立法會
Legislative Council

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

Verbatim transcript of meeting
held on Friday, 4 May 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 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 Eric LI Ka-cheung, JP Dr Hon David LI Kwok-po, JP Hon Bernard CHAN Hon Jasper TSANG Yok-sing, JP
Clerk in attendance	**:**	Mrs Florence LAM Chief Assistant Secretary (1)4
Staff in attendance	**:**	Mr KAU Kin-wah Assistant Legal Adviser 6 Ms Connie SZETO Senior Assistant Secretary (1)1

主席：

現在開始會議，我們今天所討論的是《證券及期貨條例草案》的第XII部及附表9。委員會秘書已於4月25日將相關的文件派發給各位。而法律顧問亦已呈交了一份LC Paper No. CB(1)1113/00-01(01)的文件。政府已就業界給予的回應擬備了CB(1)1128/00-01(01)號文件。此外，秘書處已發出經修訂的工作時間表，5月16日、5月21日及5月30日的會議均有所調動，希望各位留意。

區小姐，請問是由妳還是由Mr DICKENS先為各位作出解釋呢？

財經事務局副局長區璟智女士：

我先向各位作出一個簡單的解釋，然後再請Mr DICKENS向各位作出詳細的解釋。我們今天所討論的是《證券及期貨條例草案》第XII部。第XII部主要是為一個新投資者賠償安排提出一個法定的架構，我要強調是一個“架構”，細節要在將來的附屬法例再制定。有很多市場人士也會問為何不一併制定呢？問題是沒有一個架構，基金沒法成立的話，細節也沒法制定。所以我們現在首先安排在《證券及期貨條例草案》主體法例中先有一個架構，但為了節省時間，其實證監會於3月份已就賠償安排的細節，同步進行一個諮詢的工作，稍後我也會請Mr DICKENS為各位介紹最新的諮詢工作進度。這個諮詢工作的結果，將來可以協助我們制定一些附屬法例。當然，制定附屬法例也會有一個詳細的諮詢過程，亦會提交給立法會討論。

我向各位強調，第XII部是綱領性的條款。讓我向各位提供一些背景資料，現時證券及期貨市場有兩個賠償基金，在聯合交易所有聯合交易所的賠償基金；在期貨市場有商品交易所賠償基金。這兩個基金的資金來源，一小部分是來自聯合交易所參與者以前所繳付的保證金；大部分是來自法定市場的交易徵費。現時的法例安排是：如有失責的情況出現，無論有多少名客戶，每名股票經紀的賠償上限金額為800萬元。期貨經紀的賠償

上限金額為200萬元。這個制度的問題是，作為一名投資者，不能清楚瞭解代我投資的經紀行若出現問題，我將會獲得的賠償金額是多少，也不知自己有甚麼保障。今次的法律改革中，我們會建議彌補現有制度的不足之處。

新的賠償建議有數個主要目的，剛才我也曾提及，現在的賠償程度並不清晰，我們希望根據這一點能作出新的安排，最重要是透過這些安排，可以提高投資者參與市場的信心。有見及此，我們建議為每一名散戶，我要強調是“散戶”，訂定每人可獲得的賠償水平。另外，我亦希望通過這個架構可以靈活地作出安排，為將來新的市場發展提供一些更適合的賠償細節，這是可通過附屬法例做到的。

在新的建議下，證監會會設立及維持一個新的投資者賠償基金。新基金的資金來源主要有兩部分：第一，現存的兩個賠償基金的剩餘的資產。我們建議，在把這些剩餘資產歸還給前經紀繳交的保證金後，所剩餘的金錢會轉往新賠償基金，經統計後現在大概有6億5千多萬元。但這個基金在遇上一些失責情況的時候是否足夠呢？我們覺得並不足夠。第二，我們希望增設一個市場徵費，通過這個徵費所累積得來的款項，便可將現有的資金滾存。

證監會也曾與一些專家商討，根據現時的市場情況及以往的歷史經驗，認為若這個新的賠償基金累積至10億元，大抵上應該可以處理一些突發的事情。當然，這個徵費暫停後也可以隨時再次啟動。視乎市場人士對賠償上限的意見，如認為這賠償上限太少而需要提高，可能需要累積多一些資金。剛才我也曾提到，希望有一個比較靈活的架構，將來可以隨著市場人士的需要而增加或減少上限。

在第XII部，我們也有一個細節上的安排，訂明在甚麼情況下投資者可以要求賠償。我們通過一些附屬法例，證監會在諮詢財政司司長以後，可以制定一些法定的規則，清楚訂明在甚麼情況下可以申請賠償。至於每人可獲得的賠償金額，我們建議行政長官會同行政會議通過一些法定的規

則決定賠償的上限。其實無論是通過市場徵費、賠償範圍，還是賠償上限的數目，也要通過附屬法例的形式來制定，這可隨著市場人士的期望、市場的發展而作出增減。所有這些規則也是附屬法例的一種，也要提交給立法會省覽。

新賠償基金的日常運作程序，例如：資金的進出、日常記帳等操作管理的事宜，證監會也希望有一個靈活的安排。在《證券及期貨條例草案》第III部建議證監會可認可一間或多於一間的投資者賠償公司，視乎實際情況而定，協助證監會處理一些日常運作的事宜。當然，如證監會決定認可一間投資公司為其處理管理基金的日常事宜，必須諮詢財政司司長。另外，如果把一些日常的工作、處理這些基金的工作交給一間公司去處理的話，這牽涉到一個功能上的轉移，因為如果不涉及這間公司，日常的工作便要由證監會自己處理。證監會必須就功能上的轉移得到行政長官會同行政會議的批准。

《證券及期貨條例草案》第XII部是希望設立一個架構，先立法，根據主體法例再訂立一些附屬法例，我們希望附屬法例的進程盡快可以完成，所以現在證監會已同步進行公眾諮詢，研究例如賠償限額、賠償範圍等等方面的安排，現請Mr DICKENS就法律條文向各位解釋，及就將來的附屬法例而進行的諮詢工作的最新進程向各位匯報。

Chairman:

Mr DICKENS.

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

When you look at Part XII you need to read it with Schedule 9, in particular clauses 72 to 74; and also, as Miss AU said, with Division 5 of Part III, which provides for the

functions you see in this Part. It is described as belonging to the SFC. "…to be transferred to one or more recognized investor compensation companies". But the principles will remain the same. So just looking at Part XII, clause 228 has some very basic interpretation provisions. Clause 229 provides the establishment of a single investor compensation fund. Clause 230 provides that the funds shall consist of any money paid under rules to be made by the Chief Executive under section 236. Amounts paid in under clauses 72, 73 and 74 of Schedule 9. Those amounts are amounts paid from the existing two compensation funds Miss AU referred to, after allowing for the repayment of deposits paid by the exchange participants of the existing exchanges, and after making allowance for outstanding or possible claims against the existing compensation funds.

That will be the main source of funding for the new compensation fund. We estimate, as Miss AU said, that there will be about $650 million, or maybe a little bit more, coming from that source, after allowing for deposits and outstanding existing claims. The other money in the compensation fund consists of money we recover by exercise of our subrogation rights under clause 235; and there is an equivalent clause 87, which is in exactly the same terms, for the subrogation rights and investor compensation fund.

There is also provision for borrowing under clause 230(2), and the compensation fund to also include the interest or profits on investments of the fund. Under subsection (2) the commission may borrow for the compensation fund from an authorized financial institution, but it requires the consent in writing of the Financial Secretary to do so. Clause 231 provides that the money shall be paid into accounts with authorized financial institutions. Clause 232 sets up a proper accounting and auditing system for the fund, and in particular provides for the maintenance of sub-accounts in relation to various sectors of the securities and futures industry. It is proposed at this stage that there would be separate accounts in relation to the funding coming from the old Stock Exchange Compensation Fund Scheme and the old Futures Exchange Compensation Fund Scheme, and any new money coming into the fund from the levy we propose, so that we will be able to keep track of whether too much is being paid out on the futures side, and something needs to be done there; or too much is being

paid out on the securities side, and something needs to be done there.

