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, 11 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 Dr Hon David LI Kwok-po, JP

Hon NG Leung-sing Hon Bernard CHAN

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

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

Members absent : Hon Eric LI Ka-cheung, JP

Hon James TO Kun-sun

Hon Ambrose LAU Hon-chuen, JP

Public officers

attending

Miss AU King-chi

Deputy Secretary for Financial Services

Miss Vivian LAU

Principal Assistant Secretary for Financial Services

Mr Frank TSANG

Assistant Secretary for Financial Services

Ms Sherman CHAN

Senior Assistant Law Draftsman

Mr Michael LAM

Senior Government Counsel

Attendance by invitation

Mr Mark DICKENS

Executive Director, Supervision of Markets, Securities

and Futures Commission

Mr Andrew YOUNG

Legal Consultant, Securities and Futures Commission

Mr Eugene GOYNE

Associate Director, 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

Securities and Futures Bill and Banking (Amendment) Bill 2000

《證券及期貨條例草案》及

《2000年銀行業(修訂)條例草案》委員會

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- 3 各位同事,委員會在會前收到由International Swaps and Derivatives
- 4 Association, Inc.呈交的文件,秘書處已在5月9日把該文件送交各位。今天
- 5 早上我們也收到兩份新的文件,一份是由Linklaters & Alliance呈交的文
- 6 件,另一份是Hong Kong Stockbrokers Association呈交的文件,希望各位留
- 7 意。

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- 9 今天我們將會就第XIII及XIV部進行討論。我在會前已把幾份文件
- 10 送交各位,包括立法會CB(1)1160/00-01(01)號文件——政府提交的文件;立
- 11 立法會CB(1)1176/00-01(01)號文件——法律事務部提供的文件,以及立法會
- CB(1)1187/00-01(02)號文件——政府就業界提出的意見所作的回應。在上次 12
- 13 會議,政府已就這些文件作出介紹。我希望提醒各位,今天的會議大概會
- 至到下午12時30分,然後我們會討論工作時間表。秘書處已擬備工作時間 14
- 15 表(CB(1)1201/00-01(01)號文件)。請大家參考這份時間表。

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- 我們在上次會議討論到財政司司長把個案轉介市場失當行為審裁 17
- 處的問題,上次會議結束時,我們正就這方面進行激烈討論。我希望今天 18
- 19 可以從這部分開始討論。首先請政府再向我們提供較清晰的解釋,因何在
- 20 證監會完成調查後,把個案提交審裁處時,須經財政司司長作出決定。這
- 21 亦是Insider Dealing Tribunal,即內幕交易審裁處目前的做法。內幕交易審
- 22 裁處過往所處理個案的範圍,只局限於內幕交易,但現時市場失當行為審
- 23 裁處所處理個案的範圍,包括所有有關市場失當的行為。所以,市場失當
- 24 行為審裁處是既舊亦新的架構,希望各位明白我為何提出這個問題。

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財經事務局副局長區璟智女士:

- 28 多謝主席。上次剛討論這部分時會議便結束,使我們有機會再作檢
- 29 討和重新整理有關資料。議員一直以來也提醒我們,過往行之有效的制度,
- 30 將來不一定必須跟隨。這個因循的想法,不是絕對正確的。對於這個問題,

Securities and Futures Bill and Banking (Amendment) Bill 2000 《證券及期貨條例草案》及

《2000年銀行業(修訂)條例草案》委員會

1 我們在這兩天也曾跟秘書處和證監會的同事們進行認真的研究。市場失當 2 行為審裁處在運作上應如何?我們應如何向議員詳盡解釋,因何我們認為

3 應沿用現行的安排,以及這項安排有何可取的地方呢?

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5 在上次會議,我們提到內幕交易審裁處、證監會、律政司、律政司 司長和財政司司長所扮演的角色。請容許我作簡單的複述。證監會扮演的, 6 7 是調查員的角色。該會會按照內幕交易活動在法例下的定義,就有否發生 8 這些活動進行獨立的調查。律師們告訴我,證監會進行調查的原則,是證 監會對有關活動有否合理的懷疑,即reasonable suspicion。如證監會以獨立 9 10 的權力進行調查後,認為對一些可能有牽連的人士有合理的懷疑,便會將 11 調查報告呈交財政司司長。

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從這個階段開始,律政司的同事便開始參與有關程序,發揮他們的 功能,擔任獨立顧問的角色,向財政司司長提供意見。根據作為律師的同 事的分析,律政司的同事的準則,可能會比證監會同事們的準則較高。他 們不但會就有否合理懷疑作出調查,更會調查若個案轉交審裁處調查,受 牽連的每個人的證據是否足以令審裁處獲得勝訴。他們在調查完畢後,便 會向財政司司長匯報結果。他們的意見,包括誰人有牽連、是否有充分證 據證明哪些人有牽連,以及審裁處有否機會獲得勝訴等。雖然他們的意見 可能會與證監會的調查報告有所分別,但也可幫助財政司司長決定:第一, 是否須提起研訊程序,以及以何為研訊程序的啟動點。

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在現時和將來的安排下,財政司司長也要作出書面陳述,清楚說明 有關個案涉及哪間上市公司、在哪段時間內有多少人士可能涉嫌作出失當 行為等。基於財政司司長的書面陳述、證監會獨立的調查報告,以及律政 司司長的法律意見,審裁處才可決定是否提出起訴。這便是有關調查的背 景。

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在上次會議,有議員詢問因何證監會不能以"一條龍"的方式,完成 整個個案的處理程序。即該會因何不可在調查完畢後,徵詢律政司司長的

Securities and Futures Bill and Banking (Amendment) Bill 2000 《證券及期貨條例草案》及

《2000年銀行業(修訂)條例草案》委員會

1 意見,然後啟動審裁處的機制。在我們這年多以來諮詢市場期間,也發覺 2 市場人士關心一點:雖然證監會擁有相當權力,但也須作出合理的制衡。最 3 佳的做法,是使公眾人士也可清楚知道有關的制衡措施。 4 5 這個情況其實類似一些如警方、廉政公署或海關等調查機構的情 6 況。這些機構在調查完畢後,也不會啟動法院程序,而是會透過第三者啟 7 動有關程序,或由律政司的同事們決定會否進行法律程序。 8 9 證監會的安排跟這些機構的安排類似,但也不是完全相同。在上次 10 會議,我也曾提到,這個研訊的形式,對過往10年的法制而言,也是一項 11 新的嘗試,並無先例可援。我們須考慮的是制衡的問題。我們要讓人知道 12 這個機制訂有制衡措施。所以我們應保留證監會作為獨立調查員的角色。 13 當然,當審裁處啟動研訊程序時,證監會現時的角色是作為專家證人,即 以expert witness的身份提供足夠的證據。 14 15 16 財政司司長的書面陳述只是負責決定啟動研訊程序。我在上次會議 17 上也提到,進行研訊的優點,是主席跟審裁員也可提議聽取其他人士的意 18 見,以找出真相。財政司司長所能做到的,是在啟動研訊時,把集中的案 19 情呈交審裁處,讓審裁處在開始研訊程序時,可較集中地尋求真相。在研 20 訊過程中,審裁處也可傳召其他受牽連人十協助研訊。 21 22 所以,不把研訊程序交由證監會處理,是因為這做法可作為制衡的 23 安排,希望可保留證監會獨立調查員的角色。這也是市場人士在這一年多 的諮詢期間所支持的安排。我希望這可解答各位在上次會議上提出的問 24 25 題。 26 27 餘下的問題是因何不交由律政司司長啟動有關研訊。其實,只有兩 28 個選擇:由律政司司長或財政司司長啟動有關研訊。我們也曾與律政司的同 29 事們商討。他們的意見與我們的意見也很脗合。我們雙方也認為律政司司 30 長是獨立的法律顧問。這項研訊程序是一項很特殊的程序,而不是普通的

Securities and Futures Bill and Banking (Amendment) Bill 2000 《 證券及期貨條例草案 》及

《 2000年銀行業(修訂)條例草案》委員會

1 刑事檢控程序,所以並不存在《基本法》第六十三條的問題。這項研訊安2 排的目的,是對國際金融中心不應容忍的失當行為發揮阻嚇作用。既然情

3 况是這樣,法律顧問只可就勝訴的機會提供意見。

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5 然而,我們並不排除過往曾經發生一些有關法律意見認為勝敗機會6 參半的情況。換句話說,有時會出現模棱兩可的情況。但這也無可避免,

7 因為從法律專家的立場,他們只可提供意見。在這種情況下,律政司司長

8 便會把意見交予財政司司長,由財政司司長作出政策上的決定。如果政府

9 曾發出強烈信息,表示不論是市場人士或社會人士,也不能容忍有關行為,

10 即使法律意見認為審裁處不一定會獲得勝訴,或勝敗機會參半,財政司司

11 長仍可能會啟動研訊的機制。所以,在政策上,財政司司長是擔任一定的

12 角色的。從這種安排,各位便可瞭解因何我們會選擇這種方式。證監會、

13 律政司司長和財政司司長也擔任不同的角色。其中其實涉及一個制衡的安

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18 吳靄儀議員。

由律政司司長決定是否提出起訴。

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副主席:

主席:

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主席,我感到非常不安,因為這是個很基本的問題,但我不希望在這個問題上再作糾纏。究竟證監會是個監管機構(regulator),還是純粹屬調查機構,或是如海關、警務處或廉政公署等屬執法機構呢?這些機構的做法,是按照法律就一些違法行為作出調查,然後把整個個案呈交律政司,

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如果證監會是監管機構,其角色必定不限於負責調查,也包括執行,即採取行動。主席,我認為如果證監會的角色是兩者參半,而由財政司司長決定是否採取行動,在某種情況下必定會涉及政治的考慮。這樣便

Securities and Futures Bill and Banking (Amendment) Bill 2000 《證券及期貨條例草案》及

《2000年銀行業(修訂)條例草案》委員會

- 1 會使人覺得,當局在作出會否啟動審裁處的機制的決定時,會作出另一些
- 2 考慮,尤其是在市場失當行為的情況下,牽涉的當事人會是大規模的銀行、
- 3 國際投資公司或本地的小規模公司等。

