Part VIII. I hope it has been sufficient, and of course we would be pleased to answer any questions about that.

主席：

各位同事，有沒有問題？李家祥議員。

Hon Eric LI Ka-cheung, JP:

Maybe I will speak in English, I think, for the benefit of the Administration. I certainly say, on representing the accountancy profession, that there has been some very constructive dialogues, and there has been give and take I think on both sides. The final draft as it stands is a considerable improvement on the original draft. But I would not go so far as saying that all indifference has been resolved. There are still very serious concerns on this section of the Bill, which I would like to quickly outline, and perhaps with the permission of the Chairman, later I will deal with it point by point. There are about four areas.

One is that although the legislation borrows quite heavily from some of the existing legislation, it does spell out the procedures and the penalties are a lot clearer, and there is every intention that the Administration will use these powers a lot more frequently than in the past; so although the Administration or the SFC has exercised substantial constraint in the past, we are not sure whether that sort of constraint will still be the case in the future. In particular, I think the Society of Accountants is very concerned about the possibility that the law can allow the SFC to go on what you might call a fishing expedition.

I know the Administration or the SFC continually say they will not do it, but it is not reflected in the law, particularly in section 172(1)(a). All it says in the law is that "whatever appears to the Commission", so they are really in a position to call an investigation whenever they like. Also, section 172(7)(a): they are also able to give directions. In fact they can also require records from the auditor for directions that have been given, or may be given. I think the words "may be given" implies that they need not give a direction in advance to the auditor. They can actually proceed to request information, then give the direction later.

So although there are codes to help the accountancy profession dealing with requests, I am really trying to ask if there is any code that binds the SFC internally on their procedure, and whether we can have a sight of that, so that it will bind their officials not to undertake these investigations lightly. The second point is that the profession is also seriously concerned with the prospect of a criminal offence. At the moment, as stated in the

paper, if the auditor does not comply with the direction, he is likely to face contempt of court ultimately if it goes to the court. Also, of course there are very severe internal disciplines of the accountancy profession, like deregistration, sentences, reprimands, etc. Bear in mind that the accountants in the case are not the culprits, are not the villains. We are really being asked to help. What is the purpose that is served by throwing accountants to jail? It would be too tempting, I think, that when we accomplish this at large, accountants can be easily made the scapegoat, to divert public attention. It is something accountants really do not want to see.

Also the third point is really the accuracy and suitability of raw working papers of audit files that are being sought under the section. Of course, all the working papers are not prepared in a way to assist fraud investigations. They are really there to help. The primary object of the audit is to get a true and fair view of the financial affairs of the company. The auditor cannot possibly ensure that every statement and detail of the working papers prepared by the junior staff are accurate in every respect, particularly accurate from the point of view of carrying on a criminal investigation. It is just simply not on.

As I have indicated, in section 172(7)(a), the SFC can come in and request for these working papers, without the auditor having a chance even to review the accuracy of the working paper beforehand. If the SFC uses that raw working paper, which has been prepared unsupervised and not intended for that purpose, in court, I know that there is some protection for the auditor against a prosecution by the client; but if the paper is used improperly, unverified, by the Administration, it can still inflict severe damage to the client as far as the reputation of the auditor. There is nothing in the law, again, to ensure that these papers are properly being used.

I also know that the Administration intends to set up a tribunal to provide some checks and balances internally within the SFC, but I think we are of the view that this committee would not be an effective check if it is merely appointed by the SFC itself, as really an advisory body without any statutory powers being spelled out in the legislation.

The power of that committee is unclear, and the source of that power as an effective check on the SFC is entirely up to the SFC. That will not be a satisfactory check, as far as we are concerned. I think I will leave it at that. They are some general comments. I will be very happy to go to specifics when it comes to the issues, point by point. That shows that there are still substantial remaining concerns in the profession.

Miss Vivian LAU, Principal Assistant Secretary for Financial Services:

Thank you very much for these comments. Certainly the Administration looked at the accountancy profession's concerns about the SFC's power to access audit working papers in preliminary inquiry into alleged misconduct of a listed company, as now proposed under clause 172 of the Bill. Before I pass to Mr BAILEY for reply to specific questions posed by the Honourable Eric LEE, I just would like to put the whole thing in context. I think, while we note the accountancy profession's concerns, we also note the rising expectations from the media, the public and the legislature for the accountancy profession to recognize the social responsibility, and to perform its public duties.

Of course, misconduct of listed companies should not be tolerated, because it hurts shareholders, creditors and employees of the company concerned, and hence undermines the health and integrity of the market. As Mr BAILEY has pointed out just now, the existing SFC inquiry power is inadequate, so we really need the cooperation and support from auditors, to help the SFC verify records of the companies concerned. We note that these inquiries are meant to be preliminary, and have to be conducted quickly and in a low profile, for obvious reasons. These powers are shared by all securities market or corporate regulators in major financial centres.

Mr Chairman, as I said, we just want to put the whole thing in context. So with that, I will pass on to Mr BAILEY.

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

Commission:

Thank you. I think the first thing to say is that when you exercise the power under 172(1), it will not differ to what we actually do under section 29(a). You cannot just start an inquiry as a fishing expedition. There have got to be circumstances suggesting that there is impropriety in the company, and the grounds on which you can start an inquiry are in fact detailed under section 172(1)(a), (b), (c), (d), (e) and (f).

Now for us to start an investigation in that, we have to do an assessment of what information we have available, and based on that information, the Commission then has a power to authorize a person to be an authorized person for the purpose of this provision. That authorized person is then given the power to exercise the various powers under the section, which would include, if necessary, asking for the auditor's working papers.

Now, auditors' working papers have actually been obtained in the past under section 33, in cases of insider dealing, and have actually proved to be very, very useful indeed. As far as I can remember, there has never been an instance where we have had any real problems about the accuracy of those papers, and from the practical perspective we would accept that certain information in those papers may be produced by a junior member of staff, and would allow the auditor to make clarification of that. The purpose of us obtaining working papers is two-fold. The reason why we might want to look at them, even though we have not actually given a direction to the corporation, is that one of the purposes of section 172, as I mentioned earlier, is in fact a preliminary company inspection; and whereas we might have allegations which in fact could say "You could check this from the auditor's files", one of the purposes is not to disrupt a company's business, and if we can go to an auditor in certain circumstances, obtain their working papers to see that they have verified that transaction, and that there is nothing untoward in it, then we would be satisfied and we would probably close the investigation.

I do not think that type of instance would occur very much. The second type of

instance where you would want to go to the auditor's working papers to verify information, in fact to see whether or not we are being told the correct information from the listed company or other parties connected to that listed company. We certainly would not be able to go on a fishing expedition, if that is the worry there, as we have explained to auditors before. You have got quite a lot of checks and balances in the exercise of the power, and Mr LEE has in fact referred to 172(7). We have got to show that the auditor is in possession of the audit papers. They have got to be relating to the affairs of the corporation to which a direction has been or may be given; they relate to the affairs of the corporation, and they are relevant to any of the considerations. So if we are looking at whether there has been fraud or misfeasance in a listed company, we have to relate the need to those audit papers to look at that. That has to be certified by the Commission. Now, as far as the certification process is concerned, there are delegations within the Commission, and all these certifications would be done at a very high level, either by a senior director or myself. So there are checks and balances in the process. First of all, the authorized person has to present a reason why he wants to get at audited working papers. That then has to be certified before he can then give the direction to the auditors to produce the records.

So there is no question in my mind of a fishing expedition, and as far as that is concerned – and just jumping a little bit ahead to the Process Review Panel – the Process Review Panel is an independent body appointed by the Chief Executive. It has the right under its terms of reference to randomly call for any files, and randomly to basically, not using the word "audit" our work to make sure that we comply with the various checks and balances in the legislation.

So the PRP is a very, very powerful weapon as far as making sure that our powers are exercised properly. When it comes to the question of criminal offence, I think as far as a criminal offence is concerned, there is always a reasonable excuse, and quite honestly, there are two cases here. Normally if an auditor was challenging us as far as the production of papers was concerned, we would always try and negotiate, to make sure we did not have such a conflict, because as we mentioned to the Society before, we certainly try and stipulate in our

directions exactly what we want as far as documents are concerned. The grounds of inquiry are also given; but if, for instance, there was any dispute, our initial reaction would be certification to the High Court as opposed to criminal prosecution.

Criminal prosecution, as far as I can see, is a last resort, and would not be undertaken lightly. If there was a criminal prosecution – for instance, if an auditor did change his working papers to try and mislead us – I do not think there should be any difference between an auditor and any other individual assisting in a company inspection, as far as that is concerned. It is unacceptable conduct. Now, as far as auditors are concerned, the likelihood of that happening is remote. But we have to have provision. They have to be treated on the same level playing field as anybody else who is assisting the SFC in such an inquiry.