Clause 233 allows the Commission to invest money basically either on deposit with a bank or in authorized trustee investments, and provides that any return on those investments is part of the fund. Clause 234 provides the payment out of the fund of the legal expenses of the fund, the expenses in managing the fund, the expenses – and this is a new provision – in obtaining any insurance, surety or guarantee in respect of claims for compensation. It provides for the payment of interest on any sums borrowed, and it also provides not for the payment of claims but for the payment of interest on claims for compensation.

Clause 234(2) needs to be read with clause 72 of Schedule 9. The basic scheme there is that the Commission is to make provision for the return of the deposit money paid by the existing exchange participants, and for outstanding claims in the existing compensation fund. It then pays the balance into the new compensation fund. If it turns out that there are more claims under the existing compensation funds than were allowed for, money can be transferred back from the new compensation fund into the old compensation fund; but it is not allowed to be more than was transferred in the first place. You find that in subclause (3). Sub-clause (4) needs some re-consideration. It provides for the unlikely event that the new compensation fund is dissolved, and provides a default provision where the money may, in the absolute discretion of the Commission, be paid back to the existing exchange companies.

Clause 235 provides the subrogation of the Commission to the rights of claim that the fund has paid out; and in clause 235(1)(a) has been the subject of recent interpretation in the Forluxe case, and says that in the situation covered in (a) the Commission shares pro rata in any recovery with the investor it has paid out. We have given an example of how that works out in the consultation paper. Clause 235(1)(b) provides for the Commission to have priority over claimant, and the claimant cannot be paid out in a bankruptcy until the compensation fund has been reimbursed. In the light of public comments, we believe that this clause needs to be re-considered so that the Commission is put on an equal footing with the claimant and loses its priority over the claimant. That is also consistent with the

approach taken in the Forluxe decision. But we think that approach should be general in relation to all of the Commission's existing rights of subrogation. Clause 236(1) completes the framework that Miss AU was referring to. It provides for the Chief Executive in Council to make the major rules about where the fund money comes from, the maximum amount of compensation that may be paid out, what sub-accounts have to be kept by the compensation fund; and a general provision for the better carrying out of the objects and purposes of this Part.

Sub-clause (2) gives the Commission powers to provide for the circumstances in which a person is entitled to claim, the manner in which a claim must be made, the payment of costs of, and incidental to, the making and proving of a claim for compensation, the payment of interest, the documents to be supplied in support of a claim, who is not entitled to claim, and so on.

If I could take you to clause 72 of Schedule 9, which is in the same terms as clauses 72, 73 and 74, it provides for the transition to the new scheme. The essential mechanism is that once the Bill has come into force, the Secretary for Financial Services can specify a day as the appointed day. From that day, claims against the old fund, with some exceptions, cannot be made, and all of the claims are made against the new fund. So the mechanism that is provided there is that on or after the appointed day, we advertise for claims against the old compensation fund. They are to be made within 3 months of the notice, or 6 months of becoming aware of the claim, if we have not published a notice. A claim is dealt with under the old legislation, but the Stock Exchange does in fact have discretion to allow a claim out of time, and you will recall that there is provision for paying money back from the new compensation fund, to the old compensation fund, if necessary. That is one circumstance in which that might happen, where a claim happened out of time, and we have depleted the old funds; we might still have the need to put money back in the old fund to meet out-of-time claims. Basically once all of that is done, and all the claims under the old compensation fund have been dealt with, and all its outstanding liabilities have been paid, the Commission then repays the deposits made by existing exchange participants back to the exchanges, and

takes any residual balance into the new compensation fund. If it turns out that a claimant cannot be found, we keep the money for 3 years on his behalf, and at the end of 3 years the money goes into the new compensation fund. Similar provisions apply to the Futures Exchange Compensation Fund and the Dealers Deposit Scheme. That is basically the legal framework in the Bill.

The Commission published a consultation paper in March, on how it proposed the new scheme should work. Basically the paper said a number of things. It said the ambit of the existing schemes should be expanded to include all claims made by people dealing through licensed or exempt persons under the Bill, in products that are traded on HKEx, whether securities or futures products.

So it expanded the scheme to cover non-exchange participants, and in particular to cover exempt AIs. The proposed limit per investor was $150,000, and the paper, after discussing various funding options and the likely expenses of the new scheme, recommended that in addition to the existing $650 million that is going to be paid from the old compensation fund to the new compensation fund, the new fund should aim to reach a level of $1 billion as quickly as reasonably practicable, and that there should be an increase in the existing transaction levy of 0.002 per cent, to enable that goal to be met. The mechanism is that the money would be paid into the existing compensation fund pending the Bill coming into force; and once we get to the appointed day we take that money and we put it in the new compensation fund.

Eleven comments were received on the consultation paper. With the exception of two individual broking firms, there was general overall support for the new scheme and for the investor compensation company. One of the broking firms, a large investment bank normally referred to as a member of nine – but this was an individual submission – thought that instead of a compensation scheme, we should have a mandatory private insurance scheme for the whole industry. Another broking firm suggested an alternative scheme where the funding did not happen by way of a levy on market transactions, which is what we have

proposed, but happened by reference to the assets held by broking firms – what we call "covered assets" – and after allowing for the difference between settlement and custody risk. We think both the insurance alternatives were considered, and we considered it impracticable to provide industry-wide coverage from the very basic level. One of the reasons why compensation schemes like this exist here and overseas is that the risk is too great for an insurance company to cover at a reasonable premium. Once you have provided for a basic level of investor coverage, then, as we point out in the paper, firms find it easier to get insurance for the remaining risk, because the baseline risk is already covered by the compensation scheme.

Six of the eleven respondents specifically supported the expanded coverage, including exempt authorized institutions. None opposed the expanded coverage, although there was one comment that because everyone would be in the same compensation fund, it would lead to increased competition between brokering firms. All firms would be on a level playing field so far as availability of compensation is concerned, whereas at the moment the existing compensation fund covers only exchange participants.

Three respondents expressed concern over moral hazard. We have considered this very carefully, and we think the moral hazard, while present in any compensation scheme, is not significant. From the point of view of the individual investor, he is only covered for $150,000, and he is taking the risk above that. Secondly, although we hope the scheme will be able to pay out within 6 months of a claim being made, he suffers the inconvenience and delay of not having access to his money for the period until a claim is paid out. Both of those are incentives for him to try and select his broker carefully. In terms of moral hazard for the industry as a whole, the industry no longer regulates itself, so that broker A is no longer in a position to help control the risk in relation to broker B, as they were when they were a mutual organization, self-regulating through the Stock Exchange. The moral hazard there is eliminated by the SFC's licensing system, its Financial Resources Rules, its inspections, and so on.

Another comment, again on the subject of moral hazard, was that the moral hazard might increase if brokers were not liable to contribute to the scheme, as in fact they currently are. Again, we think that is a little bit misleading, because the brokers who have defaulted have basically already bet their firm, and got the bet wrong. We do not think winning or losing a few hundred thousand dollars already deposited in a compensation scheme makes any difference to the commercial decisions that particular firm makes. In relation to other firms in the same industry, as I have already pointed out, they can no longer help control the risk of another broking firm through self-regulation. There is now no self-regulation in the broking industry.

The comments were split on a subject we asked for specific comment on, and that is whether the scheme should cover overseas products as well as HKEX-traded products. Most of the respondents who responded on this question, including the Consumers Council, thought that this should not cover overseas products at this stage. Some – I think two respondents – thought that we should. What we have decided to do is, in the initial stages, to cover HKEX-traded products only, but the SFC will survey the broking industry to try and get a better understanding of just what the extent of retail involvement is in relation to overseas products, and what the risk is, and if necessary, come forward with proposals for expanding either this scheme, or putting up a parallel scheme to cover overseas products.