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5 所以我們須分清楚兩個層次。在提出起訴的情況下,無論屬刑事或 6 民事案件,律政司也可提供有關勝訴機會的意見。但市場失當行為審裁處 7 與法庭的形式不同。正如我在上次會議上提到,市場失當行為審裁處是 8 inquisitorial的,是一個調查的團體。當審裁處認為資料不足時,隨時也可 9 要求作進一步的調查,再傳召更多證人。該審裁處更具有很活躍的主動權。 10 在這個情況下,要求律政司司長提供有關審裁處是否可獲勝訴的意見,這

11 做法不是很恰當。

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另外的問題是,應在證監會有理由懷疑存在失當行為時便啟動機制,還是應待調查發現肯定存在違規行為時,才啟動有關機制。否則,只是證監會有理由懷疑存在失當行為時,便會採取起訴行動。過去是否也採用相同的水平來啟動機制呢?多謝主席。

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財經事務局副局長區璟智女士:

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這是一個很長的問題,也涉及很多關鍵性的觀點。我相信我不能就 每個問題提供絕對的答案,亦應留待其他社會人士與大眾討論,究竟政府 的監察是制衡還是干預。這個涉及對行政當局是否有信心的問題。

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或許讓我就今天的課題再作補充。證監會作為監管機構,當然須要執法,對獲發牌人士也須進行直接的監管。但內幕交易或市場失當行為所牽涉的層面,卻遠超證監會現時直接監管的獲發牌人士的範圍。這層面很多時也涉及參與上市公司活動的其他人士,譬如在條例草案較前部分提到在發牌制度下的中介人士等。所以,涉及的層面比較廣泛。正如在法例下,也訂有其他類似的條款,以對上市公司的活動進行規管,所以規管工作不單集中由證監會執行,其他機構也會進行規管。

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

《證券及期貨條例草案》及

《2000年銀行業(修訂)條例草案》委員會

1 2 在很多情況下,財政司司長也扮演最高層的角色。例如根據《公司 3 條例》和《證券條例》,倘若證監會有初步原因懷疑存在失當行為,便可

4 要求財政司司長委任審查員進行調查。過往也曾出現類似的個案。

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規管上市公司的工作,是需要多方合力進行的。就這方面,證監會 扮演的角色可能是集中進行調查工作。胡議員最關心的那些中介人士,正 是證監會直接規管的人士, regulated class。

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主席:

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12 我希望就制裁方面提問。根據建議的機制,民事懲處由MMT負責。 13 在證監會完成調查工作後,共有兩個處理的途徑。第一,是循刑事途徑處 理。這必須由律政司處理,而財政司司長在這方面也不會扮演任何角色。 14 15 第二,是循民事途徑處理。證監會調查完畢,把個案轉介MMT處理前,必 須徵詢律政司司長的意見。在這個情況下,共有三個可能的結果。第一, 16 17 有關證據已足夠提出刑事起訴。在這情況下,律政司司長便會全權處理有 18 關個案,證監會也沒有選擇,必須同意提出刑事起訴。公眾也不會持別的 意見,因為由法庭處理時,透明度會極高。第二,律政司同意證監會的決 19 20 定,把個案交由MMT處理。當兩者也同意時......

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財經事務局副局長區璟智女士:

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......同意也可分為數個層次。證監會作為調查員,法例並沒有要求 證監會估計勝訴的機會,而只是進行reasonable suspicion的測試,即有否合 理的懷疑。一旦證監會發現存有懷疑,便須作出轉介。律政司的調查會較 為深入。除合理疑點外,律政司還須調查證據是否足夠,以及勝訴是否高。 即使是民事研訊的程序,律政司也須在研究勝訴是否高後,才向財政司司 長提供意見。

Securities and Futures Bill and Banking (Amendment) Bill 2000 《 證券及期貨條例草案 》及

《2000年銀行業(修訂)條例草案》委員會

主席:

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請讓我繼續表達我的意見。第三,倘若律政司司長不同意提出起 3 4 訴,即使是提出民事起訴也反對,而把意見提交財政司司長時,從公眾的 5 角度來看,財政司司長便有很大的考慮空間。請恕我以陰謀論來理解這個 6 問題。財政司司長喜歡時,便可把一些個案交由MMT處理,但政府也可把 7 很多個案保留,不時取出某些個案作出跟進。證監會的情況便不同。當證 8 監會接獲個案時,便會作出處理。但政府卻可決定繼續進行調查,待有需 9 要時才對某人提出起訴。雖然政府可能從沒有這樣做,但這項安排實在給 10 政府上述的空間。

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財經事務局副局長區璟智女士:

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主席,從IDT十多年來的運作過程中,我確實察覺不到存在這個空間。由於有關程序須由很多人士參與,包括SFC、律政司及財政司司長,其中一方決定不作出或作出任何事情,也須向另外兩方解釋。

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18 主席:

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但有關解釋是不公開的。

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財經事務局副局長區璟智女士:

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我並不認為含糊不清或私相授受的情況會在這個互相制衡的制度 下出現。如果權力全部集中在一個人身上,你剛才所擔心的情況便有理由 發生。但由於現時存有3個權力點,任何一方決定進行工作,也須向另外兩 方解釋。

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29 主席:

Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000 《 證券及期貨條例草案 》及

《2000年銀行業(修訂)條例草案》委員會

1	何俊仁議員。
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3	<i>何俊仁議員:</i>
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5	我只是跟進剛才兩位同事提出的問題。在我們的問責及制衡制度
6 7	下,只是提供解釋是否已經足夠?而且在很多情況下,這些解釋也不是公 開的。其實總括來說,在兩個情況下,無論如何也可啟動這個市場失當行
8	两的。
9	的失當行為,需否經過行政部門呢?若需經由行政部門處理,已存在行政
10	上的考慮。那麼外界會有甚麼觀感呢?其實,使SFC獨立的原因,正是希望
11	讓人覺得證監會與行政機關是分開的,所以可獨立地進行監管。因此,大
12	家需再三考慮,採用FS的機制是否適當。
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14	第二,正如剛才吳靄儀議員所提出,開始改革時可選取兩個方向:
15	第一,不採取刑事案件處理的方式,而把有關個案視為類似民事個案的方
16	式處理。這做法與當時外國很多市場的做法一致。第二,採取獨立審裁署
17	的方式,由熟悉市場運作的人士負責處理有關個案。即採用內幕交易審裁
18	署的方式。這是沒有問題的。但人們會懷疑偵訊的權力是否適當。我不知
19	道內幕交易審裁署過往是否也擁有偵訊的權力,但如果審裁處擁有偵訊的
20	權力,最後也擁有決定仲裁的權力,便會存在問題。香港現時負責偵訊的
21	tribunal的數目不多。以死因研究庭為例,該法庭主要負責找出事實真相,
22	而並沒有仲裁權。但如果市場失當行為審裁處擁有仲裁權及偵訊權,在我
23	們目前的制度下,便會存在問題。所以,如果純粹由一個獨立的審裁署處
24	理有關市場失當行為的個案,是否可釋除這些疑慮呢?
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26	財經事務局副局長區璟智女士:
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28	審裁署是非常獨立的機構
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何俊仁議員:

Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000 《證券及期貨條例草案》及 《2000年銀行業(修訂)條例草案》委員會

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2	我的意思是審裁處無須擁有偵訊權。
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4	財經事務局副局長區璟智女士:
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6	這是無可置疑的,不論是MMT或IDT,即內幕交易審裁處與將來的
7	市場失當行為審裁處,也是非常獨立地運作的。正如我剛才提到,只有財
8	政司司長才可啟動有關機制。但如果在研訊過程中,市場失當行為審裁處
9	發現若干人士可能會是受牽連人士,便有權要求這些人士提供資料,以協
10	助研訊。我們唯一可重覆的,是倘若這些研訊程序由一個團體或一個當局
11	負責調查、起訴及提供資料等,制衡便會較我們建議由3個不同的當局共同
12	合作啟動這個機制的為少。這是顯而易見的。
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14	<i>主席:</i>
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16	我相信政府已清楚表明他們的立場。若大家對這個問題仍有意見,
17	可從另一個渠道再行討論。我們現在討論其他問題吧。各同事對第XIII、
18	XIV部有否其他問題?吳靄儀議員。
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20	<i>副主席:</i>
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22	主席,今天我其實希望提出一個較重要的問題。
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24	根據政府的說法,第XIII和XIV部基本上是完全一樣的。即在MMT
25	以民事程序研訊市場失當行為時,須證明的元素與以刑事程序研訊市場失
26	當行為的元素完全一樣。換句話說,構成市場失當行為的元素,無論是民
27	事或刑事個案,也是完全一樣的。當然,由於有關行為的嚴重程度不同,
28	在法例草擬上也有少許不同。對於這個做法,我希望提出一些問題。
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主席,為什麼須要存有兩個渠道呢?因為民事渠道的舉證要求較

Securities and Futures Bill and Banking (Amendment) Bill 2000 《證券及期貨條例草案》及 《2000年銀行業(修訂)條例草案》委員會

1 低,可運用的證據的範圍較為廣泛,而可作出制裁的範圍相對來說也較為

- 2 狹窄,即不可過於嚴厲。這是為了作出平衡。而在刑事方面,舉證的標準
- 3 較高,但倘若證明存有失當行為,便可施以較重的刑罰,這便是有關刑事
- 4 程序方面的平衡。

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主席,為甚麼要這樣做呢?我們在審議《白紙條例草案》的階段,就這方面進行的討論最多。對於民事程序方面,為甚麼必須加入一些刑事

- 8 的犯罪意圖呢?其實,刑事和民事兩者並不相若。以疏忽為例,在民事程
- 9 序方面,接受疏忽作為犯罪意圖,並沒有問題。但在刑事方面,若接受疏
- 10 忽作為犯罪意圖,便會出現很大的問題。另外,在刑事方面,我們會堅持
- 11 當事人必須存有犯罪意圖,而甚少存有例外的情況。但在民事方面,我們
- 12 不是經常堅持當事人必須存有犯罪意圖,尤其是涉及行為失當的問題,例
- 13 如"手機醫生"行為失當的案例,也無須證明有關醫生存心作出失當行為,
- 14 才可把他定罪。所以,我對這點感到十分懷疑。對於採取民事程序的要求
- 15 是否過高呢?如果是,便必須作出平衡。我們一方面須考慮對業界是否公
- 16 平,而另一方面也須考慮,這做法對投資者而言可否達致應有的效果。我
- 17 希望在這方面跟政府探討一些問題。

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在政府的資料文件中,提到與國際的比較。我們的做法主要也是仿效澳洲的做法。但跟英國比較,英國的market abuse明顯地與我們的市場失當行為屬同類型的問題,但英國的做法卻是無須證明當事人存有這些犯罪