I think I have covered the accuracy of auditors' working papers. We understand your problem on that, and we would be flexible. We can certainly ask questions and clarifications as far as auditors' working papers are concerned. I would add as far as the exercise of the power is concerned, section 29(a) was actually taken from section 152(a) of the Companies Ordinance, and I think you will find it is in fact a very similar power, except that one allows a public officer to be appointed, and the other one allows for the SFC to appoint an authorized person. The threshold again is, I think, the same if not lower; and indeed for the section 143 inspection by the Financial Secretary. The threshold, from memory, is identical. So every single inspection has a threshold that has to be met. I hope that answers the points you raised.

Hon Eric LI Ka-cheung, JP:

The answer I think we have rehearsed many times. Chairman, I think it may be helpful if we take it point by point. I think it is an awful lot. I think I am guilty of setting the scene too widely initially. There are just two general comments I have to state on record. There is no purpose of going through and back with these statements. First of all, the

accountancy profession is extremely happy to help the Administration to deal with fraud, but I think we have a problem with being asked to help at gunpoint. I think we are concerned to really make sure there is a proper check and balance within the Administration. We are not saying we are unwilling to help in any way. Let us make that clear. I think it has also to be clear that in helping, we are really, I think, playing a supportive role. We are not the criminals and we should not be treated as criminals in any respect.

The Administration keeps saying, "I hope I've put it to bed". I think we had substantial argument during the panel session and the first draft, and we were able to demonstrate that in all various securities regulators in the world, although there are similar requests made for assistance, the legislation has a very wide variation. It is certainly untrue to say that all securities regulators have the same sort of powers that the SFC has. They are subjected to a very different mode of definition in terms, and there are also various different modes of checks and balances. There is no point in going back to all this. I think it is very, very difficult to compare this, but I do not think the Administration should really mislead the Bills Committee to think that we have the same thing as everywhere in the world. It is not true.

Now, let us deal perhaps with the procedure, or the fishing expedition. I think it would satisfy the accountant if the SFC or the Administration goes to the records of the company in the first instance. If it is a company or an official that they suspect, it is they from whom they should really be seeking information. As somebody to assess, it is only fair to expect the Administration or the SFC to obtain information from the people they are investigating, the people they suspect, first, before applying such a wide investigation power to other people in assistance. I think that is what we really wanted to do. Although the Administration keep reassuring that that is the case, it does remain that they have the ability and discretion to go directly to the auditor in the first instance for information. That is what we regard as too tempting to start off an investigation through a fishing expedition because we do not hold direct information on the company; we have no idea what is going on.

I think it is also going to assist the profession if the "direction may be given" in 172(7)(a) be removed. "Direction may be given": I think we are at least entitled to know clear directions being given to us, and we are facing the prospect of being accused by the Administration or SFC of providing misleading information. Now, if we do not even know the direction in the first place, and the raw working paper, as we said, has been prepared not with that purpose in mind, in the case that some raw working papers did mislead SFC investigation, then the auditor's life is really hanging in the balance. Although the law says that we have some reasonable excuse, what reasonable excuse can we possibly offer? I think the only reasonable excuse is that these people are not prepared for the investigation, and they are probably not being reviewed. I think it has to be very clear that it is only in the cases where the auditor intentionally gives a statement that misleads, after he has had the opportunity to review it, knows the direction and everything, before anything like that should be charged.

I also submit that with 172(13), the section that lays out the criminal offence and simply says that "a person who, without reasonable excuse, fails to comply with a requirement imposed on him". The profession is still concerned that it is really up to the SFC to give direction, and the burden of proof of reasonable excuse is on the auditor. I think the lawyers will probably be able to help me. Even if the SFC in that case gives very unreasonable requests, requirements or directions, we would have to submit, to comply. These excuses I think are very elusive in this case. The law really gives them very wide powers to seek anything, so I think in a way we are still concerned with this criminal offence constructed in this way.

Chairman:

I am aware of what you have said, but regarding (7)(a) I think it may be different. It is a little bit too wide. How can anybody guess what the SFC is thinking?

Mr. Andrew PROCTOR, Executive Director, Intermediaries and Investment Products,

Securities and Futures Commission:

I think the answer to that one is that basically the reason we want this is to give us flexibility. The main purpose of the provision is to check the veracity of information we have been given, and there might be exceptional circumstances where we could probably get information from an auditor, especially if a complaint was saying things where the auditors could be checked for this, to see whether or not there were any veracity in what is being complained of. So it really is a question of having some flexibility in the investigation process.

Again, it is not a fishing expedition because we still have to have the grounds to go to an auditor, under 172(1). That is the reason for wanting the power to go to auditors' working papers before a direction has been given. It is a certification process as well.

I think, just to be clear about that section, you see that it relates to the Commission's certification in writing of certain things. There are two parallel processes going on. One is the process by which a demand is made for the production of documents, and as Mr BAILEY has taken you through that, first of all there is the threshold requirements under 172(1); then an authorized person can make a request under subclause (iv). Parallel with that, though, the Commission has to certify certain things. The words "or may be given" do not mean anything except that certification may be made before or after the demand for the documents. In other words, having gone through the process, decided that there is a proper cause for inquiry and that there are documents that ought to be produced, the Commission then has to say as a matter of certification that something exists as a state of fact. So all of the protections that Mr BAILEY has described exist, and it is really a matter of saying: "Well, before we make the actual demand, do we certify, or after we make the demand, do we certify?" In either case we have to certify it as a parallel process, distinct from the threshold requirements that lead to power to ask for the documents.

So it is not a case where a demand for documents can be made before the 172(1)

threshold requirements are satisfied.

主席：

還有沒有其他回應？Any comments or response to Eric LI's comments?

Miss Vivian LAU, Principal Assistant Secretary for Financial Services:

Mr Chairman, on the question of the words "or may be", I just would like to add that the most important thing here is that an auditor will be given a direction under 172(7) in the first line. They will be given a direction. "Or may be" actually refers to a direction which may be given to the company or corporation, that the SFC would like to conduct a preliminary inquiry. So if you look at the Chinese version of the Bill, it would be a little bit clearer.

主席：

如果是這樣的話，請政府修改這條文的 drafting，因為這可能會令人誤解。吳靄儀議員……噢！她離開了。余若薇議員。

Hon Audrey EU Yuet-mee, SC, JP:

Thank you, Mr Chairman……

Chairman:

Sorry. Mr BAILEY, you want to……

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

Commission:

Just to answer one point, if a demand was unreasonable, that would immediately provide a reasonable excuse, on the point you raised. If we made an unreasonable demand to you, then you would have a reasonable excuse not to comply. That would give you any defence you would want, either for certification or a criminal prosecution. As I said before, we certainly would not be looking to criminal prosecutions.

主席：

余若薇議員。

Hon Audrey EU Yuet-mee, SC, JP:

Thank you, Mr Chairman. First of all, I would just like to follow up on some of the points that have been made. I have other points, but maybe I can come back to that later. Mr Chairman, I also have difficulty, I must say, with section 172(7)(a), the words "may be given". While I appreciate that the Commission would like to have flexibility in any investigation, I think the other point that has to be taken into consideration is that at the receiving end, the person who has to produce the documents, must know that in fact they have to produce them; and that the person is subject to possible criminal liability if he fails to produce them.

Now, you say that the words "may be given" relate to the direction that can be given to the corporation, which is the subject matter of the investigation. What is the difficulty……

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

Relating to the certain conditions in respect of that direction?

Hon Audrey EU Yuet-mee, SC, JP:

Yes. What is the difficulty therefore in getting the certification first, and then making the demand on the auditor or somebody else? That certification or that demand may be subject to challenge, and then the poor guy has given you the documents or the information, and then discovered that in fact the certification eventually is not forthcoming. So what is the difficulty about that? In connection with all the questions that have been raised, I think in the brief it is mentioned that the powers have to be extended and so on, because in the past there has been deficiency and gaps. I think it would help if you give us some actual examples of the difficulties in the past, why you want to extend and what the background is to the need to extend that. I think it would help very much, because you said that in the past it has been exercised very rarely, and it is only 13 times. Was it because your power was limited and you could not exercise it more, or was it because you have been very careful with the exercise of the power? What would be the circumstances when you would actually exercise that power? Would it simply be a complaint from a member of the public: "Well, maybe there is some fraud there"? You keep telling us: "Look, we will be very careful, and it is not going to be exercised lightly", and "It is not going to be a fishing expedition". I think it would help if you give us some actual examples, and on the same point, under section 172(1)(e), that seems very wide. "…it appears to the Commission that there are circumstances suggesting that the members of the corporation or any part of its members have not been given all the information with respect to its affairs that they might reasonably expect". I think there has been some extension there, something new in this. I just wonder whether you can explain why that has to be couched in such wide terms.