On the question of the $150,000 limit, there was some explicit support and none opposed it. There was one comment that the limit should be per licence. Now, under the new legislation, broking firms will only have one licence, but we agree with the principle that if a broking firm were to go down, then there should be $150,000 available on the futures side, in addition to $150,000 available on the securities side; and that is a question of how we draft the rules. So we agree with the thrust of it.

On the levy, there was one commentator who was explicitly supporting the market levy. One was concerned that it might affect trading volume. Frankly, we do not think so. There are tables in the consultation paper showing that the levy represents half a per cent of

the existing dealing costs; or putting it another way, it is one-fiftieth of the stamp duty cost. One thought that $650 million in the existing fund was enough, and there should not be a levy unless or until something went wrong. Again, this is a question of judgment. One billion is more than the existing scheme. It is less than the catastrophe scenarios in the consultation paper. It is a question of judgment as to how much provision you make that is prudent. Our judgment, after listening to our external experts, is that 1 billion is about the right starting level.

One comment thought that provision should be made for the scheme to take over the place of the existing Brokers Fidelity Insurance Scheme maintained by the Stock Exchange. We agree that something needs to be done about fidelity insurance industry-wide, and that subject is in fact under consideration by Mr PROCTER's division, which is currently holding discussions with insurers, with a view to coming up with an industry-wide fidelity insurance scheme that will cover not just exchange participants but industry participants in general. We do not think it is a topic that relates to the existing compensation fund. It is something that needs to be done. It will reduce the risk in the industry. The compensation scheme is the fallback after that.

Three comments – and I have adverted to this when I mentioned clause 235 – opposed the SFC subrogation rights. Now, as I said, under clause 235 and under the existing law, the SFC has a right to be subrogated in relation to any claimant who has been paid out of the fund; and clause 235(1)(b) gives the SRC a priority. We agreed partly with the comments, and we think that the SFC's priority should be removed, and it should share pro rata with the claimant in relation to any outstanding assets.

The other comments were that three and a half million seems a little expensive to run the investor compensation company. We have costed that, and we have set out the basis for the costing in the consultation paper. It is a skeleton staff organization, basically with clerks, run by a manager. We will have another look at the costing and whether it is better to keep the administration of the scheme in-house, as if it were an independent compensation

company, but I should say that the reason for preferring an investor compensation company essentially relates to two things. One is governance. If we have a separate compensation company we can have a different governance structure from the governance structure at the SFC. In particular, we can include industry representatives, specifically as industry representatives and public interest representatives. So it will have separate governance from the SFC. Secondly – and I hate to be managerial about this, but it is true – is focus. If you have a company that is just there to pay investors compensation, it will presumably be very good at paying investors compensation in a timely way. If you mix it up with all the other things the SFC has to do, then it may suffer from a lack of focused attention. So there are arguments for having a separate investor compensation company.

Another comment was that there should be an investor education programme. We agree, and once the scheme is more concrete, we will be making it a major part of the SFC's education campaign – that the scheme exists, how it works, how to make it claims, and so on.

There was one commentator who objected to a very subtle point which I apologize for boring the Committee with. But I think it deserves to be mentioned. Under the existing scheme, because it is a modification of a scheme which has an $8 million per broker limit, there is provision for no-one to be worse off than if that $8 million limit really applied. So since CA Pacific we have been paying $150,000. If you would have been better off under the $8 million, then we take the first $8 million that we recover, and we recycle it. So some people get a top-up payment in proportion to their losses. In the consultation paper we propose that that be scrapped, essentially in the interests of simplicity. So it is $150,000 or whatever you lost, whichever is the less, with no complications whatsoever. As I say, one person opposed that. The rest did not comment.

Some opposed the inclusion of institutional claims. In the consultation paper we said that the existing scheme already excludes exchange participants from being able to claim, and we propose to extend that exclusion essentially to cover all licensed persons, collective investment schemes, banks, the exchange controllers and so on. We still think that is right

because the scheme is basically a retail scheme. We do not think a payment of $150,000 is likely to be particularly significant to a fund management firm whose broker defaults, or to a bank, and we also think those sophisticated market practitioners – and we are talking institutions, professional investors – are in a better position to control their own risk and select their broker carefully, than the average retail person that we are trying to aim the scheme at protecting.

That takes me to the end of the public comments.

Thank you.

主席：

余若薇議員。

余若薇議員：

多謝主席。

可否簡單地說明15萬元的賠償額是怎樣設定的；設定15萬元這個數目有什麼原因？

此外，根據建議，現時有些資金將來會有一個公告，指定在某一天以後截止索償，特殊情況則除外。若非如此，這批人理論上應該有多少時間可以索償？在提出終止索償的建議後，他會有多少時間可以提出索償？雖然提到在一些情況下可以延期，但分別在哪裏？本來是有多少時間，而減少時間又有多少？你們建議何時截止？又會在哪一個情況下願意延長申索的期限？

多謝主席。

主席：

第一個問題是歷史遺留下來的。區璟智局長。

財經事務局副局長區璟智女士：

第二個問題是關乎過渡的安排，以及安排之下的酌情權或是靈活性，比如在發生不尋常事件的情況下。

第二個問題，稍後我會邀請Mr DICKENS向各位講解。

第一個問題主席已回應了一半；現在是按個別經紀訂定上限，市場與投資者都覺得不是很好的安排。1998年曾出現幾宗比較觸目的違責事件，其中一宗就是正達事件；投資者對現有的上限非常不滿。當時的法例容許我們比較靈活地更改上限，當時的安排是：每名投資者有15萬元的賠償，市場與投資者對這個安排似乎都接受。我們就以這個歷史經驗為基礎，在這次證監會進行細節上的諮詢時，也會向各位講解這個數目。我們一直接到的公眾意見都是普遍支持。當然，我剛才所提到的賠償上限將來須作為附屬法例通過。如果市場的期望或市場情況有變，或基金滾存了很多錢，這個上限其實可以有所增減，這裏是有靈活性的。因此，我們覺得不宜寫在主體法例上，寫在附屬法例上會比較適宜。

Mark, would you like to speak on the transitional arrangements?

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

So many little things; the historical experience is that $150,000 more or less worked. It was not terribly scientifically derived, but it seems to have been acceptable.

Just by way of interest, in the CA Pacific case, for example, 73 per cent of the allowed claims were paid out in full at that limit. There is a value judgment. If you have got more than $150,000, are you so rich that you should not be paid out in full? I mean, it works on that basis.

In terms of the transitional provisions, the existing legislation provides for the publication of a notice, in the same way as under the transitional provisions. They then provide a 3-month time limit for making claims, from that notice. So the transitional provisions are in line with that. If no notice has been published, then you have 6 months from becoming aware of the claim; and of course under that existing legislation that rolls forever, and it does under the transitional provision. The flexibility that is built in to the transitional provision is the same as under the existing law in that the Stock Exchange, which is the person who does the claim determination at the moment, has the ability to allow a late claim if, in all the circumstances, it thinks that is the right thing to do.

My colleague Mr GREINER can correct me if I am wrong, but I think late claims are very, very rare. In fact we have had no experience of them. The idea is to give so much publicity to the process of claiming that you pick up everybody; and the commercial reality is that the claims are in relation to firms which have gone bankrupt. Although theoretically you can make a claim in relation to a live firm that has committed a breach of trust, in practice that is not what happens. The bankruptcy of a broking firm is a reasonably public event, at least as far as its clients are concerned. That is the reason for picking those time limits. They have worked in the past.