22 意圖。

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主席,政府提供的文件提到,英國的《金融服務及市場法》第119條指出,FSA會制定一個code。我今天特地把有關部分影印給同事參考。這部分是有關英國在市場失當行為方面的做法。其實我們應從第118條開始閱讀。主席,我可否邀請大家一同閱讀第118條。第118條界定何謂market abuse。倘若大家仔細閱讀,便會發現這部分包含了一些客觀標準。即如果任何人的行為不能達致這些標準,使正常使用市場的人士很可能會出現某

30 些情況,該人便觸犯了market abuse的罪行,即有關市場失當行為的罪行。

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

《證券及期貨條例草案》及 《2000年銀行業(修訂)條例草案》委員會

1 而第119條只是提到由監管機構制定一些守則,指明哪類行為是市場失當行 2 為,而哪類行為不是市場失當行為。但這些似乎也是客觀的標準。如果我 3 們再參考第112條,該條提到有關守則的作用。所以,有關行為是否屬於市 4 場失當行為,一經比較便會很清楚。 5 6 接着第123條訂明,倘若任何人作出市場失當行為,監管機構便可 7 施加懲罰,可以impose a penalty。這個懲處包括罰款。第123條第(2)款也訂 8 明,當局作出懲處時,除可處以罰款外,亦可考慮作出聲明,表示該人曾 9 作出失當行為等。所以,這些條款並沒有訂明犯罪意圖,而只是訂有一套 10 標準。如果任何人的行為不符合這些標準,便是存有market abuse的成分。 11 12 主席,讓我們參考有關美國的情況...... 13 14 主席: 15是哪一段?

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副主席:

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......是政府向我們提供的文件附件2有關國際比較的部分。由第2段開始的部分提到美國的情況。美國的情況較為複雜。據我瞭解,美國把一些行為定為不當的行為,不論稱之為市場失當行為或操控市場行為。一般來說,只要監管機構發現存有這些行為,便可加以懲處。這便是民事方面可採取的行動。採取民事行動與刑事行動的分別在於甚麼呢?如當局採取刑事制裁,便必須證明該人存有犯罪意圖。根據我們在美國進行的諮詢和據我個人的暸解,當局必須證明該人蓄意或reckless即魯莽而不顧後果地作出有關行為,才可進行刑事起訴。所以,當局把同一些行為定為失當行為,若以民事程序進行起訴,便無須證明該人存有犯罪意圖,若該人存有犯罪意圖,而有關行為屬嚴重的失當行為時,當局便會提出刑事起訴。

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30 主席,我們前往美國訪問時,取得一篇有關這方面的文章。如各位

Securities and Futures Bill and Banking (Amendment) Bill 2000 《證券及期貨條例草案》及 《2000年銀行業(修訂)條例草案》委員會

1 有興趣,可向秘書處索取。文章內容提到,有關法例只需一項條款,便能

- 2 把民事和刑事個案清楚劃分。該條款指出,若該人存有意圖或因魯莽而作
- 3 出失當行為,便屬刑事罪行。換句話說,在美國的情況下,有關的民事和
- 4 刑事罪行的分別是十分清楚的。若當局提出民事起訴,便無須證明該人存
- 5 有犯罪意圖,而提出刑事起訴時,便須要證明該人存有犯罪意圖。民事程
- 6 序的舉證標準低,罰則也低,而刑事程序的舉證標準高、罰則高,當事人
- 7 受到的保障也高。

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主席,似乎MMT對市場失當行為的各方面的要求也很低,但卻要求 存有很難證明的犯罪意圖。在這種情況下,會否令到這個做法不能充分地 保障投資者的權利呢?

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財經事務局副局長區璟智女士:

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多謝副主席的提問。這個問題正能代表投資者的聲音。我們在諮詢 過程中,這把聲音很微小。其實,代表投資者發言的,只有政府和SFC。當 我們跟業界深入探討時,一直也質疑有關市場失當行為的條款的草擬方式 是否太嚴謹。總括來說,我們一方面代表投資者的權益,但另一方面,我 們在討論這條條例時,亦開宗明義地向各位提出,其中一個很大的原則, 是在外國無法接受的失當行為,例如倫敦和紐約等,香港絕對沒有理由可 以接受。這也是我們向市場人士指出的一個最基本的尺度。

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市場人士也曾與我們分享英國的經驗。據我們的理解,英國FSA剛 23 24 完成剛才吳議員提到的Market Abuse Code,即造市行為的規則或守則的第 二份擬稿。從這份擬稿中,我們也可看到市場對當地造成的壓力也非常大。 25 26 有關的反對聲音其實是來自同一些市場參與者。我相信每個財經中心也要 27 視乎有關人士的議價地位。當局在保障投資者之餘,仍須考慮如何能令參 28 與者安心。市場參與者擔心,雖然他們所作的行為是合法的行為,但由於 29 條款的草擬方式太嚴謹,當局對他們的規管便會過於嚴緊。現時英國的 30 Market Abuse Code的第二份擬稿已加入mental element,即副主席剛才提到

Securities and Futures Bill and Banking (Amendment) Bill 2000

《證券及期貨條例草案》及 《2000年銀行業(修訂)條例草案》委員會

1 有關意圖的成份。據我的理解,這些守則也訂有evidentiary weight。我不是 2 律師,或許Audrey可以幫忙。

4 當案件呈交審裁處審理時,審裁處也會考慮mens reas element,即 5 意圖成份。我們現正密切注意英國的發展情況。當局預計有關法例可於11 6 月開始生效,所以有關守則應於9月前完成。似乎市場人士並不放心,他們 7 恐怕條例的草擬方式不夠靈活,並沒有訂明意圖的成份,使他們容易作出 8 違規的行為。當然,我們從《白紙條例草案》至《藍紙條例草案》的階段, 已在可行的情況下清楚訂明有關意圖的成份。

我只是希望向各位解釋在我們制訂有關條款的過程,我們須要考慮市場的憂慮,以及外國的發展情況。當然,我們仍然會保留第XIII部有關民事程序的建議的強項。雖然各位可能會認為民事和刑事起訴只是程序上不同,但元素也是一樣,但我也曾向內幕交易審裁處的同事詢問,據他們的經驗,程序不同便是最關鍵的因素。

剛才副主席也曾就不同的程序作出歸納。所謂不同的程序,包括搜集證據的程序、甚麼證據可以接受、當事人及受牽連人士沒有保持緘默的權力,以及審裁處甚至可要求他提供一些針對其本身的證據等。這便是有關民事程序的強項,也是我們保留了的部分。這只是涉及取捨的問題。當然,我們也很樂意跟各位進一步研究,可否使民事程序內有關意圖的成份的草擬方式更為寬鬆。就這可面,請問Mr DICKENS有否特別的補充?

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

In terms of the mental element, frankly our commitment to international standards is very high. We have spent over 4 years consulting the market, since 1996, on various versions of the provisions that now find themselves in Parts XIII and XIV. It has become very, very clear to us that in the current stage of the development of the market, it is

Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000 《證券及期貨條例草案》及

《2000年銀行業(修訂)條例草案》委員會

1	unacceptable to the market community to attach unduly harsh penalties to negligence,
2	although in fact the Market Misconduct Tribunal will have power to sanction our work if you
3	are an officer, to take reasonable measures to ensure proper safeguards about market
4	misconduct. But you cannot be called a person who has engaged in market misconduct.
5	You can merely be sanctioned, and you cannot be sued. That seems to be acceptable to the
6	market, and I accept Miss AU's point that the investors have been silent. We have been the
7	advocate for the investors.
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9	As to whether the regimes overall are as effective as the US and the UK, our feeling
10	is that they are. We found ourselves in Hong Kong – and I came to Hong Kong after 1980 –
11	with a unique institution that has proven very effective. I know that my British colleagues
12	were considering copying that, but they felt they could not do that in their own market.
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14	The American and British systems rest on giving very wide law-making or
15	guidance power to the statutory regulator. The FSA promulgates the code of market abuse,
16	and most of the substantive law in the US is actually the SFC rules. We felt, and we still feel,
17	that it would be impossible to get such a grant of power in this market, or that we would be
18	able effectively to use it. So the policy decision we have made is to go for a clear black
19	letter law approach. As for whether we could water down the mental elements in Part XIII,
20	my answer is "I do not believe that would be acceptable to the commercial community in the
21	current state of development of this market, but that these provisions are a fairly considerable
22	step forward from the existing law".
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24	<i>主席:</i>
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26	副主席。
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28	Deputy Chairman:
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30	Thank you, Mr Chairman. Looking at the FSMA, even looking at the relationship

Securities and Futures Bill and Banking (Amendment) Bill 2000 《證券及期貨條例草案》及 《2000年銀行業(修訂)條例草案》委員會

between the primary legislation and the code, the primary legislation sets down the standard, the kind of thing which would constitute it. If you look at (2) it says that when these conditions are contravened then market abuse is constituted. And I read, "(a), the behaviour is based generally on information which is not generally available to those using the market, but which is available to a regular user of the market, would or would be likely to be regarded by him as relevant when deciding the terms on which transactions in investments of the kind

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in question should be effected".

I read this only as an example. It is an objective test. It is an objective description of behaviour. You fall short of this; you have committed a market abuse. Now, if one looks at 119, which provides for the code, it gives the authority the type to prepare and issue a code; and then (2) tells you what the code should do. "The code may, among other things, specify (a), descriptions of behaviour that in the opinion of the authority amount to market abuse; (b), description of behaviour that in the opinion of the authority do not amount to market abuse".

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So the way I read it is that it is an objective test. Even that the code is there to enlarge in greater detail, in concrete detail, what kind of behaviour, it does not refer to intention. So if the code comes out with something like ours, our market misconduct, with all these requirements of mental elements, I would doubt if it has really implemented the spirit and the principle of the principal ordinance.

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Mr Chairman, when we went to the United States and we were consulted, as you remember, by practitioners in a way intensive discussion, there the message is very, very clear to us – namely, there must be a criminal mental element if draconian penalties are to be imposed. In America we are talking about fining people to three times the profit they make or the loss they cause – very, very large sums. As you can see, under the SFMA in the UK, there is not even an upper limit. There is no upper limit to how much is the extent of the fine, so they are talking in these two jurisdictions about very draconian penalties.