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

Perhaps I can deal with the first point and let Mr BAILEY deal with the second

item. In fact, what Miss EU suggests about certification ahead of the direction is exactly the point I was trying to make before. That is why it says "may be given". This subsection (7) is about the certification. It is certifying in advance of the direction "that may be given" that certain facts exist; and that certification of those facts is a prerequisite to the giving of the direction. So it is actually precisely, to pick up your point, that it says "may be given". In fact, of course, the wording allows for the certification to be made after the direction, so ironically, having regard to the earlier comments, you might say that they are the words that should be removed, and the emphasis should be on "maybe given" in the sense that the certification should be made before the direction. That would normally be the case; so it is actually entirely consistent, I think, with your observation. Of course, as a matter of practicality, one would make sure that the thresholds had been satisfied before one gave the direction, and that is why it says it is in respect of a direction "that may be given".

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

Answering your last point as far as the grounds for inquiry go, that is the existing law, and it is really to make certain that members of a company are given all the information. We have in fact used that ground once or twice, but it is under section 29A(1)(c) – "… it appears to the Commission that there are circumstances suggesting that its members have not been given all the information in respect to its affairs that they might reasonably expect". So that is the existing law. As far as where these cases start, I cannot go into specific details because we have the secrecy provisions, but in general there are a number of areas. We can either get it from complaints from the public, alleging certain matters, or we can actually get it from complaints from people who might be making allegations – transaction counter parties or people making allegations against listed companies. We have in fact had one referral from the police in the past, and we have actually done it from our own intelligence and our own assessment of matters from documents that are available on the listed company itself.

The types of case we have really have been varied. In some cases we have been

able to get the information we want, but in a number of cases, when it comes to transaction of counter parties in particular. We had a case where we suspected that certain transactions with a person in Hong Kong were not arm's length, but we could not go to this other party to find out whether indeed it was arm's length. One of the main reasons we need to be able to go to third parties in particular is to be able to verify the transactions, whether or not it is a fictitious transaction, whether the person exists; and in certain circumstances we have even suspected that.

As far as auditors' working papers are concerned, these have, as I mentioned earlier, been quite useful in providing information in insider dealing cases and other cases. Auditors may have looked at transactions that we believe are suspicious, and on their working papers they may have verified certain matters as far as that transaction is concerned. This would give us a means either to close the case very quickly. I must stress that the reason we have had this power in the past is for a discreet inquiry. If you go to a full company inspection under 143 of the Companies Ordinance, it is, as far as I am aware, usually publicized. The publication of an inspection can cause tremendous reputational damage to a listed company. One of the reasons we were given this power is so we could make these discreet inquiries, so there would not be that reputational damage, and because all our inquiries are secret, we are not allowed to disclose anything unless we take that action.

Of course that is the reason, so being able to go to an auditor's working papers to verify transactions would be part of that discreet process. Indeed, if we thought an auditor's working papers might be able to cut the inquiry very early on, it may not even necessitate going to the listed company itself. That is really the reason why we want to get auditors' working papers. As far as banks are concerned, we actually have a power under section 29(a) at the moment, to pull the banking records as far as the listed company is concerned. However, there has been some argument as to whether or not it actually allows us to do it, and we have been very careful. In fact, we think it is badly drafted, and one of the reasons we have taken the opportunity in the bill is to clarify what we would say is an existing power as far as banks are concerned. Bank information in any investigation, whether it be into a listed

company or market manipulation or insider dealing, can be one of the most useful sources of information to chase funds and again trace the veracity of the transaction or trace connections. That is the reason for the extension to banks.

If you would like me to elaborate on any part, I am more than willing to do so, just to give you examples of cases in which we have actually done 29(a) inspections, and where there has been overt action taken. The MKI Chesterfield cases, going back many years: we took action there which was later resolved through the courts. The cases involving Mr CHIN Pui-chung was a section 29(a) inspection, taking it under 37(a) to the courts. So we have managed to take action in some. In other cases we have actually referred matters, say, to the Independent Commission Against Corruption, and in one case we referred it to the Financial Secretary for a further inspection under 143, because our powers were limited.

Hon Audrey EU Yuet-mee, SC, JP:

Thank you very much for that explanation. You see, it is one thing having powers to do routine inspections. The Monetary Authority goes into the bank and says: "I want to inspect your books". I mean, I find nothing wrong with that, but it is quite another to have a power of investigation in relation to suspected fraud, where you have very limited risk of servant incrimination privileges and things of that sort, and particularly when it is all done in secret. Indeed, very often the subject of the investigation really does not want to bring it open, because even if the suspicion is unreasonable, he does not want the suspicion to become public. So it is one thing for you to assure us that the power will only exercised by somebody in your position, and of course it is not a question of not trusting you; the power is there, and it is very intrusive power, and is very wide. It goes to things like you suspecting that not all the information has been given. What is the assurance that given somebody else taking your position, who wants to abuse this power, that there will be adequate safeguards there?

Mr. Andrew PROCTOR, Executive Director, Intermediaries and Investment Products,

Securities and Futures Commission:

I think the answer to that one is: I have been in this position for only two and a half years, and the people before me who had this power have certainly exercised it before me.

Hon Audrey EU Yuet-mee, SC, JP:

It is not a question about personalities. It is really a question about what is stated here in black and white.

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

I think there are checks and balances in the process. You cannot just willy-nilly start an investigation.

Hon Audrey EU Yuet-mee, SC, JP:

That is what I am asking. What are the checks and balances?

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

The checks and balances: let us look at how you would start an investigation. Maybe I can describe the process to you. If you get a complaint received where we suspect there is impropriety in a listed company, it is given, say, to a manager or a senior manager to assess. He has to then come up with a detailed assessment of the information in our possession, and whether or not any of the criteria in 172(1) would then be met. That assessment is then passed through the chain in the Commission, at least to a senior director or executive director, to consider, and probably in that process the director would have input to

see whether or not there were anything else that should be looked at. So you have a ground for starting an investigation which has a lot of checks and balances in the process, before the actual directions can be issued, and the delegations then for the directions to be issued I think are senior director and above. So it is at a very high level in the Commission.

Once the authorized person has got the direction, he can then exercise the power to obtain the books and records of the listed company, etc. Those directions tend to be quite detailed, and if we are going through a listed company, we would certainly spell out the information we want – and some can go on to several pages. Also, when you have the checks and balances, the actual checks and balances for third party auditors and banks, then you have the certification process.

For that certification process the authorized person would again have to do a detailed justification as to why he wanted to do what he was intending to do; and making sure it relates to the matter under investigation, and that all the different elements of the certification are in fact met, so that the person is certified again at a very high level in the Commission, who would be able to read this and come to a decision that that was a reasonable request to be made.

So there are checks and balances right the way through the process, as far as that is concerned. If indeed, when it comes to closure of cases or further action, the decision for taking action in the courts would be a decision of the Commission. I think it is in consultation with the Financial Secretary. Also, if the case were going to be closed there would be checks and balances in that, because you have to make certain that someone's recommendation for closure is a genuine reason for closure. So there are checks and balances in that process.

Again, as far as these various processes go, they are all documented. They are all on file. I mentioned the PRP earlier. One of the things that the PRP will be looking at is that we follow the processes, and in fact as far as the processes under section 29(a) now are

concerned, we do, in fact, have a manual that the process review panel will follow for scrutinizing cases like this. The PRP will be a powerful weapon in that process. As I said, we have only exercised the power 13 times. We view this type of case very, very carefully. It has tremendous implications, not only for the parties who may be looked at. It has also has implications for us because of resources, and we are very, very careful on how we exercise it, and make sure that every case is given the most careful of consideration. I hope that answers your question. Certainly the files are open to the PRP.

主席：

何俊仁議員。

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

Sorry, could I just add one point? On the question of information being withheld from shareholders, this is apparent under section 143 of the Companies Ordinance, and I think it goes to the heart of minority shareholders' perception. I would add that again this is from my memory, that when we did Mandarin Resources under section 29(a), and the subsequent action under 37(a) of the SFC Ordinance, one of the grounds we went in with was on that particular ground. I think the reason for having that is predominantly for minority shareholder interests, and we have used it, as I said, in that quite well-publicized case of Mandarin Resources. The other checks and balances, of course, which I forgot to mention, is that there is always a judicial review possibility, and there is complaints to the Ombudsman. So there are other courses for people aggrieved with our actions in regard to anything we do, notwithstanding what is in this particular Bill.