主席：

余若薇議員請跟進。

余若薇議員：

多謝主席。

我明白15萬元是歷史的因素，正如剛才你提到“正達事件”也只有70多個百分比的人獲得15萬元的全部賠償額。其實有沒有考慮過：如果索償額超過15萬，會否按一個百分比作出賠償？這樣會否很複雜？你們有否考慮過這些賠償方法？

主席：

條例內會提到，在清盤後如果有剩餘的資產會怎樣分配。請政府再解釋。

財經事務局副局長區璟智女士：

其實所考慮的因素：第一是要滾存多少資金，因為這個是“用家自付”的計劃，影響投資者每個人都要供款。我們也要考慮個別投資者的負擔，在這方面取得平衡。

第二，剛才Mr DICKENS也有提到，雖然那個憂慮不是很大，也有市場人士向我們提出，如果賠償上限太高，道德風險也會相應增加，這也需要取得平衡。如果是一項行政安排，這個問題也會比較簡單。

主席：

我有些問題希望跟進。

我相信這個與deposit insurance scheme在概念有相似的地方。有些國家在釐訂deposit insurance scheme 時，會 from time to time 考慮賠償的數目cover大概有多少個百分比的客戶，其實這也是一個考慮的指標。比如我們的指標是可以cover 75%，若有這樣的指標，就算不是附屬法例界定，

而是一個政策上的界定，那麼這個銀碼，比如賠償15萬元是cover 75%的客戶，這個賠償額在未來兩三年後可能會跌至只 cover 70%的客戶。這樣可能有個相對的機制，觸動你需要把基金的銀碼加大，或將cover的客戶比例提升至75%。

視乎將來附屬法例的內容怎樣才可以令這個機制比較自動地調整，或者是可以觸動將來的賠償資金每隔一段時間要向經紀進行調查，瞭解客戶的平均投資額等等。

財經事務局副局長區璟智女士：

主席，我覺得這是一個很好的建議。

我們日後制定附屬法例時，也會參考這些有用的指標，就是怎樣制定，以及何時啟動檢討機制？根據數月來與市場溝通的經驗，各位都覺得水平是70%至80%，而且也與外國的水平相若。

主席：

金管局在制訂deposit insurance scheme 時也作出這樣的比較，阮先生的研究也是cover 80% 的客戶，賠償大概10萬元。

Mr DICKENS, will you supplement?

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

If I could just make a comment, historically the payouts have been around the 70 to 80 per cent mark. A client is paid in full. We have said in the consultation paper that we do think the amount should be reviewed as necessary, in particular in the light of claims

experience going forward. All of our sums for the new compensation fund scheme have been done on a highly conservative basis that assumes that the default rates going forward will be as bad as in the past, despite the fact that there have been a number of measures taken to reduce the risk, and the Bill will hopefully reduce the risk even further.

We are hoping that the payout experience will also be lower than appears, and that will allow some room to extend the compensation scheme. The only other two points I would make are: we are in favour of regular reviews, but by and large, this money, while important, is not as critical as people's savings bank deposits which are necessary to buy the groceries. This is, hopefully, not quite their grocery money. The other thing I would say is that normally when a broker has defaulted it is at a time of market stress, so the market is already low; and what happens is that the market goes up, so only 50 per cent of investors would be covered at, say, the $150,000 level, because all their investments have become more valuable. Then the market goes down again, and they turn back into 75 per cent investors. So you need to allow for the growth in the level of the market as well, when you do these reviews. But we did do the sums at the $200,000 level and the $250,000 level, to see if it would be viable. While it is not appropriate at this stage, it may well become appropriate going forward, in the light of a better claims experience.

主席：

何俊仁議員。

何俊仁議員：

主席，我希望提問的是：聯交所屬下一個委員會現時負責處理索償，以及決定那些索償是否得直。這個機制是否需要檢討？我始終覺得會有利益衝突：雖然錢是由徵款撥出，但聯交所的管理階層，始終會以比較保守甚至是很傾向於過分保守的方式處理索償。其實我覺得這個權力是否應該交回給SFC行使？

財經事務局副局長區璟智女士：

《證券及期貨條例草案》就是建議日後投資者的索償由證監會處理。

何俊仁議員：

請問是哪一條條文？

財經事務局副局長區璟智女士：

第234條，鄭先生有沒有補充？

高級助理法律草擬專員鄭劍峰先生：

第234條基本上訂明：授權證監會會同行政會議制定附屬法例。現在第XII部分只是提供一個就這些方面制定附屬法例的法律架構。

何俊仁議員：

主席，在這樣的情況下，將來制定附屬法例的時候，計劃讓誰來行使這個權力？因為我沒有聽說這方面會有改革，如果沒有改革，現時的機制就是要交回聯交所，我覺得這樣有點問題。各位是否同意？

財經事務局副局長區璟智女士：

第236條提到附屬法例。附屬法例涵蓋投資者日後在哪些情況下可以提出索償，以及賠償的上限等等。

第234條提到證監會有權從基金撥出一些款項做各種事情。我請Mr DICKENS詳細解釋日後在細節上的安排，如果有投資者遇到失責情況要求索償，那麼索償應該交由誰負責？由哪一個機構考慮？其中會否牽涉到議員指出的情況，即交由一個可能有利益衝突的機構處理？

何俊仁議員：

主席，我希望Mr DICKENS比較一下現時的情況，現在有關索償的決定確實由聯交所委員會作出，是否會有改革，又是怎樣的改革方法？

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

One of the major drivers of the new compensation fund was exactly the point made by the Honourable Member. There is a conflict of interest. Now, we do not say that the Stock Exchange has performed its duties badly; we think it has performed them very conscientiously, and in fact we supervise its performance of those duties. That said, there is a perception of conflict of interest, and one of the major drivers when we first mooted the idea of a new compensation scheme back in 1998 was to remove that conflict. The Bill only provides a framework, so it is a little bit hard to pick up, and you need to look at Division 5 of Part III. The idea is that there will be a new, independent compensation company that will be set up to determine the claims, within a framework laid down by the SFC and the Chief Executive in Council. That company, we plan, will have a board consisting of representatives of the SFC, a representative or more of the exchanges, a representative of the industry – because this is an industry-wide scheme now – and public interest representatives who will be the ultimate decision makers in relation to a claim, although most of the claims would, of course, be processed by professional staff in accordance with the criteria that we will be laying down in the rules.

The idea is to take the administration of the scheme away from the exchanges, to

remove that perception of conflict of interest.

Hon HO Chun-yan:

Would the decision made by the Compensation Board be appealable?

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

Yes.

Hon HO Chun-yan:

And if so, is it the same right of appeal, to the Court of First Instance?

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

The existing scheme provides an appeal to the Court of First Instance. What we would propose – and we are still discussing this with the administration – is that there be a better right of appeal; that there be a right of appeal to the Securities and Futures Appeals Tribunal. The reason for that is twofold. One, we think that is a more streamlined procedure. The whole idea is that that is a faster procedure; but there will be a judge and two industry members of that tribunal. There will be no worse right of appeal than under the existing scheme, and hopefully there will be a better one.

主席：

我有一個意見，由於將來可能有很多交易的渠道，請證監會在考慮制定附屬法例的時候，可否規定交易透過怎樣的渠道可以得到保障，例如

發出transaction receipt，列明哪些經紀是有保障的。有保障的交易可以寫清楚最高保障額是15萬元。例如我到一間美國銀行，銀行counter有一個牌，表示有FDIC的保障額10萬元，讓投資者較清晰地知道，經過這樣的渠道有這樣的保障。關於這個問題，我希望法例作出規定，以便投資者有選擇，我相信經紀也會支持的。

財經事務局副局長區璟智女士：

現在有一個簡單的構思，就是凡通過證監會監管或者金管局監管的中介人士而進行交易，這個投資者就受到保障。這個做法很簡單，只要查看這位人士是否獲證監會發牌便可以了。

主席：

那個角度是不同的。經紀或中介人士若可在主要交易文件內提到transaction是在這裏交易的，讓我知道結果，就無需向證監會調查。如果在法例內規定那些單據有這個保障，對投資者而言會比較簡單和容易瞭解。

財經事務局副局長區璟智女士：

我相信證監會可通過守則要求持牌人士這樣做。

Chairman:

Margaret.