Securities and Futures Bill and Banking (Amendment) Bill 2000

《證券及期貨條例草案》及 《2000年銀行業(修訂)條例草案》委員會

I would completely agree that you have got to have criminal elements before you can do so, but from the description of our Bill, the cold shoulder order, the suspension order, the court order, and so on, do not amount to the same sort of draconian penalties. What we have heard from these investment bankers, practitioners and so on, is really not about this sort of thing. So it may be that because we have taken – I am sorry I must employ this sort of language - - we seem to have put it in such stringent terms, it may have triggered off other jurisdictions taking us as the model.

Again the question is: do we have any reason to impose higher requirements of market misconduct in Hong Kong than in other jurisdictions? In other words, what will have constituted a market abuse in UK would not be market misconduct in Hong Kong. I mean, is that sort of thing desirable for us? There are two questions. One is: comparing the two, it seems to me that the UK is about behaviour. Market abuse is about behaviour. Our requirements are higher. Secondly, as to the market response, the market response is non-draconian penalty without criminal intent. Since we are not talking about draconian penalties here, then this comment is not applicable.

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

Can I take you to clause 270, which I think covers some of the ground, although not perhaps all. Page C2067. Clause 270 imposes an affirmative duty on every officer of a corporation, to take all reasonable measures to ensure proper safeguards exist effectively to stop the corporation committing market misconduct. That is as wide, it seems to me, as the duty handled under the market abuse code where you have to show you took reasonable precautions and exercised due diligence to avoid behaving in a way that constitutes market abuse. Now, breach of that duty in clause 270 does not result in the person who breaches it committing market misconduct, but it does result in him being liable for sanctions under clause 250, by the Market Misconduct Tribunal, because in clause 250, which is on page C2029, clause 250(1) says: "Where a corporation is engaged in market misconduct, and the

Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000 《證券及期貨條例草案》及

《2000年銀行業(修訂)條例草案》委員會

1	market misconduct is directly or indirectly attributed to a breach by any person as officer of a
2	duty under section 270, then the sanction orders may be made by the tribunal."
3	
4	What that boils down to is that there is a negligence standard under which you can
5	be sanctioned, if you are an officer for a corporation, for market misconduct. The pre-
6	condition is that the corporation itself will have had to have the guilty state of mind of
7	intention or recklessness for most of these provisions, and negligence for one of them. But it
8	does mean that this is not purely an intention or recklessness provision. Officers do have
9	affirmative duties under this provision.
10	
11	The market abuse code in Britain is not yet finalized. It is a moving target, and it
12	has been getting, for want of a better word, narrower in its successive drafts. We very
13	carefully considered whether we should go down the market abuse route. We in fact, at the
14	critical stage of this exercise, had received the submission from the Consumer Council
15	suggesting that we do go down the market abuse route. We decided that it was far too
16	difficult. My personal feeling is that the regime that we are asking you to institute in Part
17	XIII in particular - and Part XIV merely reinforces it - will on the whole be equivalent to
18	where the UK will get with the market abuse code, but that it would be an unacceptable
19	proposition to our market participants. For example, the SFC be given unlimited power to
20	fine which will not be accepted.
21	
22	They are having trouble accepting it with the SFA, but much as I hate to say it,
23	there is probably a perception, particularly amongst the international financial players, that
24	they can place greater faith in the judgment of the SFA than in the judgment of the SFC.
25	That is a reality we have to work with.
26	
27	<i>主席:</i>
28	

各位同事,就這部有沒有其他問題?

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Securities and Futures Bill and Banking (Amendment) Bill 2000

《證券及期貨條例草案》及 《2000年銀行業(修訂)條例草案》委員會

Deputy	Chairman:
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Mr Chairman, can I ask Mr DICKENS or Miss AU to explain this in relation to the United States situation? Because we did ask about the maximum of three times the profit, and so on, and asked them whether they have ever imposed it in a civil situation. They do not seem to be at all faced with this sort of thing. They said it is relatively rare for them to go to that level, but they have done it. So is the Hong Kong standard lower than the standard in the US, so that what is a market abuse punishable quite draconially in the UK would not be punishable in Hong Kong?

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

Commission:

I do not quite agree with the term there because there is currently litigation on this very point. The reason the decision was made to no longer persist with the three times penalty which we originally proposed when we outlined this Bill, was that we received advice to the effect that there might be difficulties under the Basic Law in the International Convention on Civil and Political Rights in having a penalty of that sort. Therefore the sanctions were modified so they are as you see them in this Bill.

The US jurisprudence is different because it pre-dates the International Convention on Civil and Political Rights. They have had 200 years of jurisprudence on their bill of rights, and I think the only thing I can say is that this is a very interesting topic, but can I ask that we explore it in writing? We have to be very careful about the impact on current litigation, and I am afraid to talk at large.

財經事務局副局長區璟智女士:

29 我們可以交代的,已載於文件的第11及12段,由於一個聆訊過程正 30 在進行,我不可多作討論。

Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000 《 證券及期貨條例草案 》及

《2000年銀行業(修訂)條例草案》委員會

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2	Deputy Chairman:
3	
4	Mr Chairman, I do not want to go into the particular proceedings, but just my
5	general concern of where we set the standard. We must not set a standard first lower than
6	the general international standard, and two, if we set the standard too low for market
7	misconduct, then we would not be able to protect our investors effectively. It is a matter for
8	other Members to pick up if they wish.
9	
10	主席 :
11	
12	我相信政府可就技術的層面進行研究。立法會的同事也希望香港的
13	標準可接近國際的水平。
14	
15	Miss AU King-chi, Deputy Secretary for Financial Services:
16	
17	We fully agree with the principles set out by the Honourable Margaret NG. What
18	I would like to emphasize is that we need to accept the package in the entirety – that is the
19	severity of the sanctions, both legal and criminal, and the nature of the proceedings into civil
20	or criminal, and also the level of intention that needs to be proved. We need to see the three
21	elements together in comparing whether one regime is more superior than the other two. I
22	think it is a bit difficult to write an conclusion at this stage, in particular when the FSA is still
23	working on their second draft of the market abuse code. We will watch it very closely.
24	
25	<i>主席:</i>
26	
27	但我本人認為這亦比較困難。我同意政府就英國的做法進行跟進,
28	但英國的有關法例於11月份才生效,所以我們也要視乎我們在時間方面如
29	何處理。
30	

Securities and Futures Bill and Banking (Amendment) Bill 2000 $\,$

《證券及期貨條例草案》及

《2000年銀行業(修訂)條例草案》委員會

1	<i>副土席:</i>
2	
3	主席,我們是否已就第XIV部進行討論?
4	
5	<i>主席:</i>
6	
7	不是,我們是同時就第XIII及XIV部進行討論的。
8	
9	<i>副主席:</i>
10	
11	我希望就第XIV部提出一個問題。
12	
13	<i>主席:</i>
14	
15	好的,其他同事有否其他問題?
16	
17	請胡經昌議員先發言,然後由余若薇議員發言。
18	
19	<i>胡經昌議員:</i>
20	
21	主席,首先我很高興很多法律界的人士已提供意見。我相信第XIII
22	及XIV部也是業界很關心的部分。我相信業界也認為,就內幕交易及較為嚴
23	重的罪行等作出檢控,也相當合理。有關文件第37段也提到,過往並沒有
24	那麼多的失當行為,但政府現在便把一些失當行為加入有關條款中。在政
25	府向我們提供的文件中指出,政府就失當行為方面會採用澳洲的法例為藍
26	本。但從政府提供的文件的附件有關國際比較的部分,我們可發現其中一
27	些失當行為並不在美國和英國法例的涵蓋範圍以內。
28	
29	我希望提出的第一個問題,是有關大前提的問題。在整條草案中,
30	政府有時採用美國的標準,有時參考英國的標準,有時也採用澳洲的標準。

Securities and Futures Bill and Banking (Amendment) Bill 2000 《證券及期貨條例草案》及 《2000年銀行業(修訂)條例草案》委員會

1 在很多情況下,某些較為完整的法例也可能有其制衡的措施。就是有關香

- 2 港本身的情況的資料已經很多,更要從不同的國家取材,使我擔憂我們有
- 3 否遺漏。

4

5 在制行方面,我們會否採用較為嚴謹的措施,或基於某個理由而採 6 用了某些措施,因而出現其他國家訂某些制衡措施而我們卻沒有這些措施 7 的情況呢?我和業界人士也非常擔憂,政府可否就因何選擇採用澳洲的法 8 例作出解釋呢?政府因何不選擇採用美國或英國的法例呢?澳洲的市場是 9 否很大呢?但較美國和英國的市場而言,澳洲的市場實在不算很大。如果 10 我們的目的是使香港的水平與國際水平一致,更不要說超英趕美,政府為 11 甚麼不採用這些國家的法例為藍本呢?其他地方不採用我們現時建議的制

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度,必定有很多原因。

這部分提到,市場失當行為除內幕交易外,還包括5類其他的行為。 其實業界在不同的層面也曾就這方面提出意見。業界認為,有關法例不應 阻礙正常的市場活動。而政府一直以來的回應是,當局一直以來也就這方 面進行研究,也會明顯地反映這個意思。政府的意思是,由於市場不斷發 展,香港的情況已追不及這個發展的速度。舉例而言,美國視為正當的市 場行為,在香港卻是沒有清楚界定為是否正當的行為。而當有關人士待法 例清楚列明有關行為是否正當時,才進行這些行為,可能已經太遲。

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我希望大家也可作較長遠的考慮。希望政府可作出解釋,因何香港會選擇仿效澳洲的做法,而不是參考美國和英國的做法。我們剛前往英、美進行訪問......

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主席:

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28 我們只是採用澳洲就market misconduct所作出的定義,對嗎?