主席：

首先由何俊仁議員發問，然後由李家祥議員提問。何俊仁議員。

Hon Albert HO Chun-yan:

I just heard Mr BAILEY mention about certain equivalent power now being enjoyed by the Monetary Authority in requesting records from the bank. Banking records, is it not? When you are talking about records, I think it is vastly different from working papers that are in the possession of the auditors. Is there any type of working papers for banks, such as memos exchanged between management, between banking officials, on certain proposals that are suggested by clients? On minutes of working meetings? That is equivalent to working papers. Of course that does not necessarily amount to banking records. Similarly, how about in other professional regions? Management consultants: would you be asking for working papers from the management consultancy firm? I am sticking to working out certain proposals for our clients.

I think this is very important. Let us understand what sort of papers we are looking at. It is much more embracing than other records that we normally handle. Secondly, I understand that during our discussions in the last term of this Council, on the White Bill, there have been certain information papers provided to us both from the accountancy profession and from the Administration, on the situation in comparable jurisdictions. I think that would certainly be a very useful guide for us to consider the position, where the right line should be drawn, to ensure that there is a properly balanced procedure.

Chairman:

Okay. Mr BAILEY?

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

As far as banking records are concerned, I think one of the things I would stress from the outset is that there is a big difference between an inspection power and an investigatory power. I am not certain, but I think Mr PROCTOR who mentioned banking records.

Chairman:

The investigation powers on 170(a). Right?

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

Yes, for the inquiry point. I am referring to 172. I would like to stress that there is a difference between a power to obtain information from a bank for an inspection purpose, and an inquiry power when there is a ground for inspection, such as fraud, misfeasance or anything in the listed company. As far as that is concerned, going back to the audit working papers, audit working papers do contain a lot of valuable information, and I think one of the things I would stress is that as far as a listed company is concerned, the investing public rely a lot on the auditors for the true and fair picture of a listed company's accounts. There is a responsibility there.

I am not sure of the powers under the Banking Ordinance as far as the AI is concerned. Perhaps Arthur YUEN could answer that one. But I think we have to differentiate between an inspection power and an inquiry power, and if we in fact did want any other matters that were relevant, there is provision under 172 as "any other person". Personally I cannot see us exercising that, to go outside a transaction counter party to somebody else. I would not have thought that would have occurred. I think your question on banks is probably more related to the Monetary Authority's inspection powers, as opposed to an inquiry power.

Miss Vivian LAU, Principal Assistant Secretary for Financial Services:

Mr Chairman, if the members are interested in their area, the whole MA's power under the Banking Ordinance, we can certainly provide a note after the meeting.

Chairman:

Are you able to have some feedback on this part?

Yes?

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

Thank you, Chairman. Under the Banking Ordinance the inspection power and investigation power is set out in section 55 of the Banking Ordinance. Under section 55(2), that is related to investigation power, the Monetary Authority can investigate the books, accounts and transactions of an authorized institution under certain circumstances. Now, that is related to an investigation of an authorized institution if there is suspected misconduct that may be prejudicial to the depositors or members of the bank. I think the subject matter here is: we are talking about investigation of listed corporations, and in that process the SFC may demand that a bank produce bank records.

That is a different matter from investigation on the bank itself. So I would draw the distinction there. Under the Banking Ordinance we do have the power to investigate books, records and transactions.

Hon Albert HO Chun-yan:

My question really is whether or not the SFC should have the power to require a

bank, which is serving for a listed company under investigation, to provide records and working papers which may throw light on the true financial position of the company.

Chairman:

What is the definition of "bank records"? Does that include exchange memos and other things?

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

Yes. In fact, when we actually obtain banking information we can obtain a variety of things. We can obtain correspondence relating to a transaction. We can have loan facilities. We can obtain……

Hon Albert HO Chun-yan:

Yes. These are records.

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

These are records. We can obtain that.

Hon Albert HO Chun-yan:

Now, how about internal working memos? For instance, you know, memos that are made by management, banking officers, in their discussion of a client's proposal: would that be discoverable?

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

As long as it was relevant to the investigation, the answer would be "Yes".

Chairman:

Arthur YUEN, will you supplement this point?

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

Yes. I agree with Mr BAILEY's interpretation.

Chairman:

All right. So the de facto meaning is "everything"? Right?

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

Can I just clarify that, Mr Chairman? I directed Mr HO's attention to subclause (6) on page C1859. There is the restriction on what the documents must relate to. An authorized person must have a reasonable cause to believe that the authorized financial institution, i.e. a bank, is in possession of any record or document, (1), relating to the affairs of the listed corporation under inquiry, or (2), any of its group corporations; and secondly, that that document relates to the affairs of such corporation or a transaction of such corporation; and three, that it is relevant to the investigation. So as long as the document passes those three tests it is obtainable under the 172 inquiry power.

Hon Albert HO Chun-yan:

Well, the only remaining query is: why is the term "working papers" not used here? Maybe that is a term that is particularly relevant in the accountancy profession. I think in all other professions when they are working on their lay clients' proposals, they must have their own working papers. The same applies to lawyers; the same applies to management consultants; the same applies to banks. That is one of my queries. Of course, the second part of my request is about the provision of the information paper concerning comparable jurisdictions, for the benefit of new members.

主席：

何俊仁議員，你認為第171條無需載有"audit working papers"的definition，因為該定義似乎包括任何文件，抑或你認為.....

何俊仁議員：

不，我只想清楚知道有關情況。坦白說，我現在仍要小心考慮香港會計師公會的意見，因此我需要清楚瞭解目前的情況。我希望知道，就目前的情況而言，是否只有核數師才需交出working papers，抑或其他專業人士全部均需交出working papers？

主席，我提出這一點的原因，是由於working papers屬於十分重要的文件，當中除了客人的指示之外，亦會載有專業人士的意見，所以該等文件不只反映客人的指示。我本身亦是專業人士，所以瞭解這方面的情況。政府當局剛才提到其他行業的情況，請問該等行業所需交出的文件，是否亦包括這些文件呢？

Chairman:

Vivian or Mr BAILEY?

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

I think the answer to that is: the definition of "audit working papers" was put in as a result of discussions with the Hong Kong Society of Accountants, because audit working paper is a special type of document which is well-known in the audit profession; and it was to restrict it to the audit working papers within an accountancy firm. There is no such terminology, as far as I am aware, when you come to banking records or any other records of any corporation. So in order to have the flexibility, as Mr GOYNE pointed out, as long as it relates to the matter under investigation, we can then go and request various documents, whether they be internal memos, cheques, any type of statements. That was the reason why "audit working papers" is specifically defined. I think the definition was actually taken from the Mutual Legal Assistance Bill. That is the reason why you have a specific definition.

主席：

李家祥議員。

Hon Eric LI Ka-cheung, JP:

Thank you, Chairman. Although I think Albert's comments are useful, I would like to draw very distinct difference both here in the working paper and on the comparable jurisdiction within Hong Kong. The first point is that the audit working paper is well defined, as explained, but the information that is sought is so different from the bank. As the Audit Committee Chairman of a major bank, I can tell you what is going on there too, but the major difference is that the auditor has vast power under the Company Ordinance to demand or require information from the client. Some of the information we require from a client is extremely sensitive in nature to the business. A bank in normal circumstances cannot

volunteer the information for the purpose of obtaining a loan and credit.

So in a way, I think obtaining the working papers from an auditor is not new to SFC. We have passed at least six or seven laws in the past three years or so. That is partly why the profession is so uptight about this. To go through the back door in obtaining these working papers, the auditor enjoys the power under the Company Ordinance, to obtain information for the purposes of ensuring financial integrity of their accounts for general investors.

It is for that purpose that the law grants them the power to obtain information. For any other legal authority or regulator to obtain that information through the back door like this, legislator will take a very cautious view. In all the legislation I have passed in the ten years in LegCo, in every instance we allowed the court to be the final check and balance. It is confirming, I think, Albert who has passed all these laws with me. In the event that the requests are not reasonable, the auditor can seek the direction of a court, or we can compel the administration to go through a court summons. We are talking about a very serious offence, too. Drug trafficking is another one which is coming up; serious organized crime, etc. So in a way, the SFC is asking for different treatment, more than what we have granted so far in all other legislation to other regulators, by trusting basically their own internal procedure as a check, rather than the court. The court is somewhere really further down the road.

Before, in the legislation, if they exercise their power, the auditor can, of course, object to the court. But now the fact that the laws are so specific in laying out all the procedures, means that in a way, although it spells it out more clearly on both sides what should be expected, it does reduce the ability for the auditor to object to certain requests in the court.

I would not want to leave the impression that accountants are unreasonable, because the accountancy profession accepts that in this case the SFC should have wider powers, because of the nature of the work is discreet, and there are similar powers, with a

slight difference always, elsewhere. We accept allowing the administration this discretion without objection, but we are asking for a much clearer, more specific, I think, checks and balances to be provided in law and not just in terms of explanation given here. How can that be done? For example, the certification process executive within the SFC: the term of reference of the process review tribunal is unclear to me, even now. I do not even know what they do. I have asked some of their members, and they have no idea what they are supposed to be doing.