副主席：

主席，我明白主體法例是成立一個架構，也就是提到一些最主要的事項，而那些細節、詳情則列明在規則內。但是，哪些事項才需要在主體

法例寫出來？我覺得剛才何俊仁議員所提的問題很重要，尤其應提出與過往的做法的分別之處，讓人知道不是由過往的機構負責和評審，而是由另一個獨立的組織或由證監會評審，這些事是不會改變的，是否都應該訂明在主體法例內？我覺得第234條的規定並不是很清晰。

財經事務局副局長區璟智女士：

我們會研究第234(1)(e)條可否再寫得清晰一點。該條訂明：證監會有責任根據本部訂立的規則訂出賠償額。我們可以再研究如何可寫得更清晰。

主席：

何俊仁議員。

何俊仁議員：

主席，我希望投資者可清楚知道保障的範圍。股票行如有過失，是否與現時的做法一樣，包括與股票行有關連的財務公司？

財經事務局副局長區璟智女士：

應該比現在的更為廣泛。現在包括交易所的參與者，日後再包括一些非參與者，而他們是獲證監會發牌提供中介人服務，以及銀行證券部的顧客。

何俊仁議員：

哪一條條文可以參考相關的範圍？

財經事務局副局長區璟智女士：

關於範圍的問題，正如我在開場白中曾經提到，隨著市場的發展，可能需要更新。關於第236(2)(a)和236(2)(f)條兩部分，我們建議通過附屬法例的形式清楚列明，在哪個情況之下，投資者可以提出賠償的申索。這種情況正是證監會在3月初就賠償細節發表的諮詢文件所得出的具體方案。現在我們正歸納公眾和市場各方面的意見，基於這些意見，我們可以開始訂定第236(2)(a)條或236(2)(f)條下的附屬法例的草擬方式。如果這個法例獲得通過，證監會有權力訂立附屬法例，下一步就會提交立法會省覽。

主席：

這就是我剛才提出的意見。由於包含的範圍比以前廣泛，不能每次都要依賴某人向證監會提問有關保障的問題。

財經事務局副局長區璟智女士：

最好開宗明義地說明。這是一個好的建議。

何俊仁議員：

主席，我希望再提出一點。當然現在還有一段時間才完成法例的審議，日後的諮詢文件若收集了意見並作出定論後，可否有一份文件讓我們知道附屬法例的內容？這個可以方便我們知道附屬立法的政策和目標。

主席：

有一個相關的問題，希望副局長日後在財經事務委員會可嘗試商討，就是現時強積金的推行，令很多人需要儲蓄與投資，但這些不是主動的儲蓄投資，也就是被迫儲蓄與投資。那些儲蓄與投資很多時候投資在一

些基金，而那種類型的保障，可能不屬investment compensation fund的範圍。我希望局長日後可在財經事務委員會研究這個問題。以前的基金投資者可能較sophisticated，自己能處理本身的財務管理，但現在所有人都因強積金而儲蓄，要投資在很多證監會的licensed product。在那方面的賠償或保障又如何？這範圍也相當大。將來如果真的出現問題的時候，可能都會再回到證監會。其實剛才Mr DICKENS提過可能會由fidelity insurance cover，但暫時不是這方面的subject，我借這個機會提到，希望日後在財經事務委員會上討論一下。何俊仁議員。

何俊仁議員：

主席，我還希望提出一個問題，可能不屬這個法例的範圍，但也是相關的，那是關於證券公司清盤的情況。

我相信局長也知道正達的清盤事件頗為複雜，在事件中怎樣去處理股票是一件複雜的事情，要邀請英國的專家和御用大律師到法庭提供意見，現在訂下了原則，發覺原來是可以分股票的，怎樣分也是很複雜的，最近有兩個案例也是採用不同的方案來分，一個是正達，另一個是Forluxe，由於案情有所不同，各自採用不同的方法分股票。

還有一點，以我所知，似乎英聯邦國家當中也不是有太多案例，甚至據破產處所說，這樣繁雜地去分股票，這差不多是第一個案例。我想知道，關於立法方面，有否參考過這些案例所遇到的問題，是否需要立法處理，還是由於已經有法庭的決定，政府覺得很滿意，會跟隨指引去做。抑或是覺得不應由這個法例處理，而於《破產法》處理呢？

財經事務局副局長區璟智女士：

對，是“Insolvency Law”。我不是專家，我不能回答這個問題。

正如你所說，一間公司清盤之後，清盤的資產怎樣安排是由法院決定的，有《破產法》或《清盤法》去指定，如果沒有案例可循的話，法官可能要考慮得更周詳，不能透過《證券法例》處理這個問題。我們只是做了第一步，無論清盤與否，不論可否取回金錢，現在最新的建議是先給你15萬元，如果其後能通過清盤的程序取回該公司所欠你的金錢，當然是最好，但那是由你剛才所說的第二個法律程序處理，這個法例不是"Insolvency Law"，不能夠處理上述問題。

何俊仁議員：

即是說當一間證券行清盤，遇到分配資產的問題時，並不是這條法例可以處理得到的。

主席：

我亦希望詢問，我明白這問題不能在法例中訂明。就是投資者透過經紀購入股票，所有股票都在central depositary，而depositary內的股票是in the name of該經紀，因為除非該客人開設獨立戶口，否則一定不可能in the name of該客人。可否解釋一下是否必須要是in the name of該經紀，還是in the name of某人？

財經事務局副局長區璟智女士：

這問題可以向Mr DICKENS查詢。

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

The stocks are supposed to be held in what is called a client-segregated account, so in theory, all the clients' stocks are in the client-segregated account, and in theory, all you

would have to do is look there to see my stocks, Mr GREINER's stocks, Miss AU's stocks. Then you would look at the broker's books to work out whose was whose, but all of those stocks are meant to be protected from broker insolvency. The problem, of course, is that when a firm defaults it has nearly always done something wrong, or made a mistake in the process, so that almost by definition it has started using the clients' stocks on its own account. That is where the complications come in. The mechanism is fine, except in the stress case where the firm starts to go down and become unable to meet its liabilities – in which case, stocks do not end up in the right account. They end up in the wrong account. That leads to the sorts of complications Mr HO was referring to, where the liquidator then has to go through and try and work out not where things are, but where they should have been. At the moment, on paper there is a protection. The clients' stocks are segregated, but in the case of a defaulting broker, almost by definition, he has misdealt with the stocks and they are in the wrong account or they have been sold.

主席：

我們的法律顧問好像有些意見希望提出，對嗎，K. W. KAU？

助理法律顧問顧建華先生：

多謝主席。主要有兩點希望補充，第一點是在現行法律下，根據香港法例第333章第99條第2款，證監會可以從儲備當中注資入賠償基金，但是似乎新的提議當中沒有提及這個權力。

此外，因為剛才狄先生也提過新的法律上的詮釋，《證券及期貨條例》第235條第1款(b)段的安排，是否仍可實行。我不知道我有否理解錯誤，就是現行的賠償基金並非一種保險的制度，而是對於因中介人士失職而遭受損失的投資者提供一個基本的補償，但是那作用並非使該投資者除了可以向該失職的中介人士取得賠償之外，再有額外的賠償，我不知道現在法庭的詮釋會否改變了該賠償的性質。

財經事務局副局長區璟智女士：

請Mr DICKENS先解答第一個問題。

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

The first question we agree. It is intended that the SFC be able to pay money into the compensation fund, should it ever become necessary or should we have a surplus on our reserves. We sought legal advice from the draftsman on this question, and we were told it could be done under the power in 236(1)(a). If there is any doubt about that, it is a simple matter to add an express provision, but our understanding was that that was to be provided for in rules. That would be sufficient authority for us to pay into the compensation fund.