29

30 胡經昌議員:

Securities and Futures Bill and Banking (Amendment) Bill 2000 《證券及期貨條例草案》及

《2000年銀行業(修訂)條例草案》委員會

	不是。
<u>E</u>	<i>村經事務局副局長區璟智女士:</i>
,,,	
	多謝胡議員提出這個問題。這個問題其實也相當重要。我們在考慮
如]何加大遏止市場失當行為的力度時,確實曾參考其他國家的做法。但當
我	3.們參考其他法例制度時,也須考慮哪些法例跟香港法例的《普通法》的
翟	! 【慣性質類似。所以政府主要選擇參考英國和澳洲的做法。我們亦有留意
美	國的做法。但考察團或許也有留意,美國的法律發展較為複雜。
∄	· · · · · · · · · · · · · · · · · · ·
	為甚麼政府認為美國的法律發展較為複雜?
具	<i>村經事務局副局長區璟智女士:</i>
	美國亦訂有class action等互相輔助措施。所以只參考美國的明文法
例	可能並不足夠,還須參考他們的手段。總括來說,我們只參考澳洲及
英	至國兩套法例。大家也曾到英國考察。英國的趨勢是主體法例宜寬不宜細,
紐]節仍在草擬階段。我們草擬法例時,當局還未開始草擬有關code。所以
我	我們只好參考一項行之有效並已累積若干年經驗的法例。我們參考了澳洲
的	」法例,因為該法例已落實一段時間。稍後請Mr DICKENS加以補充,因為
他	1對澳洲方面的知識比我更多。香港的法院也可參考他們的一些案例。而
由	1於該法例在澳洲已實施多年,市場人士也知道該法例的情況。
	另外,澳洲的法例的另一個好處,是該法例的紀綱目章已清楚指出
失	當行為的種類。對市場人士來說,他們很清楚在甚麼情況下便可能會觸
犯	2法例。如果我們以較廣泛的方式進行草擬,監管機構便會擁有較廣泛的
西]情權,而可能須在Code中指明哪些是違規的行為。但經商討後,我們認

Securities and Futures Bill and Banking (Amendment) Bill 2000 《 證券及期貨條例草案 》及

《2000年銀行業(修訂)條例草案》委員會

1 為較理想的做法,是提供較高的透明度,即提供穩定性,讓人們在作出某

2 些行為前,清楚知道該等行為是否合法。我們認為較佳的做法,是在主體

3 法例中清楚指明何為失當行為。

5 剛才胡議員提到,別人不採用這個做法而我們卻採用。其實情況並 6 不是這樣。其他地方也正採用這個做法。第二,我們建議的做法是否"補補 7 貼貼",取材自不同的地方?答案是否定的。第XIII和XIV部整部分的參考 8 來源也是來自澳洲。或許請Mr DICKENS就澳洲方面的經驗作出解釋。

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

Commission:

Initially, the reason for choosing Australia was exactly what Miss AU said. It was at the time the only nice black-letter code around. The US provisions are found in rules and they are found in case law, and they have got 70 years of case law behind them. They are also, incidentally, dealing with as much, much more sophisticated market than ours, and against a very difficult legal background. The British, at the time they started this exercise, had nothing. Even the Code of Market Abuse was not a gleam in their eye. This exercise has involved consultation for something like 5 years already, and this is the 1996 redraft we are discussing.

The reason with persisting with an Australian model is exactly the second point Mr WU made, that we need to be sure that there are no unintended consequences on legitimate market conduct; and we know that because these provisions have been in force somewhere else for 20 years, and that market has active hedging, active arbitrage, active program trading, a very sophisticated range of derivative products, and all of the trading strategies that go with that. In those respects, but not in size, it is slightly ahead of this particular marketplace. The reason we want to cling to these provisions, even though I believe some Members of the Committee would be prepared to give us even wider powers, is because we are very confident there will be no unintended consequences on legitimate market behaviour. Because the

Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000 《證券及期貨條例草案》及 《2000年銀行業(修訂)條例草案》委員會

1 market will keep changing, we are asking for a safe harbour power so that we can continue to 2 allow legitimate market conduct to go on, even as the market evolves.

It would have been very tempting to go for the British approach. On paper it gives the regulator enormous power. Unfortunately it is a work in progress and is not yet complete, and it is a political reality in Hong Kong that we would not be entrusted with such wide powers, either by yourselves or the market.

主席:

11 胡經昌議員。

胡經昌議員:

政府已作出解釋,但政府亦未有就所有提問作出解釋,因為暫時尚未有英國方面的資料,而英國現時正繼續進行有關規則的草擬工作。我希望政府能提供資料,以釋除業界,特別是以Linklaters & Alliance作為代表的9名investment bankers的疑慮。如果澳洲的法例真的如政府所指,對市場失當行為所訂的內容非常清晰,政府可否以列表的形式,講解如safe harbour等的情況,向業界加以解釋?因為若政府把澳洲的情況列舉出來,業界便能清楚瞭解香港有否這些safe harbour。

我們現時並沒有這份資料,但如果政府可以列表形式,把英國、美國和澳洲的情況作出比較,大家便能夠清楚各方面的分別。如果政府可以這樣做,對業界或投資者也可提供保障。在很多情況下,其實並不是業界的問題,而是投資者的問題。因為......

主席:

30 在大部分的情況下,這也是業界的問題。

Securities and Futures Bill and Banking (Amendment) Bill 2000 《證券及期貨條例草案》及

《2000年銀行業(修訂)條例草案》	委員會

1	
2	胡經昌議員:
3	
4	現時我們是以個人作出的行為決定是否失當行為。雖然將來的情況
5	如何,仍是未知之數,但最終仍是屬於個人的問題。我們無須就這個問題
6	爭論,但我們的擔憂,是有關條例的草擬方式,會對投資者造成影響。我
7	們現在也有"大欺細",即恃強凌弱之嫌。對"細"的一方會否造成影響呢?其
8	實,過往投資者也有受到影響。在這樣的情況下,政府可否採取較清晰的
9	草擬方式,讓所有人也能清楚知道應如何行事呢?
10	
11	<i>主席:</i>
12	
13	區璟智局長,妳們可否辦得到?
14	
15	財經事務局副局長區璟智女士:
16	
17	我認為投資者並不會就胡議員剛才所關注到的問題產生憂慮。第
18	一,市場預期證監會會草擬一些所謂"安全港"的規則。正如剛才
19	Mr DICKENS提到,在某些情況下並在某個時段內,某些活動可能是市場慣
20	用的做法,而有關法例卻無緣無故地使這個做法成為違規行為。這是因為
21	假如在有關情況下,這種慣常做法是倫敦和紐約的市場也不允許的做法,
22	我們也必須跟隨。這正是我們建議賦權證監會制訂有關安全港的條款的原
23	因。
24	
25	第二,市場預期證監會會作出廣泛的諮詢。其實我們已把這項程序
26	訂明在法例以內。證監會亦須諮詢財政司司長,然後提交立法會省覽。相
27	信大家也知道這些制衡的制度。
28	

Members as to the intention that SFC - - how it exercises its powers in making

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我還記得在上次會議席上,Mr DICKENS has briefly introduced to

Securities and Futures Bill and Banking (Amendment) Bill 2000 《 證券及期貨條例草案 》及

《2000年銀行業(修訂)條例草案》委員會

1 safe harbour rules under that section of the Bill. I remember that Mark has

- 2 briefly mentioned the areas of safe harbours that the SFC would look into.
- 3 Perhaps I could ask Mark to repeat in this area, like price stabilization and so

4 on.

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

7 Commission:

One, yes; we hope to deal with each of Linklater's and the other comments one by one, and take you through the clauses and see whether any adjustment or refinement of the language is necessary; and some things may need to be fine tuned in the primary legislation. But when it comes to safe harbour power, we have looked at three main areas that were proposed by the market: the areas of price stabilization in initial public offerings, and we agree that we should make rules for exempt price stabilization in initial public offerings because that is the situation in both the US and the UK. What we are currently waiting for is the second draft of the UK rules to be finalized, so that we can in effect piggyback off that. But the principle is agreed, and by the time the legislation comes into force, there will be a safe harbour. It will have checks and balances in it. that is why you need detailed rules.

We also looked at market making. At the moment our market does not have a very sophisticated form of market making. We have it only for a limited number of new products, mainly in the derivatives market, and the market making obligation is very weak. You do not in fact have to deal; you merely have to quote a certain percentage of the time during the day. The reason for considering exempting that form of market making is that in the strict market making regime in other jurisdictions, the market maker is an involuntary trader. He has to trade whether he has to or not. That is his obligation – to make a market. Were we to find that we were developing products in this market that needed that sort of market making – we hoped that Depondrius was such a product – we would then need to consider whether we needed a safe harbour rule. Our evaluation of the way the system works at the moment is that we do not need those safe harbour rules, but if it does come up in

Securities and Futures Bill and Banking (Amendment) Bill 2000 《 證券及期貨條例草案 》及

《 2000年銀行業(修訂)條例草案》委員會

the Linklater's letter and I will consider it.

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Similarly, and it comes up in the Linklater's letter again, we looked at the Chinese wall situation. At the moment you are exempt from the insider dealing provisions if the dealing happens on one side of a Chinese wall and the information is on the other side of that Chinese wall. But you are not so clearly exempt from some of the market manipulation provisions. It is possible, for example, that a large house might give an order; it might do a dealing based on its arbitrage book and do another dealing based on its fund management arm, and those two dealings happen to intersect in the auto-matching system. So the house would have dealt with itself. It would not have recorded it as a crossing because it happened on both sides of the Chinese wall. Our answer to that in the short term is that we think it is adequately covered by the defences we have put into the Bill, but again we have no problem with the proposition that such conduct should not be caught; and were it to turn out that, as trading strategies evolved and developed, that there was a need for a safe harbour in that area, we would be prepared to create one after going through the due process of consulting the market, consulting the FS and so on. At the moment we do not think one is necessary, but those are the three main areas we looked at, and they are the only areas the industry asked us to look at.

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胡經昌議員:

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其實我剛才只希望提出簡單的問題:澳洲是否已向我們提供這方面的資料?剛才政府提到,有關法例在澳洲已行之有效。那是否表示政府可提供一些資料給我們作為初步參考?

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

27 Commission:

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Yes. In fact Australia have not created safe harbours for any of these things, because they take a very strict view. We are prepared, given that our market is much more

Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000 《證券及期貨條例草案》及 《2000年銀行業(修訂)條例草案》委員會

1 international than theirs, to accept, for example, stabilization in IPOs, which the Australians

2 do not accept. In Australia stabilization is illegal. So we cannot give you your planned

safe harbours because we have not built any.