It is a very vague term. It is not spelled out in law. The nature of the crime or the investigation is again vague. In the US I think some of these crimes are very specifically spelled out in the legislation, and they are defined in very specific and precise terms. In Hong Kong we do not have that.

I think, to come back to the Honourable Audrey EU's earlier point, we are really giving substantial power to the SFC and the Administration and the executives alone. In this case, it is not unreasonable to us as a legislator to ask for assurances. When I come to this point, I would say that there is a substantial level of trust of the present executives. I am not running on any conspiracy theory. That is why we have gone so far, but by passing law and procedure we have to look in the long term. We cannot simply say that we trust a person or a group of people, so they must be all right.

What I am really hoping will happen, which will probably help the legislator, is for the SFC to at least spell these explanations out in writing, in the form of some sort of code of practice. Obviously they will have to guide their own junior officers in how to deal with these things in terms of internal procedure; and they will at least have to spell all these out, how to view various things, in written form, and submit it to this Council; and if there is any change in this code of practice, of course there should be public consultation.

I think the profession has to provide a code to help them. Why cannot the SFC provide a code to help the legislator? I think that will at least mean something is on record,

spelled out clearly so that we know exactly the intention of how the law is going to be used. That is a minimum requirement, I think, to be asked, and I think the accounting profession has to bend over backwards, extremely, to accept legislation like this. However, at least we shall have some fair assurance of the legislature.

Chairman:

Any response ? Mrs Alexa LAM.

Mrs. Alexa LAM, Executive Director and Chief Counsel, Securities and Futures Commission:

Thank you, Chairman. I would like to respond to Miss Audrey EU's point earlier about the checks and balances that should be imposed on the Commission's power to do the clause 172 inspection. In this process I hope also to be able to respond to Mr Eric LI's points that he made just now. First of all, we agree that the power to do mini inspections is an intrusive power. However, we have to look at the bottom line, which is really a question of balancing different interests.

On the one hand, when you talk of misconduct, fraud, or oppression of minorities with respect of listed companies, you have to have somebody who is in a position to take swift action. On the other hand, of course you have to make sure that this somebody taking swift action is not going to impose too excessive a burden on the market.

Let us have a look at Hong Kong. If we are serious about Hong Kong being able to maintain its position as an international financial centre, we have to continue to improve on our corporate governance, and it is crucial that shareholders are treated fairly, openly and equally. Whenever there is a problem with listed companies, with shareholders being oppressed, the first public response is: "Go to the SFC. What are they going to do about it? Ask them to investigate. Ask them to take action". Now, what we are asking from this

Chamber is that you give the regulators adequate powers, and you also impose on the regulators adequate checks and balances. Let us take a look at the excessiveness of the burden, because we are now talking about balancing the burden. Now, as Mr BAILEY pointed out in the last several years, ever since we have had this power, we have exercised the power 13 times. The purpose of this particular inspection is that it can be done swiftly and quietly, so that the reputation of the company does not have to be tarnished, because for all you know, at the end of the day maybe there is nothing wrong with the company. It is done secretly, so to speak.

On the other hand, let us have a look at section 143 of the Companies Ordinance. That one is done openly. The Financial Secretary appoints an inspector. Everyone in town knows about it. Tens of millions of dollars from the public purse have to be spent to produce a report. Typically it takes quite a bit of time - for instance, the World Trade Report, which I am sure everybody remembers. Balanced on the other hand is this mini inspection that we are given the power to do. We do it very quickly, because the purpose is that we can quickly produce a report to the Financial Secretary and recommend whether or not he needs to do a 143, which could do a lot of damage to the company; or he could do a number of other things as well. For instance, in the past several cases we have done, we have succeeded in, say, getting the majority to buy out the minority, and therefore basically rescuing the minority.

We have also, on the basis of section 29 evidence that we have collected, gone to court and gotten an order under section 37(a) of the Securities and Futures Commission Ordinance, which includes a number of things, including for instance getting the court to give an order to immediately freeze particular assets or to freeze particular actions. That again is to protect the company and to protect the minority, and the creditors. Also on the basis of that we have also gone to court to do a winding-up, because the company has gone to such a stage that it is really best for everybody, particularly for the minority, that the company is wound up. So because of that, we believe that it is important that the regulator be given this power.

Let us have a look at the checks and balances. My colleague has explained the internal checks and balances, which is that it has to go all the way up to the executive director. My experience has been that it does not just stay with the executive director. All the executive directors in the Commission naturally get to know about it. They talk about it and they generally take a collective decision. That is internal. Obviously I understand that this Chamber would want to see something which is also external, so to speak. Now, for external purposes, we have the Process Review Panel. Some members have expressed concern because they have not seen the terms of reference. I am sure the administration would have no problem disclosing the terms of reference. The PRP has actually already started functioning. They have two work groups and the work groups have already started looking at our stuff.

On top of that you also have judicial review, and you also have the right to go and complain to the Ombudsman, in the event that you are not happy or you are concerned with the action that our staff members take. Now, this may not be the total, overall protection that certain people are looking for, but in terms of providing an adequate balance so that we can move ahead in our bid to continue to be an IFC, we would submit that these are probably adequate for LegCo to go by. Thank you.

主席：

我也希望跟進這問題。由於現時亦可能有一些人認為證監會的權力不足，有關條例有必要賦予執法機關權力，要求被調查機構必須作出解釋。第172條關乎索取資料或紀錄的情況，但有時所作出的一些行為不一定會有紀錄的。舉例來說，數名負責人員進行了一些活動，而該等活動可能屬於失當行為，又或屬於第172(1)(*a*)至(*f*)條所載列的行為，如果並無文件記錄曾進行這些活動，證監會是否有權憑表面證據或環境證據，強制被調查人士必須作出解釋呢？因為當有關人士被控干犯其他罪行時，他們不一定需要作出解釋的。

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

I do not quite understand why you say it is not documented. Maybe the translation was not coming through.

Chairman:

Well, something can be done without documentation. That something will force it into the category of 172(1)(a) to (f). That appears to the Commission that there are a lot of cases here. That may not be documented. That may not have been documented.

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

In the listed companies?

Chairman:

Yes. For example, there are some senior management. They have not documented certain activities. They try to plan, but they have not yet written down that information. It appears to you that it may have already been done through (1)(a) to (f) hypothetically. You have the power to ask them to give you records, but they do not have any records. You can prove it in circumstances where you feel you have already the circumstantial evidence that they have done something that forces them into category (1)(a) to (1)(f). Do you have the power to mandate the person being investigated to explain the situation?

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

Commission:

The power to ask - - I think in my experience that whether you have discussions that may lead to something, in general it would, in fact, be documented at some point in time; and there is an express power to ask questions as to the origin of the transaction. Let me just find it for you. It is "…to provide explanations as to the circumstances in which it was prepared or created; details of all instructions given". It is under 172(2)(a)(i) and (ii). It is on page C1859, at the top. In fact, to be quite honest about it, if there were actually no documents you probably would not be able to do very much about it, in any case. But as I said, my experience of having been an investigator in both the SFC and previously in the police, normally you would actually find that a document would be created at some point in time, for a transaction, because probably what they have been discussing would be put into something. If there were skulduggery beforehand, you could ask questions as to what happened in that transaction, to come to a conclusion on it. I would not have thought there would be any instance where you would not have a document at some point in time, because there has to be a transaction to come out of those discussions, to have an effect.

主席：

李家祥議員，我知道你亦希望發問問題，但容許我先行提出這問題。如果一些上市公司的職員知道公司發生了一些事情，而他們知道假如某些消息被披露後，便會影響公司的股價，在這種情況下，如果他們向部分stakeholders披露有關消息，證監會將如何處理呢？上述情況可能屬於你們以往所說的內幕交易，其實報章亦不時載有這方面的報道。舉例來說，如果在A君與B君交談後，便出現某隻股票被大量沽售或吸納的情況，而他們的行為本身並沒有任何紀錄，在這種情況下，如果證監會認為出現第172(1)(*a*)至(*f*)條所訂的情形，證監會怎樣對上市公司進行調查呢？

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

Without making any comment on anything that is in the public domain at the moment, I think the answer to your question is that really this would relate to share dealing, and if you had conversations within a listed company, where information was disclosed to a third party, and there was a movement in the share price that was indicative of malpractice, and that could be, say, related to a later corporate announcement, you would not use the provision under 172 to investigate. You would probably use the provision to obtain information about who is dealing in the share, which would be under 174. Then if you could find a connection to the company, or indications that there was a connection to the company, you would go under 173, which allows you to investigate market misconduct, which now includes insider dealing. I think you would be looking at your situation not as a listed company inquiry, but probably an insider dealing inquiry. Sorry, it should be under 175.