On the second question, before we ask for it to be clarified, we are in heated agreement that clause 235 is not clear, and is not satisfactory. What we want to do is re-draft clause 235 so that it provides essentially as follows: where we have paid out the client in full, we are subrogated to his rights in full. Where we have paid out the client in part, he preserves his right to sue the liquidator for the balance, or to prove in the liquidation for the balance, and we reserve the right to prove in the liquidation for our $150,000. That leads, we believe – and if necessary or desirable we can generate some scenarios for the Honourable Members to look at, to show how this works – to the same result in all situations as was held to be the outcome in the Forluxe case, by the judge.

If you want to get technical about it, we would share pro rata to the payout versus the individual's claim in whatever the assets available to that individual were. In most scenarios, from memory, and please do not hold me to this, under about $800,000, that means the investor is better off than he would have been. Then we need to think about the residual case; but we agree that clause 235 could be a great deal clearer, and needs to be re-drafted.

Hon Margaret NG:

I would like to have those scenarios, not just for members of this Committee, but I think through this Committee the public would have a greater opportunity of understanding.

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

Yes. We are actually in the process of generating the individual investors in CA Pacific, so they will know their rights and their options. So it is not a great deal of extra work.

主席：

胡經昌議員。

胡經昌議員：

多謝主席。其實當局提出了這份諮詢文件後，業界也有提了一些意見，但是剛才Mr DICKENS已就某些情況作出解答，所以我不需要再提問。

我的問題是，因為這是主體法例，將來的附屬法例會如何，包括文件第22段所提到的互相資助情況。過往也曾提及，其實較大部分的經費來源是來自證券交易所，最主要的原因是因為1987年股災之後期貨所導致的情況。我相信當時業界也有很多反應，為何要資助期貨方面呢？但是政府今次寫得比較明確，如果將來與期貨交易所有關的損失遠較預期為高，證監會會就處理有關的不平衡提出建議。我希望知道，其實這件事情何時會做，到了甚麼階段才會做，怎樣衡量「遠較預期為高」，會否現在已經可以說出一個概念呢？

財經事務局副局長區璟智女士：

或者請Mr DICKENS跟各位分享一下。Mr DICKENS。

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

We will be keeping sub-accounts for the fund. We have set out the sums in the consultation paper, if you could give me a moment. At page 19 of the consultation paper, the money going into the new fund, the $650 million, around $580 of that will come from the old Stock Exchange money, but please bear in mind that is transaction levy. It is not members' contributions. 74 million – again, transaction levy, not members' contributions – will come from the futures side. What we are basically saying in the covering paper and in this paper is: if we see that 74 million being depleted at a faster rate because there are more claims on the futures side than we anticipated, then we will have to look at funding it probably by increasing the levy on the futures industry.

How you do that levy, whether you do it on a per transaction basis or a per firm basis, is a question that can wait until then. The reason why we are not too worried about the detail at this stage, because we have already agreed the principle, is that our actuarial study shows that it is unlikely that that 74 million will be depleted. The historical fact is that over the last 10 years the bulk of the claims have come from the securities side, with only one futures firm going into default. If we are wrong about that, as I say, we increase the levy on the futures side. We just keep track of that $74 million and of the futures claims, and see if it is being run down, and vice versa.

胡經昌議員：

其實是有一個利用此數目衡量的機制，但這份文件寫得不太清楚，

多謝你們能考慮這點。

主席：

我希望提問第230(2)條，有關容許證監會在獲得財政司司長批准後，可以向市場貸款一事。現在的安排是政府亦可以借出款項，將來是否也是如此？

財經事務局副局長區璟智女士：

政府希望這條條款將來不要隨意採用。不過，如果發生災難性的事件，當時累積的基金也不夠用，又希望投資者能盡快取回15萬元。其中一個安排，就是基金可以申請私人機構貸款，當然亦可以考慮向政府貸款，但同樣要付利息。

主席：

我知道，但條例中寫明"authorized financial institutions"，是否不包括政府在內？是否表示法例不容許證監會向政府貸款？

財經事務局副局長區璟智女士：

法例的寫法，就是屬意證監會向銀行貸款，但要通過政府給予保證。

主席：

會否出現這情況：銀行的貸款會比政府的貸款較為昂貴。政府的儲備可能是買美國債券，而市場的利率會較美國債券的利率為高，透過政府貸款會否較為便宜？

財經事務局副局長區璟智女士：

公帑是納稅人的金錢，如果向政府貸款較為便宜的話。就是說...

主席：

政府的儲備用於購買美國債券，收取的利率大概是6厘。如基金在市場貸款的利率是7厘或8厘，政府向基金貸款也可收取6厘或6厘以上的利率。這樣的做法，不但政府沒有吃虧，基金也有好處。倘若不允許證監會向政府貸款，也不比較借貸的利率，政府就是屬意只可向私人機構貸款。但我記得政府在正達事件中也有貸款。

財經事務局副局長區璟智女士：

沒有，是證監會和聯交所各自撥錢。

主席：

是否preclude政府貸款？

財經事務局副局長區璟智女士：

如果政府以津貼的利率貸款就不是很公平，變成了由納稅人資助某一部分的投資者。以往也曾有案例，87年的股災時是向私營機構貸款，由政府給予擔保，並且要通過立法會審批。

主席：

各位對第XII部分是否還有問題？胡經昌議員。

胡經昌議員：

主席，我有一個提議：據我所知，交易所前兩天曾提交意見，但交易所直接把意見交到證監會。交易所所提交的意見一向都是保密的。我希望詢問交易所可否把意見給我們參考？

主席：

既然是保密又怎麼能公開？

胡經昌議員：

不，我們只是在委員會內部公開。

財經事務局副局長區璟智女士：

若是政策上的意見，並牽涉條款的內容，我們就務必要和各位解釋。

主席：

如果是保密的意見書，過往他們都願意提交給委員會。

胡經昌議員：

主席，我最近才瞭解到很多團體向證監會或財經事務局提交了意見書。我的建議是，無論有關意見書是提交政府的任何部門，都應有副本提交給法案委員會參考。我知道業界對諮詢文件有意見，為何沒有把意見呈交委員會？其中的原因就是沒有向委員會呈交一份副本，所以我才提出這

個建議。交易所的情況比較特殊，就是要開會才能決定政策性的文件要向哪個部門提交，所以交易所的文件並非即時收到。我再補充一點，就是業界若有其他意見呈交交易所，交易所也應給我們作為參考。

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

It is up to the people making the submissions, whether they want their identities disclosed, and it is also a matter for them, whether they send things to this Council, although I think they should. What I have been careful to do is to make sure I have mentioned in my summary – and will mention it again in the written summary – each of the views expressed both by the Hong Kong Stockbrokers Association and by the Hong Kong Exchanges, but without attributing those views to a particular person. Obviously we give them very great weight because they come from the industry.

主席：

任何人士有意見，都可以隨時提交給委員會。如果他們不願意，我們是很難勉強他們。

胡經昌議員：

主席，我不是說勉強他們，而是業界人士可能有點誤會，他們以為把意見書提交給政府後，意見書會轉交給委員會。我們也曾向業界或者其他人士提到，不要指望意見書會轉交給委員會，你們如覺得確實有需要，就呈交一份副本好了。我提出的意見是希望他們政府方面會作出一定的回應，剛才Mr DICKENS說過他們會回應，這也是一件好事。

主席：

好的。

財經事務局副局長區璟智女士：

證監會和交易所的日常聯繫也很密切。我們不斷就這個改革或者其他市場事宜交換意見。

Chairman:

Margaret.

Hon Margaret NG:

Mr Chairman, thank you.

Obviously we have not had a great deal of time to look at the summary of public comments on this Part, but just looking at the list on page 2, the first comment made by the group of nine investment brokers, they suggest that the range of persons required to contribute to the compensation fund is not specified in the legislation. They say it is spelled out, so I am not sure how far it is specified, but is there any specification in the primary legislation, in the Bill itself, to give people a clear idea of the range of persons required? I see that the response is that it will be spelled out in full in the subsidiary legislation, but in principle who would be exposed to paying a contribution? Is that somewhere in the Bill itself?