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主席:

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7 我希望在這裏稍為停下來,可能其他同事也有興趣研究這個問題。 8 有興趣研究這個問題的同事,可透過證監向我們提供的資料進行研究。或 9 請資料研究及圖書館服務部搜集澳洲有關這方面的法例的資料。證監會已 10 有這方面的資料,那便請你們提供。

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余若薇議員:

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第一個問題,我希望詢問有關第XIII部第274、298及247條間的關係。我特別希望證監會或政府解釋第247條,因為我認為這條款頗難理解。第247條訂明,在市場失當行為審裁處的判決可於其他民事和刑事程序引用,但這做法只限於某些情況。我希望政府解釋,在甚麼情況下可引用有關判決。另外,據我的理解,第274和298條的意思是,同一行為不會同時受到民事和刑事起訴。

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第二個是關於銀行的問題。業界提出一個問題:如果他們持有一些公司的股票作為抵押品,並知道該公司快將倒閉,銀行打算出售這些作為抵押的股票,根據有關條款,這做法便屬內幕交易。我想清楚,這會否造成困難?當銀行持有有關公司的股票時,該銀行難免會知道該公司的資料,因為該公司可能會由於跟銀行有合約上的關係,或由於銀行向該公司借出款項,而該公司需向銀行透露一些資料。但如果該銀行明知這公司不會還款,特別是在還款期屆滿的情況,而銀行打算把股票賣掉,但又知道了一些內幕消息,有關條款也逼使它不可賣掉有關股票,這會否出現問題?

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財經事務局副局長區璟智女士:

Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000 《 證券及期貨條例草案 》及

《2000年銀行業(修訂)條例草案》委員會

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2	我希望請Mr DICKENS先解答第二個問題。
3	
4	Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures
5	Commission:
6	
7	I will take that question. What the banks are asking you to do is to have the ability
8	knowing that a share price is about to go down drastically, to sell to the innocent investors in
9	the market, to protect their own financial position without contravening the insider dealing
10	provisions. Now, Australia has an exemption for that, the other jurisdictions do not. We
11	consider that to be classic and very harmful insider dealing. It will be unlawful under this
12	Bill, and we would strongly oppose giving the banks the exemption they request, because it is
13	a classic insider dealing situation where a person has knowledge that the value of shares is
14	about to decrease sharply, but nevertheless sells them into the market.
15	
16	If they want to sell them by private treaty and tell the person on the other side that
17	there has been a default, they are allowed to do that under this Bill, but what they are not
18	allowed to do is sell them to unsuspecting people, because that is insider dealing.
19	
20	Hon Audrey EU Yuet-mee, SC, JP:
21	
22	My point is that if the bank or the mortgagee at the same time has the right to sell
23	because, for example, the company is not paying on the due date - it is defaulting, so
24	therefore the bank has the right to sell – and at the same time has got some insider information
25	
26	
27	Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures
28	Commission:
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30	They cannot sell.

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

《證券及期貨條例草案》及 《2000年銀行業(修訂)條例草案》委員會

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2	Hon Audrey EU Yuet-mee, SC, JP:
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4	They cannot sell, even though they have the right to, under the contract.
5	
6	Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures
7	Commission:
8	
9	Everyone who is caught by the insider dealing provisions has the right to sell. By
10	definition they own the shares. But if you know certain things that the market does not
11	know, and you are in a certain relationship with the company, then you are not allowed to sell.
12	That is what insider dealing is all about.
13	
14	Hon Audrey EU Yuet-mee, SC, JP:
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16	Even though the company is defaulting?
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18	Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures
19	Commission:
20	
21	Especially because the company is defaulting. The person on the other side of that
22	transaction is going to lose a whole lot of money.
23	
24	Chairman:
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26	No one can sell prior to the information is made public.
27	
28	Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures
29	Commission:
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That is the whole essence of insider dealing prohibition.

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Securities and Futures Bill and Banking (Amendment) Bill 2000 《證券及期貨條例草案》及

《2000年銀行業(修訂)條例草案》委員會

2 3 財經事務局副局長區璟智女士: 4 5 我相信第274和298條的意思,是當局只可就同一行為作出民事或刑 事起訴,而不可就同一行為進行2次審訊。至於第247條,我需要邀請我的 6 7 律師同事幫忙講解。 8 9 高級助理法律草擬專員陳子斂女士: 10 11 主席,文件第27段也有簡單介紹第247條的意思。其實該條文的主 12 要意義與《內幕交易條例》第19條相同。內容大致是提到由審裁處處理的 13 案件所提供的所有證據,在這部內全部也可以適用,並可作為舉證的資料。 但在其他案件,例如刑事或民事案件,除非有關內容涉及發假誓或其他案 14 15 件,或涉及definition的問題,或與其他案件有關連,否則這些證據不可作 16 為舉證的資料。但另一個例外是,即使沒有審裁處的程序,根據《普通法》, 審裁處的資料也可作為舉證資料。所以我們便把它保留。有關條款的內容 17 18 主要是希望確保所有的資料都可作為舉證資料,即在這部內提及的所有法 19 律程序也可以保留。 20 21 余若薇議員: 22 23 我從文件第27段閱讀至第35段,還參考了《藍紙條例草案》,但我 24 仍不太明白有關次序的問題。通常有關程序會否有一個先後次序? 25 26 例如,首先由市場失當行為審裁處搜集證據,然後怎樣可決定進行

民事或刑事程序呢?如果進行民事程序,便不可進行刑事程序,如果進行

刑事程序,便不可進行民事程序。若證監會決定提出民事起訴,是否代表

律政司不可提出起訴呢?或若律政司提出起訴,是否代表證監會不可進行

民事程序呢?有關條款的意思,是否不論進行民事或刑事程序,這個失當

Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000 《證券及期貨條例草案》及 《2000年銀行業(修訂)條例草案》委員會

1 行為所產生的民事或刑事案件,都可運用市場失當行為審裁處所搜集得的 2 證據? 3 4 高級助理法律草擬專員陳子敏女士: 5 6 讓我簡單解釋。其實第274和298條是一併運用的。換句話說,如果 7 我們已進行民事程序,我們日後便不可使被告蒙受雙重損害,再就同一行 8 為向他提出刑事起訴。另一方面,如果我們選擇提出刑事起訴,我們也不 9 可令他蒙受雙重損害,再向他提出民事起訴。其實意思是當我們已選擇採 10 取某個方向的行動後,便不會透過另外一個途徑,再向他提出起訴。也就 11 是說,若進行民事程序,便不會進行刑事程序;若進行刑事程序,便不會 12 進行民事程序。 13 14 余若薇議員: 15 16 但主席,這個民事程序是普通投資者...... 17 高級助理法律草擬專員陳子敏女士: 18 19 20 對不起,這個民事程序是審裁處根據第XIII部進行的民事程序。換 21 句話說,若審裁處向他提出起訴,律政司便不可根據第XIV部,再次向他提 22 出起訴;若律政司根據第XIV部向他提出起訴,審裁處便不可再向他提出起 23 訴。 24 25 但至於投資者本身可提出的民事程序,是另外的獨立民事程序。回 26 應剛才余議員提出的問題,審裁處所作出的判決,或刑事方面作出的判決, 27 是可以作為這些獨立民事程序的舉證資料的。

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主席:

Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000 《 證券及期貨條例草案 》及

《2000年銀行業(修訂)條例草案》委員會

1	但那些獨立民事程序便要由投資者自己提出。
2	
3	高級助理法律草擬專員陳子敏女士:
4	
5	換句話說,共有3種法律程序:根據第XIII部由審裁處進行的民事程
6	序、根據第XIV部進行的刑事程序,以及由投資者提出的民事法律程序。
7	
8	<i>主席:</i>
9	
10	希望各位留意,在今天的會議上,我希望保留大概15至20分鐘,討
11	論日後的工作。所以,我們討論這些問題至10時20分或25分時,便會暫停,
12	Bernard •
13	
14	陳智思議員:
15	
16	多謝主席。
17	
18	主席,我想就剛才有關澳洲經驗方面提問。文件第68段提到
19	investment bankers(投資銀行)質疑現時MMT的工作。我希望向Mr DICKENS
20	提問,剛才他提到澳洲已採用這個做法一段時間。澳洲也有這些資金雄厚
21	的investment bankers。因何這些investment bankers在澳洲改例時沒有提出意
22	見,而在香港的情況下,卻有很多不同的意見?
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24	Chairman:
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26	Mr DICKENS. Interesting questions.
27	
28	Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures
29	Commission:
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Securities and Futures Bill and Banking (Amendment) Bill 2000

《證券及期貨條例草案》及 《2000年銀行業(修訂)條例草案》委員會

I am now about to reveal my age. In 1980, when we brought these provisions into force in Australia, index arbitrage was virtually unknown in that market. The international investment banks were not then present. Program trading had not been invented. People did not use computers. They used to write things up on boards. Price stabilization in IPOs had never been heard of. So the answer is: these comments were not made at the time. Since then the market has grown around the provisions, but index arbitrage, program trading and some very sophisticated derivative products have been offered, without impediment.

As to your question as to why the investment bankers who are now global and have arms in Australia and in the UK, the US and Hong Kong are worried about these provisions in Hong Kong, I think it is a combination of two things. We have repeatedly asked them to get advice from the Australian general counselors in their Australian arms. They seem not to have done that, although if you look at the latest letter from Linklater's, you will see they have retreated a long way from their earlier submissions.

Secondly, and I made this point before, there is probably greater reputational risk in Hong Kong in that we are not yet seen as a reliably credible jurisdiction by these people – and I find that reasonably offensive, because I have been practising here for 10 years. They give ASIC more trust than they give us, but that is in fact the case. So the answer is that we are very happy that this will not be a problem, that these activities will not be prohibited. We are prepared to issue guidance to that effect.

There has recently been a case in the Australian courts, about a very complex sort of market manipulation that took place against the background of an expiry day on a futures contract. So it was a classic index arbitrage unwind with the market manipulation features. Now, the court gave very clear guidance there as to what was legitimate conduct, and it is quite clear that most index arbitrage strategies are legitimate. The particular one adopted by the company was not regarded as legitimate by the court. It was not regarded as legitimate by us. We took disciplinary action. It was not regarded as legitimate by the English authorities who also took disciplinary action.

Securities and Futures Bill and Banking (Amendment) Bill 2000 《證券及期貨條例草案》及

《2000年銀行業(修訂)條例草案》委員會

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I think the real answer to your question is that the international investment banks do not co-ordinate globally in the way we might imagine they do. They have a tendency to seek local legal advice and sort of deal with the local situation in local terms.