主席：

如果有關人士不作出解釋，可不可以是……條例草案第 175 條？該條文關乎調查，進行調查須得到財政司司長同意。你所指的是條例草案第 175 條嗎？

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

Under 175 it is the Commission that appoints an investigator. There is a residual power for someone who is not a Commission employee to be appointed with the consent of the FS. It is similar to existing law. It has never been used before. So 175: an investigator of the Commission is in fact appointed. It is identical to section 33. Under 175, you have got to be able to base an investigation on one of the grounds stipulated under (a) to (g), and then an investigator is appointed by the Commission. He then has quite wide-ranging powers. He can ask a person to produce documents, give explanations, answer questions. It is a wide-ranging power of investigation. We have had this power for a long

time, and in fact this is the power we have used in the past, in insider dealing cases, for example, to get audit working papers. It is very, very wide-ranging and this is the main power that we use. We do not use the 29(a), which is the equivalent of 172, very often, as we have emphasized.

Under the general power of investigation we can literally go to anybody and ask questions, as long as it is relevant to the inquiry; and in the circumstances where you saying there was no information, it is a question really of evidence. If you could find someone dealing in shares and that person then said: "Mr Director of A company gave me that information", and you get corroboration, you could still go on a case without documentary evidence.

Chairman:

My point is: if any person remains silent during the course of investigation, do you have the power to mandate him to explain?

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

Yes. A person cannot remain silent. Let me just try and find the provision. It is under 177: "A person is obliged to answer questions…". 176.

Miss Vivian LAU, Principal Assistant Secretary for Financial Services：

Chairman, I think a requirement is set out in clause 176(1)(c). 177 is about penalties.

主席：

And 176(1)(c). So based on 176(1)(c), 假如某人被調查.....

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

You have also got to read section 180 as well. Under subclause (ii), a person is obliged to provide or make explanations or statements, etc.

主席：

也就是說，如果證監會認為某類交易出現不尋常的情況，並有合理因由懷疑某公司／某人作出違規行為，證監會可強制被調查人士回答問題，對嗎？

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

That is correct.

主席：

李家祥議員。

Hon Eric LI Ka-cheung, JP:

I will try to quickly wrap up everything.

Chairman:

Do you want to go back to the auditor?

Hon Eric LI Ka-cheung, JP:

Yes. I am afraid so. It is just that I have to wait my turn. It should be quite quick. I hope I will sum up the audit profession's view very, very simply, by saying that the accountants are offering to help, but their working paper is essentially private property, obtained through other legislation. In this case I think we are recognizing the SFC's special needs, and we are willing to lower the threshold of the law. In other law it insists that they have to go through the court summons. In this case we are not. I think the legislator will understand that the SFC is a fearfully powerful organ. What the law has done so far is two things. One is to legitimize, actually spell out clearly, the vast power they have. Secondly, a gun has been put at the helpers' head. I think we try to help, but there is a gun at our heads.

I think from our point of view the accountancy profession really is making a plea to this committee to guard us against any possible abuse of power. I think there are two things we are requesting: one is to consider carefully whether we should be the subject of criminal offences, bearing in mind that we are already facing possible contempt of court and very severe disciplinary power for not complying. We are really not the culprit. We are just trying to help.

The second thing is to recognize the fact that all explanation given to this committee is not equivalent to law. It has no long-term or legal effect. I do not really need to explain all that. To help us to, in a way, formalize the checks and balances which they have talked about but not reflected in the law, it should first of all consider spelling out the review process committee's role and function in the statute. Secondly, we should ask the SFC – which I am now asking – to spell out all the procedures and the internal checks and balances in the code of practice, for us to review. I think that is the only sure way that we will have something on record, so we are clear that it is just not something that has been said, the law passed, and it is forgotten. Thank you.

Chairman:

Thank you, Eric. I think you make your point well. Any response from the Government?

Mrs. Alexa LAM, Executive Director and Chief Counsel, Securities and Futures Commission:

As we set out in the paper – and I am referring to paragraph 28 of the paper – we will not be concerned, but the offences are there as standard provisions in similar regulatory powers, both in this jurisdiction and other major international financial centres. The objective actually is to deter non-compliance and adapt it from the existing law. They are not targeted at auditors. They apply to any person from whom the SFC may request information under the clause. The most important thing is: if people do not comply with this provision, most of the time the SFC would go to the court to compel them to give the information. That is the first priority, because we need the information. We do not really want to put anybody in jail in that case. We really want the information, so we will go to the court.

主席：

Thank you. 余若薇議員。

Hon Audrey EU Yuet-mee, SC, JP:

Thank you, Mr Chairman. I think in Hong Kong we all need the police to help us to catch criminals and protect us against fraud, and all that; and there is no doubt that we need the SFC to police securities fraud and to help us to catch fraudulent directors, controllers, and things of that sort. But at the same time we also have organizations like CAPCO and

IPCC to watch over the police, and all that I think I have been asking is that we also have some independent organization, if possible, to have some form of check and balance, whether it be the court or the PRP. I think certainly consideration should be given to making that a statutory body, or alternatively to write it somewhere in the Bill, to say what are its functions, who are going to be appointed. Every time you talk about the internal procedures I am actually less concerned with people at the bottom, at the various steps going up. I am less concerned with people like that. I am more concerned with people at the top. We have no control over people appointed to head the SFC, appointed to important positions in the SFC.

As Alexa says, we are not talking about people who are now occupying this position, but when we are looking at bills we have to think of five years, ten years, maybe 50 years down the line. That is why I am more concerned with people who are going to be appointed at the top, and whether there are sufficient checks and balances for their wide powers that can be abused. I therefore agree with Eric LI's point, not so much with the audit working papers, but really with the PRP and whether in fact that could be an additional form of control, in addition to court, because it is sometimes very expensive going to court. What I would actually like to ask about is section 180, which is the rule against self-incrimination. Section 180(2)(ii) provides that the evidence which you obtain through the exercise of these powers we have been looking at cannot be admissible in evidence for civil or criminal proceedings instituted eventually under Part XIII. Is this new, or is this an extension of the original powers?

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

It is an extension. Basically you have in the existing law, a similar provision that extends to the Insider Dealing Tribunal. Now, because you have the Market Misconduct Tribunal, it will effectively become the new Insider Dealing Tribunal with extended responsibilities for dealing with market manipulation and similar-type offences. It really is just an extension as far as that is concerned.

Hon Audrey EU Yuet-mee, SC, JP:

Yes. Can you again similarly give us some background or some illustration as to why you need that extension? It again is a question of balancing. On the one hand you like to help people who have been defrauded. On the other hand you want to protect the subject matter of investigation. You want to protect defendants, because the rule against self-incrimination is of course a very hallowed rule that certainly common law lawyers like to observe as much as possible. Can you explain why that has got to be extended? What are the difficulties you experience?

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

We have Part XIII and Part XIV, which basically deal with similar conduct. Part XIV makes various types of misconduct criminal, and Part XIII allows for it to be dealt with by the Market Misconduct Tribunal, using the civil standard of proof; and the penalties have been designed so that it is human rights friendly. Basically as far as Part XIII is concerned, there is always a difficulty with obtaining evidence to the criminal standard. So by putting it to a tribunal where the civil standard is being used, this allows us to use basically more information that we could not actually produce under a criminal prosecution. As far as the extension is concerned to criminal offences under Part XIII, this is basically an extension of offences that were under the Insider Dealing Ordinance, and it is for such matters as giving false statements to the Insider Dealing Tribunal. There is the creation of a new offence, from memory, in relation to not complying with orders. So the information that has been obtained under investigation could in fact be relevant to the prosecution of those types of offences. It is really the sort of perjury and similar-type offences.

主席：

第179條關乎向香港以外地方的規管者提供協助。第179(5)(*b*)條訂明，該等在香港以外地方的規管者必須受足夠保密條文規限。也就是說，其他地方的證監會如要求香港證監會提供協助，以便他們進行調查，香港證監會在取得有關文件後，把有關文件交給該等規管機構，該等規管機構必須遵守一些保密規定。究竟怎樣的保密規定才算"足夠"呢？他們可以在甚麼情況下，披露透過香港證監會所獲得的資料？他們可將有關資料用作何種用途？我們可獲得甚麼保證？

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

This is in fact existing legislation, and when we enter into, say, a Memorandum of Understanding with overseas regulatory authorities, one of the main things we have to look at is whether or not their secrecy provisions have similar restrictions to what we have under our legislation. Every time we look at entering into an agreement with an overseas regulator, we always ask for their legislation to see what use that information can be put to, whether or not they have adequate checks and balances on the use of it.