Chairman:

Mr DICKENS.

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

No. It is not in the Bill. That is the short answer. This comment predates the consultation paper, where we discussed it. It is post-bill but pre-consultation paper, and the group of nine made no comments on the consultation paper, presumably because they thought the point was dealt with there. What the paper discussed was a range of alternative funding mechanisms, including – but it rejected it very quickly – contributions from the general taxpayer. What we have basically discussed is that we are levying the industry participants on a firm basis, on a covered asset basis, on a covered account basis; and we have decided all of those were in-expedient in the short term and inappropriate, and then said "Well, let's levy the actual market users".

So the people who will pay for this scheme are in fact the people who buy and sell securities or futures contracts on the exchanges, and they will pay by way of a transaction levy, or have already paid by way of a transaction levy, because most of the money in the new compensation fund has already been raised. It is in the old compensation fund now. It came from the Stock Exchange and from the SFC. On the securities side, we each contributed $300 million, and it came mainly from levies on futures contracts, on the futures side. We are not saying that is the all-time model. What we are putting forward in the consultation paper is that we have a levy of 0.002 per cent on all transactions until we get to $1 billion in the fund. Then we cut that off. The general principle that the SFC supports, although I accept that is not in the legislation, is that the burden should be borne by the industry or the users, because they are the beneficiaries. It should not be borne by the general taxpayer.

Hon Margaret NG:

Mr Chairman, of course I understand this is still under consultation, but even as a matter of principle, who should fall within the range of persons who should contribute, is still undetermined. But at such times as you can determine in principle, the range of people who should contribute, would there be any merit in mentioning that in the principal legislation?

When you, in principle, may fall within the range, then you would look in the subsidiary legislation to see whether you are in fact included; and also if you should, at the end of the day, decide that the general public should be excluded from contribution. I think that is something people would like to know. In other words, the primary legislation sets out the four corners of the scheme, and who should contribute.

政府會考慮的，是嗎？是否將問題提問出來會比較好一些？

財經事務局副局長區璟智女士：

我們嘗試把條文寫得清楚一些，但在草擬附屬法例時又不會有太多的掣肘。

副主席：

大原則的地方，例如基金的資源等等，是否應該清楚一點。

財經事務局副局長區璟智女士：

政府草擬《藍紙條例草案》時是在去年的年中，當時還沒有進行諮詢。現在諮詢已進行，如果覺得公眾都是支持的，我們可以將這個架構概括地表達出來。

副主席：

主要是原則性的事項都應包括在主體法例之內。

財經事務局副局長區璟智女士：

好的。我們會嘗試。

主席：

何俊仁議員剛才所提到的事項，都包括在修訂條例內，政府可以作為參考。就這部分各位是否有問題？吳亮星議員。

吳亮星議員：

我提出一個很簡單，但屬行文方面的問題。很多段出現“司長”，但英文是Financial Secretary，其他政策局的條例有沒有牽涉其他“司長”？因為釋義中沒有提到。

副主席：

主席，我補充這方面的資料。我們研究中、英文文本的分別時，已經提出其中一個例子，我希望法律顧問會在適當的時間向委員會彙報，研究這個問題的解決方案。在中文本而言，“司長”一詞是沒有定義的。

吳亮星議員：

特別是在抽出來討論或提到“司長”一詞時，會不太瞭解是哪一個司長。

財經事務局副局長區璟智女士：

法律顧問的同事在這方面有沒有補充？

助理法律顧問顧建華先生：

關於"司長"的定義，在附表1已作出解釋。

財經事務局副局長區璟智女士：

這是一個草擬風格。英文是Financial Secretary，中文在附表1訂明，"司長"在本條例指表財政司司長”。我們能否接受這種簡化的寫法？其實是因人而異，不過我們樂於考慮議員們的意見，研究如何可以令讀者較容易理解，最主要是用家理解。

主席：

有Consistency會較好。

主席：

余若薇議員。

余若薇議員：

多謝主席。我希望就第236條提問。根據該條，某些規則由行政長官會同行政會議訂立；另一些則由證監會訂立，其中部分規則是兩者都可以訂立，將來應該如何區分？是否有一個特別的原因，導致有些規則須由行政長官會同行政會議訂立，而另一些由須證監會訂立？可否說出背後的原因？

財經事務局副局長區璟智女士：

剛才Mr DICKENS已經簡單地解釋過，我們嘗試將附屬法例分為兩種：第一種在第(1)款提到，是非常重要的“綱領性”法例，權力應在於行政長官。屬第(1)款的附屬法例應該先做，而屬第(2)款的附屬法例就不可以逾越行政長官同行政會議所訂定的附屬法例，必須跟隨第(1)款所訂立的附

屬法例去做。這裏是按照關鍵和重要性而分為兩組；證監會在第(2)款所制定的附屬法例很多是涉及日常運作的，作出修訂的機會可能比較大。但第(2)款的(a)及(f)段也很關鍵，所以多加了一個制衡，要求證監會在制定之前諮詢財政司司長。其實是三級制，我們請Mr DICKENS再作補充。

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

The only thing I would add is that they are all equally subject to negative vetting. The ones that the Commission has power to make are basically meant to be machinery provisions. The exception to that is the circumstance in which a person is entitled to claim. That is 2(a) and (f). The persons who are not entitled to claim: with those we must consult the Financial Secretary. The things about funding and keeping track of the money belong to the Chief Executive in Council, as does the maximum limit, because those are very, very significant to the rights of investors. Then you go down to "…must consult the FS", which is the basic "Who can make a claim?" Then how all the machinery works is basically a matter for the Commission. All of them are subject to negative vetting, and we hope to have the draft rules in front of you, before you have to sign off on this Bill.

主席：

余若薇議員，在討論第XVI部的第3分部 "Powers to make rules, and codes or guidelines"時，我希望政府能做一份詳細的列表，列明哪些附屬法例須由行政長官訂立？哪些由Commission訂立？相對於各codes的powers，我們便能夠清晰地作出對照。有了這份詳細的列表，分層次地列明，我們會容易作出比較。這個議題我原來希望是在討論第XVI部分第3分部時提出，既然余若薇議員現在提到，我就暫且建議政府提交一份表，能一次過地解釋全部的問題，這樣的做法會更加好。

余若薇議員：

主席，不只三級制，因為還有很多內部的級別。

主席：

如果能夠做一個金字塔出來，這樣就容易明白。Margaret。

副主席：

主席，金字塔固然可以令人很清楚地知道有關情況，但我也考慮原則的問題。哪些規則、附例的制定應該屬於證監會的決定？哪些屬於行政長官的決定？原則上也有提到證監會的獨立性，以及證監會的權力範圍。反過來說，政府日常的行政機關對證監會的職能應有何種程度的干預或者監控。我希望政府在對這個問題作出回應，就是在討論第XVI部 － 三級制的部分時，讓我們瞭解有關原則性的問題，以便我們決定能否就權力的分佈及獨立性的程度，全面同意政府的回應。多謝主席。

財經事務局副局長區璟智女士：

我們在制定附屬法例時會考慮到其重要性。如果對市民大眾會有很重要的影響時，有人會憂慮證監會權力的責任。所以我們考慮到的制衡措施就是，他們須諮詢財政司司長，如覺得諮詢還是不夠，權力仍是過大時，應加入多一些制衡措施。我們考慮到的制衡，就是不如撤銷證監會制定規則的權力，而把該權力給予另一個機構，例如財政司司長或是行政長官會同行政會議。剛才Mr DICKENS也提到，這些附屬法例始終是要通過立法會省覽。