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主席:

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8 我認為這部分也很有趣。我們參考有關法例,或許也會有所幫助。9 吳靄儀議員。

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副主席:

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13 主席,我也想跟進余若薇議員提問有關第247條的問題,特別是第 14 247(3)條。在我們的法律顧問所提供的對比表中也有提出,一般來說,第247 15 條的意思是,若在市場失當行為審裁處的程序中提出的證據,令當事人須 16 負上刑事責任,該等證據不可在其他刑事程序中獲得接納。但第(2)款訂明, 如果當事人發假誓,則是例外。由於這是很多法例的做法,所以我不覺得 17 18 存有問題。但第(3)款則提出一個很有趣的規定:"由某人提出的研訊程序證 19 據可在任何法院的任何其他民事或刑事法律程序中獲接納為針對他的證 20 據,前提是假若沒有根據第244條提起有關的研訊程序,該等證據本可在該 21 法院中根據適用於該等民事或刑事法例程序的法律或程序,而在該等程序 22 中獲接納"。那就是說,這類證據是可獲接納的,admissible就是可以呈堂的 23 意思。

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甚麼證據是可以呈堂的呢?第一,若這些證據與件事有關,而沒有別的原因使這些證據不被接納,便是可獲接納的證據。所以,admissibility的定義是十分廣泛的。如果原本在這些民事或刑事程序上是可獲接納的證據便可接納,而審裁處的證據也是可以接納的,基本上在審裁處提出的證據,便全部是可獲接納的證據。因此,妳剛才提出的第一個保障,是完全無效的。關鍵在於若沒有進行第244條所訂的審裁處審查程序,而審裁處又

Securities and Futures Bill and Banking (Amendment) Bill 2000 《 證券及期貨條例草案 》及

《2000年銀行業(修訂)條例草案》委員會

1 沒有權力,迫使當事人提供資料、文件及證據等,這些證據及文件根本不

- 2 會出現。所以,可能出現的情況是審裁處迫使當事人提供所有資料,然後
- 3 在另外的刑事或民事法律程序中以這些資料作為可以接納的證據。那麼還
- 4 有甚麼保障呢?多謝主席。

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6 Chairman:

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8 Eugene.

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10 Mr Eugene GOYNE, Associate Director, Enforcement, Securities and Futures

Commission:

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The circumstance in relation to 247(3) is not as I understand your interpretation to be. 247(3) was inserted after 247(1) and (2), which basically mirror the existing provisions under the Securities Insider Dealing Ordinance. (3) is there to say that basically if the proceedings had not occurred before the MMT, then information given at MMT proceedings would be admissible in any other proceedings, other than those covered in (1) and (2) if they were admissible according to the ordinary rules of evidence. It is saying that (1) and (2) do not affect the ordinary rules of evidence in relation to other proceedings. So if information is given in an MMT proceeding, then it is only admissible in proceedings other than those covered under (1) and (2) if it is admissible according to the ordinary rules of evidence governing those proceedings. The effect of that will be, in most cases, that the common law privilege against self-incrimination will exist in that self-incriminating evidence will not be admitted in other civil proceedings, for instance. It is basically a preservation of the ordinary rules of evidence in relation to other proceedings, other than those covered in (1) and (2), and that is the only intention.

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Deputy Chairman:

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The only admissible principle seems to me to be self-incrimination, and that is, in

Securities and Futures Bill and Banking (Amendment) Bill 2000 《 證券及期貨條例草案 》及

《2000年銀行業(修訂)條例草案》委員會

1 fact, quite a narrow answer.

Mr Eugene GOYNE, Associate Director, Enforcement, Securities and Futures Commission:

In relation to other information admissible before the MMT, the MMT is not bound by the ordinary rules of civil or criminal evidence, and can consider any material that it feels appropriate to consider, but would probably give it weight according to the ordinary rules of evidence. However, if such evidence is tendered before it, (3) will also have the effect that regardless of the effect, the MMT has decided to admit it before itself, irrespective of the ordinary rules of civil or criminal evidence. If there are independent proceedings, the admissibility of that evidence before the MMT and the fact that the MMT has let it in will not affect its admissibility before other bodies. Those other bodies, criminal or civil courts, or statutory tribunals, will decide whether that evidence is admissible according to the rules of evidence applicable to that particular body.

Deputy Chairman:

Mr Chairman, I have no problem with the rules of admissibility. That is not the question. I am talking about fact. If there is no MMT hearing, many things will not be said. Evidence will not be given. I would not have told you things, and so if you were to institute a criminal or civil procedure against me, there would not be any evidence available – all right? It is just not available. It did not come about. But since a MMT hearing has taken place, these things have become available. Now, once they have become available, then what makes them inadmissible? If they are admissible by the rules of admissibility, then they would be used.

I asked earlier if some evidence is unlawfully obtained, what then? Do you use it? These are admissible.

Securities and Futures Bill and Banking (Amendment) Bill 2000 《證券及期貨條例草案》及

《2000年銀行業(修訂)條例草案》委員會

1	Mr Eugene GOYNE, Associate Director, Enforcement, Securities and Futures				
2	Commission:				
3					
4	If I can summarize the intent of (3), the intent is exactly as I think you are				
5	proposing. There is certainly no intention for the government or the Commission to depart				
6	from that within the terms of the Bill. The intention behind 247(3) is that irrespective of				
7	whether the MMT has decided under its special, very liberal, evidence rules to allow				
8	something to be admitted before it, if there is other independent civil or criminal proceedings				
9	that are not covered under subsections (1) or (2), which are special cases that are preserved				
10	from the IDT's existing arrangements, then the admissibility of that evidence which the MMT				
11	has been let in will only be decided by those other bodies, be it a civil or criminal court,				
12	according to the rules they would normally apply.				
13					
14	It is in effect an avoidance of doubt provision. It is not letting material in that has				
15	been let in before the MMT. It is saying that, for instance, if there are separate collateral				
16	criminal proceedings and material admitted before the MMT was perhaps relevant in some				
17	way to those proceedings, that criminal court will only admit that evidence if it is admissible				
18	in accordance with the ordinary rules of criminal evidence.				
19					
20	Deputy Chairman:				
21					
22	Mr Chairman, let me just try it once more. What is admissible in an MMT – what				
23	this tries to say, just because something is admitted, and is admissible before an MMT, does				
24	not mean that it would be admissible before the other court in criminal or civil proceedings,				
25	because MMT is wider. So just because MMT admits the evidence does not mean it has				
26	changed the rules of evidence in the other, the rules of admissibility.				
27					
28	Mr Eugene GOYNE, Associate Director, Enforcement, Securities and Futures				

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Commission:

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

《證券及期貨條例草案》及 《2000年銀行業(修訂)條例草案》委員會

1	Yes.				
2					
3	Deputy Chairman:				
4					
5	Okay. I understand that. I am not concerned with admissibility. I am				
6	concerned with availability. The MMT has made these things available. Once they are				
7	available they are then admissible. Of course they are admissible in the other tribunals.				
8					
9	Mr Eugene GOYNE, Associate Director, Enforcement, Securities and Futures				
10	Commission:				
11					
2	No.				
13					
4	Deputy Chairman:				
15					
6	Let me put in a conspiracy term. Now, if there is no MMT hearing, you just do				
7	not have any evidence against me. You ask me to make a statement, and I say, "Thank you				
8	very much. I don't wish to", that is the end of the matter. Since you cannot get me that				
9	way. You say, "I will have an MMT". All that is required is for the Financial Secretary to				
20	have this statement. MMT would take place. Once the MMT starts, MMT can ask me to				
1	say all sorts of things, and I will have to say them. Once I have said them, now you can say,				
22	"Of course the MMT fails", but now you can institute criminal or civil proceedings against				
3	me, and now this evidence has become available.				
4					
5	Now, I am not using the admissibility rule of the MMT. I am just saying as a				
6	matter of fact, this body of evidence has become available, and the other tribunals can use it.				
27	This is the situation, so this is what I am worried about.				
8					
9	Mr Eugene GOYNE, Associate Director, Enforcement, Securities and Futures				

30

Commission:

《2000年銀行業(修訂)條例草案》委員會

1					
2	Completely true.				
3					
4	Deputy Chairman:				
5					
6	Thank you.				
7					
8	Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures				
9	Commission:				
10					
11	Sorry, but it is correct. Now, the question then becomes what you do about that				
12	It happens in civil trials now, although they do not have the power to compel certain sorts of				
13	evidence to be given. In particular, you cannot be compelled to incriminate yourself in the				
14	civil ligitation, and you can in the MTT. That might lead to, say, an action for tort of some				
15	sort, by somebody else. It is a point I just think we need to give further consideration to.				
16	(3) has no sinister intent. (3) is neutral on your question. We need to consider whether the				
17	evidence that would not come into being but for the tribunal proceedings				
18					
19	Deputy Chairman:				
20					
21	Do give us an analogy.				
22					
23	Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures				
24	Commission:				
25					
26	should be used somewhere else. Well, it can be used in other trials. I agree				
27	with you there. The question is whether it should be able to be.				
28					
29	Chairman:				
30					

《2000年銀行業(修訂)條例草案》委員會

1	Okay.			
2				
3	Hon Audrey EU Yuet-mee, SC, JP:			
4				
5	Mr Chairman, it is on the same point. I cannot understand clause 247, and that is			
6	one of the difficulties. Margaret has already made the point. Can I just ask also in relation			
7	to clause 247(1)? The last part is "not admissible in evidence against that person in any			
8	other proceedings, civil or criminal, in a court of law, brought by, or against it". Can I just			
9	have that bit explained, with relevance also to (3)?			
10				
11	Chairman:			
12				
13	Sherman.			
14				
15	高級助理法律草擬專員陳子敏女士:			
16				
17	多謝主席。其實這個處理方法在第(1)款中已經說明。在剛才副主席			
18	讀出的那一段前已訂明"subject to subsection (2) and (3)"。原意是第(1)款所			
19	涵蓋的證據的範圍很廣泛,並且是不可在其他程序中獲得接納的證據。第(2)			
20	款提到甚麼證據是在其他程序中可獲接納的證據。第(3)款也是提到甚麼證			
21	據是在其他程序中可獲接納的證據。至於第(3)款的政策背景,就是剛才			
22	Mr Eugene GOYNE已解釋原因。			
23				
24	<i>副主席:</i>			
25				
26	主席,第(3)款是有關不可獲得接納的證據。			
27				
28	高級助理法律草擬專員陳子敏女士:			
29 20				
30	是可以的。			