Primarily we pass information to overseas regulatory bodies for the purpose of them taking administrative action within their own jurisdictions against persons they license there; and it is part of the globalization of the markets, where basically we are getting markets now where there are no borders, and there has to be this co-operation to ensure proper conduct. As far as criminal matters are concerned, there are checks and balances that we cannot pass information to them, if it is going to be used in the criminal prosecution. The primary object is really for them to perform their function. It has to relate to them performing a function. We cannot use it if a person claims privilege in a statement. If they claim privilege we could not pass that statement to the overseas regulatory authorities for criminal prosecution.

主席：

假如被調查人士向香港證監會提交了一些資料，而其後海外的證監會要求香港證監會提供協助，香港證監會把部分資料交給海外的證監會。請問在這種情況下，被調查人士會否知道香港證監會將哪些資料提供給海外的證監會呢？

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

When we do a direction to exercise the powers to assist an overseas regulator, again you would have to go back, I think, to 175. You would have to actually exercise the power under 175(1)(g), and as part of that process, when the direction is actually written, the exercise of the power has to be one of the similar matters in the earlier sections of 175. We have to evaluate that as well. So basically it has to be a similar type of matter that we could investigate. The overseas regulator has to meet the criteria for assistance, which includes secrecy, and in the direction the person would be under no illusion as to why we were exercising the power, because we would basically be saying "We are exercising this power to look into the matter for an overseas regulator in relation to X, Y, Z law of that jurisdiction, which is similar in nature to the other matters we can investigate in our own jurisdiction". So a person would certainly know why we were investigating it.

As far as the use of information is concerned, when an overseas regulator requests us for assistance, as part of the MOU agreements they have to stipulate the purpose for which that information will be used. We have to consider that on a case by case basis.

主席：

條例草案第179(5)條提到，海外規管機構的名稱會在憲報內刊登。證監會是否已經與所有在憲報刊登的海外規管機構簽訂MOU？

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

Commission:

At the moment I think we have, from memory – I have a list here – 33 MOUs in existence, where we have gazetted. At the moment there is gazettal both for investigative assistance and just normal liaison. I can certainly provide you with a list of the jurisdictions where we have MOUs, if you would like it.

主席：

政府可否告知我們，為何當局不透過附屬法例，列出證監會將會協助的機構？根據第179條，證監會將會向一些機構提供協助，並且已經與有關機構簽訂MOU。由於證監會不會每月與該等機構簽訂MOU，而直至現時為止，證監會只與30多間機構簽訂MOU，那麼為何不透過附屬法例，列出證監會將會協助的機構呢？

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

I think, Chairman, it is just because you do not enter into an arrangement with another jurisdiction. You enter into an arrangement with a regulator in another jurisdiction, and the identity of the regulator changes, and so on. That is the context of the memorandum of understanding. I think it has really been approached in the context of gazette for greater flexibility, greater speed, rather than amending schedules. There is nothing more to it than that, in the past.

Chairman:

You put all the lists of the overseas regulators in the schedule, and every time you add or you delete, you can amend the schedule. By never varying them, would it be clearer to the people?

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

I suppose in the sense that it would be more transparent as to the accumulated list, that is right, and I do not think it adds a great deal in terms of procedure. If it is a matter where the schedule can be amended by the Commission passing the regulation, in effect, which is a negative rebate in the sense that you use, I do not think it makes much difference.

Chairman:

I would appreciate that if you interpret the law, there is a schedule; there is a negative vetting process. This is not too much controversial but it looks to me as if it would be more transparent.

各位同事有沒有其他問題？若暫時沒有其他問題，我想知道證監會有沒有與中國證監會簽訂MOU？

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

Yes. We have an MOU for information-sharing with the CSRC.

主席：

我想問關於境外執法的問題。舉例來說，內地的公安在香港無權執法，那麼海外的證監會若需要進行調查時，他們是否有權在香港進行調查工作？我並非單指中國證監會的情況。我希望知道，一般來說，海外的證監會是否有權在香港進行調查工作？

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

I think the answer is that when you talk about the CSRC and any other regulator, there are two types of information-sharing arrangements. One is for pure information-sharing of what is already in existence on the SFC files, and the other is where you can exercise the investigatory powers of the Commission at the moment under section 33 or under 29(a). That is usually on the basis of reciprocity. As far as the CSRC is concerned, it is purely an information-sharing MOU, because they cannot assist us in investigation. They do not have the power of investigation, so in fact we have not got an investigatory assistance MOU with them.

As far as other jurisdictions coming to do investigations in Hong Kong are concerned, if they have arrangements with us for investigatory assistance, and their particular request meets all the requirements of legislation, we would do the investigation on their behalf. There are a few occasions where in fact people would be willing to be seen on a voluntary basis in Hong Kong; and in fact we have done the same where people are willing to see us on a voluntary basis elsewhere. As long as that is purely on a voluntary basis, and as a matter of courtesy we are informed, those people are in fact exercising their own right to see these people themselves, as individual members of our community. It does not often happen, but you can in fact have people assisting on a voluntary basis.

主席：

我仍然未能完全瞭解箇中的運作情況。讓我列舉一個簡單的例子，假如某隻股票同時在香港及中國掛牌，並且同時在兩地進行交易。當中國證監會或香港證監會需要在香港或中國進行調查工作時，在執法權力方面是怎樣分工的？

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

Commission:

We have not, as far as I can remember, had a case like that. I can understand why you are asking the question, but if the share, for instance, is listed in Hong Kong, we would be exercising our powers separately, and they would be looking at it separately from their point of view. We would not be able to exercise our powers purely to help them in their investigation. It would have to, at this point in time, probably be two distinct investigations.

Chairman:

May I ask more directly? For example, the Chinese Securities Commission: do they have power to come to Hong Kong to investigate companies listed in Hong Kong or listed in China?

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

No.

Chairman:

No, absolutely not？

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

No.

Chairman:

They must go through SFC?

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

Well, it depends who was looking at what, but again, as far as I am aware – and perhaps you could correct me if you think I am wrong on this – they would have no powers to come and exercise their powers under the one country-two systems. If there was any arrangement – I am not too sure whether they have other regulatory authorities – they would certainly have to meet the requirements of those other regulatory authorities if, say, they were looking at matters in Hong Kong.

主席：

首先由胡經昌議員提問，接著由涂謹申議員發問。胡經昌議員，你是否希望跟進這問題？

胡經昌議員：

是，我希望跟進這問題。

主席：

OK。首先由胡經昌議員提問，接著由涂謹申議員發問。

胡經昌議員：

關於傳送資料方面，請政府告知我們，有關的程序如何？也就是說，如果某規管機構向證監會索取某人的資料，證監會是否只會在有足夠的資料證明該規管機構正進行調查，以及該等資料能夠協助該規管機構進

行調查的情況下，才將有關人士的資料交給該規管機構？此外，由於香港制定了《個人資料(私隱)條例》.....

主席：

Privacy與secrecy是不同的。

胡經昌議員：

主席，我現在正處理一宗個案，這只是一宗本地個案，並不涉及海外的規管機構。在該個案中，證監會是不會將有關資料交出來的。請問當海外的規管機構向證監會索取有關資料時，證監會會怎樣做呢？證監會是否應該在傳送資料的程序上訂定一些監控措施，避免隨便將有關資料交給其他規管機構？

主席：

涂謹申議員，由於會議尚餘5分鐘便結束，你首先提出問題，然後政府的代表一併作出答覆，好嗎？

涂謹申議員：

好。

主席：

那麼你首先提出問題，然後由政府的代表一併作出答覆。

涂謹申議員：

主席，關於資料傳送的問題，這部分載述把資料轉交給執法機關或監察者的情況。也許很多人並沒有留意到，現時銀行將IT base轉移到國內，其實很多資料也送往國內。立法會較早前舉行會議以聽取公眾對採用智能式身份證的意見時，IT界的專業人士認為亦應留意這方面的事宜，這題目與我們現時所討論的有一點關連。

關於第 179(5)條，獲證監會協助的海外規管機構，必須符合第(*a*)及(*b*)段的規定，也就是說，該等規管機構執行的職能，與證監會的職能相若，即負責進行監管工作。此外，該等規管機構受足夠保密條文規限。其實當中所涉及的事宜十分複雜，因為這關乎兩地機構的執法問題。條例草案規定該等規管機構必須受足夠保密條文規限，這是否足夠呢？是否應該訂定其他規定呢？舉例來說，是否需要考慮有關地區的法治水平？議員在討論移交逃犯的問題時，曾對此表示關注。

我希望提出的第一個問題是，現時在憲報刊登的機構，哪些海外機構……

主席：

政府的代表已答應向我們提供這方面的資料。

涂謹申議員：

第二，政府認為是足夠的保密條文，實際上是否真的足夠呢？我們是否需要考慮有關地區整體的法治水平？如果需要考慮的話，這會否令中國證監會陷於困境？若會，問題便出現了，因為香港與內地的關係複雜，兩者又緊密結合。這令我感到很困擾，我們怎樣才能確保有關機構遵守保密條文呢？條例草案訂明該等規管機構必須受保密條文規限，這只是一項規定。有關機構是否遵守該項規定，又是另一回事。

主席：

政府的代表可否作出整體的答覆？

財經事務局首席助理局長劉利群女士：

主席，由於委員剛才提到保密條文的問題，我希望首先就這方面作出回應。其實有關保密的條文並非載於這部分，而是載於第XVI部第366條。該條文規定，證監會須將在履行其工作職務過程中所取得的資料保密。在一些情況下，證監會可以.....