副主席：

主席，我正是要提出這一點，由於這些附屬法例是要立法機關省覽

的，所以立法機關是制衡的機關。在行政架構，即政府與證監會之間，我們是談到其獨立性。但在提到行政機關和立法機關時，我們談及的是制衡。所以開始談到條文第11條時，我們是否贊成有一個剩餘的權力，或者reserve power，由行政長官向證監會發出提示，我本人是有很大的保留。我覺得這些權利並不是制衡，比如你要得到財政司司長的指示，或者一定要和他商量並得到他同意；或者是要向他諮詢，從另一個角度看，這都會減低證監會的獨立性。原則上我並不反對，因為證監會有多大的獨立性，也是個政策問題。我寧願有真正的制衡，也就是說立法機關對證監會所用的權力，應有一個制衡。至於證監會不獲賦予制定規則的權力，這是另外一回事。

我們看到證監會、財政司司長和行政長官，以及立法機關之間是有一個三角關係，我們應該在討論第XVI部分的時候提出這點。

財經事務局副局長區璟智女士：

主席，這是個很基本性的問題。證監會自1989年成立至今，由第一次制定法例開始，社會大眾和市場投資者均確認行政機關難免有扮演制衡的角色，這是不可置疑的。我們也一直扮演著這個角色，並在法例上演繹出來，而演繹的方式要有很高的透明度。

主席：

這是一個大的課題，關乎第XVI部的第3分部，剛才提到的意見希望對你們草擬文件的時候，可以作為參考。

余若薇是否有補充？

余若薇議員：

主席，再看有關行政長官會同行政會議可以訂立規則的第236(1)

條，接著的(a)、(b)、(c)及(d) 4項是否可以放在主體法例內？是否一定要有特別的原因，須由行政長官會同行政會議去訂立規則，然後作為附屬法例，經立法機關省覽，這是一個大原則的問題。

第(1)(a)條提到方法，似乎只是提到方法，而不是說經費的來源，其實，一些大原則的問題是否可以放在主體法例內？

財經事務局副局長區璟智女士：

我剛才也曾解釋過，希望通過市場的發展，可能以後會有修訂，但通過附屬法例的形式是會比較適合。

余若薇議員：

主席，剛才提出的問題和副主席所提到的問題相似，比如大家想知道的是從何人或從何途徑徵收一些經費放入基金，大原則是知道有哪些人士，日後經過附屬法例當然可以再訂得詳細一點，即使已列入大原則亦可以再提出來討論。這裏也是同樣的考慮，就是賠償基金的經費是從何處來，其實大家應該要知道有關的大原則。

財經事務局副局長區璟智女士：

我剛才已經答應副主席，她希望我們再檢討第236(1)條，在草擬時要較為清晰，至少知道要付錢的大概是哪些人士。

余若薇議員：

主席，我的意思是，如果在主體法例的大原則內已作出訂明，那麼附屬法例是否不需要經過行政長官會同行政會議決定，而可以由證監會制定，也就是不需要第236(1)條為主體法例的一部分，然後根據第236(2)條由

證監會制定附屬法例，這樣可行嗎?

財經事務局副局長區璟智女士：

如果想保持有靈活性，我相信第236(1)條也要保留，因為始終需要擬定一些細節。我們現在嘗試詳細訂明一些綱領性的問題，但是，也不可以取代我們心目中附屬法例的那些細節條文。當然可以商榷的是這些權力是否應該賦予證監會，這個是可以商榷的。

主席：

何俊仁議員。

何俊仁議員：

我提出一個新的問題，不知有關以上部分的問題是否已問完？

主席：

政府還是要檢討的，正如開始時提到，在去年11月首讀的時候，只是完成了這個文件的framework，也不能載述很多的內容，待定出了framework才可以把較詳細內容放在主體法例內。可能你們在再作出修訂時，才發現需要由行政長官會同行政會議制定附屬法例的餘下部分並不多。

余若薇女士：

主席，有關原則的問題，會不會牽涉到有關證監會以外的政府政策，這不僅是證監會監管的問題，而是牽涉到證監以外的公共政策問題，可能需要行政長官會同行政會議制定那個規則。

但是，倘基金的主要綱領和基本原則已經在主體法例訂明。那些規則就要更詳細講述細節和具體情況，既然是那些細節就不一定要行政長官會同行證會議提出，這些行政管理細節具體化的條文，可以交還給證監會。由於有很多事還要參考，還要視乎諮詢以後所作的決定，我們今天的討論很難會完成。

財經事務局副局長區璟智女士：

各位在第XVI部分可窺全豹，第一，整條法例中其實很多條款都不可以由行政長官作決定而成為附屬法例的，第二，有關制定證監會徵費的問題，那正是牽涉到很多市場的環節，我們在徵詢過程中，市場人士都質疑：這些權力賦予證監會，是不是適宜的做法。我們認為，作為一個制衡，不如把該權力收回予行政長官。市場大眾都明白這些都是附屬法例，可以交由立法會再作討論。

余若薇議員：

主席，對不起，我好像在咬文嚼字，或者是否會有一個更適宜的考慮方法，不是說行政長官會同行政會議是否對證監會作出制衡，而是某些事情若在證監的權力以外，比如牽涉到局長剛才提到的市場或公共方面的其他政策的時候，我們似乎有理由不讓證監會作出決定，而是仍交由行政長官會同行政會議決定，也就是跨政策的做法。

財經事務局副局長區璟智女士：

市場人士曾向我們表明： 就是把這些權力放在監管機構作為制衡是否足夠，我們認為這是一個解決的辦法。

主席：

我想市場或公眾人士對證監會信任的程度，在過去的十幾年內會有一定的轉變。證監會最初成立的時候，我想胡經昌議員最清楚，市場人士會懷疑：證監會監管他們，那誰監管證監會呢？是會有這樣的情緒出現。各位同事，我想這部份的問題都差不多完畢？何俊仁議員還有新的問題？

何俊仁議員：

主席，還有一個細節的問題，關於賠償，是否一定要中介人士或者股票行清盤，才可以索償或得到賠償？

主席：

不是，不一定，他有過失和失當都是可以的。

何俊仁議員:

失當是當然的，但是一定要清盤。如果不清盤，你是可以起訴他。清盤後才可以運用這個基金。動用基金的其中的條件，是否有過失的人士或者公司要清盤或破產？

主席：

不一定，有失誤就行了。Mr DICKENS。

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

It is set out on page 17 of the consultation paper. Basically it is wherever there is a cause of action in relation to money, securities, futures contracts, in bankruptcy, winding-up,

breach of trust, defalcation, fraud or misfeasance. That is basically the existing category, although in practice it is rare to get a claim except in a bankruptcy; but they do have the right to be paid, before a bankruptcy.

We received one comment which talked about the situation where someone sells their securities and the broker does not pay them. As far as we are concerned, that is covered by the existing words, but if there were any doubt about it, we would expand the words to cover it. It should be covered. This is meant to be all situation except, in effect, negligence; any misfeasance situation.

Hon HO Chun-yan:

It is not a prerequisite that the party which is subject to the claim must first become bankrupt before they claim any money.

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

Exactly.

Hon HO Chun-yan:

There is no prerequisite there.

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

No prerequisite that there be a bankruptcy.

Hon HO Chun-yan:

The aggrieved party can choose either to go to court or to go to the compensation board, under this.

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

Strictly speaking, yes. There is a third place they can go. They can choose to come to the SFC, and if the firm is still in business, we will be more than happy to use our good offices with the firm, to see if we can get them to resolve the dispute in the client's favour.

Hon HO Chun-yan:

Of course any person who wishes to go for compensation under this regime is subject to the cap.

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

Yes. But for us intervening with the firm, there is no cap. It is purely something we do to protect investors.

Hon HO Chun-yan:

Fine.

主席：

我們這部分的會議到此為止，下次的會議在5月8日上午10時45分舉

行。向大家報告一下，我們討論到第XII部，和我們原來預定的時間表落後了3個會議，也不算太差，我們會繼續努力。

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