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

《證券及期貨條例草案》及 《2000年銀行業(修訂)條例草案》委員會

1					
2	<i>副主席:</i>				
3					
4	第(3)款是不可以的。 It is not admissible.				
5					
6	高級助理法律草擬專員陳子敏女士:				
7					
8	是可以的。"The evidence given by any person at or for the purposes				
9	of any proceedings instituted under section 244 referred to in subsection (1) is				
10	admissible in evidence"。當然,剛才我們討論時,只是反過來說。即如果				
11	根據一般有關證據的法例,有關證據是不可獲得接納的,這些證據便不可				
12	獲得接納。但寫法是若一般有關證據的法例訂明,有關證據是可獲接納的,				
13	這些證據便可獲接納。				
14					
15	其實,整個解釋是,根據subsection(1),第XIII部所有的證據都可以				
16	獲得接納,但其他的證據便不可接納,但亦有例外的情況。第(2)款便提到				
17	例外的情況,例如發假誓。第(3)款也提到例外的情況,即如果有關證據在				
18	一般情況下是可獲接納的,在這情況下便可獲接納。當然,仍存在吳議員				
19	剛才提出的問題:在審裁處特別提出的證據,是在一般情況下不能獲得的證				
20	據。這是另一個問題。				
21					
22	<i>主席:</i>				
23					
24	我們再作研究吧。何俊仁議員,現在是最後一個問題了。				
25					
26	何俊仁議員:				
27					
28	其實我想跟進這個問題,但由於剩餘的時間不多,我還是先提出另				
29	一個問題吧。剛才也說得很清楚,如果已進行刑事檢控,便不可向MMT提				
30	出起訴;若已向MMT提出起訴,便不可再提出刑事起訴。我提出的問題是,				

《2000年銀行業(修訂)條例草案》委員會

1	如果有人被刑事檢控,並經定罪,而有關罪行亦相當嚴重,他按理應被停				
2	止很多職責。但刑事法庭卻沒有類似MMT的權力,可施加終止令、作出冷				
3	淡對待等多方面的罰則。那麼當事人豈不是可以繼續執業嗎?這個問題應				
4	怎樣解決?				
5					
6	財經事務局副局長區璟智女士:				
7					
8	我還記得我們在去年4至6月討論《白紙條例草案》時,何議員也有				
9	提到這點。我們當時承諾就人權和《基本法》方面進行諮詢,研究有否出				
10	現違規的情況。我們當時得到的建議,是將某些民事制裁伸延至刑事制裁。				
11	我們已經做到這點。或許請Sherman指出有關section。				
12					
13	高級助理法律草擬專員陳子敏女士:				
14					
15	有關條款是載於第C2121頁的第295條。載於有關定立罰款及監禁刑				
16	期的條款後的第(2)款(a)、(b)及(c)段訂明,法庭可訂立一些命令。				
17					
18	何俊仁議員:				
19					
20	即類似MMT的				
21					
22	高級助理法律草擬專員陳子敏女士:				
23					
24	是類似的。				
25					
26	財經事務局副局長區璟智女士:				
27					
28	所有可以伸延的制裁,我們已經做了。				
29					
30	何俊仁議員:				

Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000 《證券及期貨條例草案》及 《2000年銀行業(修訂)條例草案》委員會

1				
2	在刑事法庭,大部分負責檢控的也是律政司的律師。但是否適宜發			
3	出這些命令,可能有很多其他考慮的因素。當局有否人選會向法庭陳述,			
4	提出法庭應作出某些考慮呢?我覺得增加法庭的權力是好的,但由於負責			
5	檢控的是律政司,如果要發出命令,刑事法庭是否還須進行別的聆訊呢?			
6				
7	財經事務局副局長區璟智女士:			
8 9	你是否擔心刑事法庭的法官不瞭解			
10	你走台塘心刑事法庭的法自个喝胜			
11	<i>何俊仁議員:</i>			
12				
13	會否存有這種可能性呢?			
14				
15	<i>財經事務局副局長區璟智女士:</i>			
16				
17	我們也會與律政司的同事商量。我們覺得通常在這種情況下,法官			
18	都會徵詢有關方面的意見。			
19				
20	<i>胡經昌議員:</i>			
21				
22	主席,我想請她們在跟進吳靄儀議員和余若薇議員的提問時,多距			
23	進一個問題。可否請她們跟進第244(7)和第245(1)(a)條,說明這兩條會否存			
24	在衝突?這兩條也是關於admissible evidence的問題。			
25				
26	財經事務局副局長區璟智女士:			
27	李明 <i>儿</i> 4月明照日甘蔗。			
28	請問你的問題是甚麼?			
2930	Chairman:			
50	CITALI III WILL			

《2000年銀行業(修訂)條例草案》委員會

2	"the standard of proof required to determine any question or issue before the					
3	Tribunal shall be that applicable to civil proceedings in the court of law."					
4						
5	<i>副主席:</i>					
6						
7	主席,我相信這條款是沒有問題的。胡經昌議員的意思,只是請署					
8	方向作出我們回應時,也同時考慮這條條款吧。					
9						
10	<i>主席:</i>					
11						
12	讓我們在這裏暫停。局長,妳也可以留步,但由於我們只是討論日					
13	後工作的程序,如果妳有要事,可以先離席。					
14						
15	我想請各位同事參考立法會CB(1)1201/00-01(01)號文件。該份文件					
16	列出了未來會議舉行的時間。請各位細心研究,因為這對各位的影響很大,					
17	你們也要爭取自己的權益。文件有一個printing error,5月21日的會議時間					
18	不是上午8時30分,而是下午2點30分。6月5日以後的會議是新安排的會議,					
19	而會議的日期編排至7月底。由於很多委員會在7月底仍會舉行會議,希望					
20	各位研究這些安排有否造成困難。我們在7月13日、16日、18日及27日也會					
21	舉行會議。					
22						
23	<i>副主席:</i>					
24						
25	我們早已有心理準備了。					
26						
27	<i>主席:</i>					
28						
29	巳有心理準備便最理想了。如果這樣的話,希望我們可一起努力,					
30	最低限度完成第一次逐一研究條例草案每項條文的審議工作。另外,請各					

Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000 《證券及期貨條例草案》及 《2000年銀行業(修訂)條例草案》委員會

1 位留意,在6月1日和6月5日舉行的兩次會議,會進行內部討論。我亦希望

- 2 藉這個機會,請秘書處列出我們在5月30日前曾激烈討論的題目,refresh我
- 3 們的記憶,使我們知道需要討論甚麼題目。你們不需要提供詳細的文件,
- 4 只是highlight topics,寫出有關題目便可。當然,我們也希望政府能趁那兩
- 5 個星期的空檔時間,整理一些積壓的文件,好讓我們就逐項條文進行審議
- 6 時,可取得你們的回應和研究你們提出的CSA。

7

副主席:

9

8

主席,根據Pauline(助理秘書長1)提供的資料,劉漢銓議員的海外考 11 察報告書的初稿已差不多完成。到那時候,我們便很可能可以取得一些 12 highlight。我們可否跟他聯絡,看看他在這方面可向我們提供甚麼幫助和資

13 料呢?

14

主席:

1617

18

19

20

21

22

23

15

如果到時劉漢銓議員的報告書的初稿已經完成,我們可以邀請劉漢 銓議員向我們匯報考查團的體會,使我們可在研究條例草案時加以考慮。6 月1日和6月5日會議的目的,是希望各位議員提出一些特別的issues,如果 我們可就這些issues達成共識,便可向政府提供意見。即使我們不能達成共 識,各位亦可知道有關議題具爭議性,好讓大家在進行CSA的階段時加倍留 心。對這個程序安排,大家有沒有問題?如果沒有問題,請各位把有關時 間記錄在你的日記簿內。

24

25

何俊仁議員:

2627

我很擔心有很多議員會在7月份休假。請你問清楚。

28

29 主席:

《2000年銀行業(修訂)條例草案》委員會

1	由於現在已是5月初,所以我發出這份文件,並預留10分鐘的時間				
2	進行討論,確保同事明白有關情況。				
3					
4	吳靄儀議員。				
5					
6	副主席:				
7					
8	主席,由於不是全體委員也有出席今天的會議,我希望秘書處可發				
9	出文件,提醒各位委員,我們希望在6月1日和6月5日的內部討論會議上,				
10	就政策性的問題取得一些共識。由於我們到時可能會就我們的意向進行投				
11	票,他們的參與是很重要的。				
12					
13	<i>主席:</i>				
14					
15	我們會盡量尋找一些較為主流的意見。這可能會較為容易。				
16					
17	法律顧問。				
18					
19	立法會秘書處法律事務部高級法律顧問李裕生先生:				
20					
21	主席,趁政府的代表仍然在場,希望主席跟政府方面澄清,他們能				
22	否在有關時限內向我們提供有關文件。				
23					
24	在過往數個月以來,我們發現在擬備文件方面,出現時間相當緊迫				
25	的情況。我們通常都要待政府提供文件後,才可就這些文件提出意見。過				
26	往,政府通常在會議舉行前的兩個星期內,已將所有關於某部的文件備妥。				
27	我明白擬備這些文件是相當複雜的工作,所以他們可能趕不及向我們提供				
28	文件,故此我們有時也不能預早向議員提供文件,我們感到相當抱歉。				
29					
30	另外是關於中譯本的問題。據我的理解,政府正就這個問題進行內				

《2000年銀行業(修訂)條例草案》委員會

1	部的灌涌。	遇到一些需要更	改字眼的情况	, 他們也雲就其他	也條文作出對比,

- 2 並可能需修改另一些部分。所以,到現時為止,我們還沒有收到政府就修
- 3 改中文本方面的資料,即為使中英文本脗合而需作出的修改。所以我也不
- 4 知道能否按這個時間表訂定的時間,備妥有關資料。政府也曾向我表示,
- 5 會以標示文本的形式,即把有關部分mark up,事先向委員會提供所有委員
- 6 會審議階段修正案。不知政府在時間上能否配合?

7

8 主席:

9

- 10 我相信政府已聽到這些意見。政府暫時也不用作出回應,但希望你 11 們清楚我們的要求。立法會亦希望能與政府合作,在切實可行的情況下,
- 12 完成這條法案的工作,並盡量小心行事。我相信在我們完成逐項審議條例
- 13 草案條文的第一輪審議工作後,可能要待立法會休會後,政府才可更努力
- 14 地進行其中一些工作,例如有關中文本的工作。我希望我們在9月初復會
- 15 時,有關工作大體上已經完成。

16

- 17 相信政府已聽到我們的法律顧問提出的要求,希望他們能盡量做
- 18 到。多謝各位。

19

20 m2777