主席：

我們所關心的，並非香港證監會如何處理所取得的資料，而是海外證監會的情況。

財經事務局首席助理局長劉利群女士：

條例草案訂明，證監會可以在一些情況下將資料交給海外的規管機構，協助該等規管機構執行職務。其實證監會在有關過程中亦會考慮一些問題，例如證監會向該等海外規管機構透露這些資料，是否符合投資大眾的利益或公眾利益？又或證監會向該等海外規管機構披露這些資料，會否一方面使該等規管機構能夠履行本身的職務，同時又不會違反投資大眾的利益或公眾利益？事實上，條例草案的條文亦有提到這些考慮因素。

主席：

Are these all the answers？涂謹申議員。

涂謹申議員：

政府必須仔細考慮公眾利益這一點。此外，我亦想跟進主席剛才所提到有關調查方面的事宜。我們從蘇志一個案知道，警方及廉政公署與內地當局已就這方面訂定有關安排，如果內地當局需要來港調查案件，他們必須先向廉政公署及警方通報，也就是說，必須經相關的對口機構。現時香港證監會與中國證監會有否就這方面達成協議？舉例來說，假如國內的一些執法機構需要來港進行調查，他們或會把有關案件當作貪污案件進行調查，這是否屬於警方及廉政公署與有關方面所簽訂的 memorandum 的涵蓋範圍？如果證監會並沒有答應過 ICAC 及警方.....

主席：

OK，我明白。當我參閱這條例草案時.....

涂謹申議員：

主席，請容許我提出我的意見，某些人或會特別害怕內地的公安部或檢察院，但某些在內地開設的香港投資機構最害怕的，可能不是內地的公安部，而是中國證監會。所以，現時有否備忘錄訂明中國證監會調查人員一定不能夠在香港進行調查呢？眾所周知，中聯辦其中一名副主任專門負責監督所有中資機構的運作。如果需要進行調查時，有關的調查工作經證監會進行，或是由內地當局以威嚇手段獲取有關資料呢？對共產黨來說，這做法可能並無不妥。一國兩制應怎樣定位？我認為應清楚考慮這些問題。

主席：

我相信有關規定是清楚的，只是我不清楚該等規定吧了。

財經事務局首席助理局長劉利群女士：

主席，我們剛才所說的諒解備忘錄，即證監會與世界各地海外規管機構所簽訂的諒解備忘錄，大部分條款的內容關乎兩者怎樣分享資料。關於調查權方面，我可以肯定地說，MOU不會處理有關調查權的問題。在香港的法律架構下，海外的規管機構無權進行這類調查。舉例來說，海外的規管機構無權入屋進行調查，因為香港法例並沒有賦予該等規管機構這項權力。如果海外的規管機構打算在香港進行調查，他們必須經證監會，由證監會根據《證監會條例》所賦予的權力進行。

涂謹申議員：

政府現在所說的，是另一回事。即使以蘇志一個案為例，問題的關鍵並非在於內地執法機構強制他人作出某項作為。任何人均不能以作為公安人員或中國證監會人員的身份為理由，要求香港證監會提供資料。如果內地執法機構在香港強制某人作出某項作為，該人可以報警求助。我所提出的一點是，任何人均不能以作為中國證監會人員的身份為理由，來港調查有關中國證券法律的事宜，這違反一國兩制的原則。如果諒解備忘錄並無這方面的規定，便存在漏洞。蘇志一個案涉及公安部與ICAC的問題。現在所說的，是證監會與其他調查機關就調查範圍所簽訂的諒解備忘錄。諒解備忘錄怎能夠沒有訂定這方面的規定？

財經事務局首席助理局長劉利群女士：

主席，我不認為在證監會與海外規管機構簽訂的諒解備忘錄中，需要處理這方面的事宜。

主席：

政府可能認為並無需要……

涂謹申議員：

主席，如果某人自稱是中國證監會的人員，該人前往一間中資公司，表示需要就某項事宜進行調查，你認為這做法是適當嗎？如果內地的公安部這樣做的話，警方認為這做法並不適當，因為無論內地的公安人員有否在香港入屋調查或拘捕任何人士，內地的公安人員並不能夠在香港以作為公安人員的身份，作出這樣的作為。這是由於內地的公安人員需要通知警方，並由警方詢問該名香港市民，如果內地的公安人員來港替他錄取口供及索取資料，他是否同意這樣做。我們現在所說的，並不是強制他人提供資料的情況。即使有關人士自願提供資料，也不可以這樣做。

主席：

我剛才提出的問題是，本港與證券有關的法例有否訂明禁止其他海外規管機構，例如美國證監會就某些行為在香港進行任何形式的調查？我們首先不要談中國證監會的情況。

涂謹申議員：

都不應該！都不應該！

主席：

知道，知道。我明白你的問題。海外的規管機構如要在香港進行調查，他們必須預先通知證監會，又或必須經證監會進行調查。請問香港的法例有否訂明這一點？一如涂謹申議員所說的，可能會出現以下的情況：中國證監會向有關公司表示，他們並非執行本身的權力，只不過是希望索取一些資料，有關公司可選擇是否給予中國證監會有關資料。事實上，我們認為不應該作出這種作為。請問法例有沒有這方面的保證？

財經事務局首席助理局長劉利群女士：

主席，政府會依法辦事。如果立法會所通過的法例並無授權海外規管機構在香港進行有關活動，那麼該等規管機構便不可以這樣做。我們的做法並不是在條例草案內訂明禁止這樣做。

主席：

如果某間機構被美國證監會或中國證監會查問，該機構可否作出投訴？該機構可向哪個部門投訴？在作出投訴後，該機構有甚麼方法可以證明美國證監會或中國證監會來港向該機構索取資料？

財經事務局首席助理局長劉利群女士：

主席，關於你所提出的問題，其實不單是海外的證券規管機構，如果任何人在欠缺法律基礎的情況下，在香港以威嚇手段或其他方法強制其他人作出一些事情，這是違法的。若是違法的話，當然會根據有關法例的規定處理。

主席：

涂謹申議員。

涂謹申議員：

主席，如果政府的代表未能理解我們所說的情況，他們應該與警方探討此事。我們所說的，並不是海外規管機構在香港強制某間公司交出資料的情況。如果海外規管機構強制某間公司提供資料，該公司可報警求助。然而，如果任何人以作為公安人員的身份在香港進行調查，警方認為這樣做是不對的，因為違反了警方與內地公安部所訂的規定。該人不能夠來港向有關人士聲稱是公安人員，然後向該人索取資料，即使該人很有禮貌地

索取資料也不行，因為他首先需要透過警方進行聯絡工作。這是警方告訴我們的。

ICAC亦表示，有關人士不得在香港以作為中國檢察院人員的身份，向香港的公司表示正調查一宗在內地發生的貪污案件，並懇求該公司提供一些資料。他們亦需要透過廉政公署作出安排。

請政府告知我們，有關人士可否在香港向某機構表示本身是中國證監會的人員，懇求該機構跟他合作呢？若該人不可以這樣做的話，證監會是否應該與中國證監會簽訂諒解備忘錄，訂明有關事宜必須經香港證監會處理？

香港證監會應與中國證監會簽訂這樣的諒解備忘錄，亦應與世界各地的規管機構簽訂有關的諒解備忘錄。FBI及負責緝毒的機構亦與香港警方簽訂有關的備忘錄。

主席：

鑒於時間所限，而且委員會在下次會議亦有時間繼續討論條例草案第VIII部，讓我們在下次會議繼續討論這方面的事宜。當我看完條例草案這部分時，我心裏也有一個疑問，就是不同地方的證監會在權力分工方面是怎樣安排的？他們在香港進行調查時的情況是怎樣？如可以的話，請政府的代表參考廉政公署及警方與海外的執法機構所簽訂的備忘錄，然後作出比較，並在下次會議告訴我們有關情況。

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