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, 15 June 2001, at 10:45 am in Conference Room A of the Legislative Council Building

Members present : Hon Margaret NG, (Deputy Chairman)

Hon Albert HO Chun-yan Hon Eric LI Ka-cheung, JP

Hon NG Leung-sing

Hon Jasper TSANG Yok-sing, JP Hon Audrey EU Yuet-mee, SC, JP

Members absent : Hon SIN Chung-kai, (Chairman)

Dr Hon David LI Kwok-po, JP

Hon James TO Kun-sun Hon Bernard CHAN

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

Public officers attending

Miss AU King-chi

Deputy Secretary for Financial Services

Miss Vivian LAU

Principal Assistant Secretary for Financial Services

Miss Emmy WONG

Assistant Secretary for Financial Services

Mr K F CHENG

Senior Assistant Law Draftsman

Attendance by invitation

Mr Mark DICKENS

Executive Director, Supervision of Markets, Securities

and Futures Commission

Mr Gerald D GREINER

Senior Director, Supervision of Markets, Securities and

Futures Commission

Mr Andrew YOUNG

Legal Consultant, 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

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	<i>主席:</i>
2	
3	各位同事,我們的法定人數剛好足夠。我們邀請政府代表進入會議
4	室。今天最主要是討論Part III。Good morning and welcome to the meeting. We should
5	now start on Part III •
6	
7	各位同事請參考CB(1)1468/00-01號文件。區局長,政府是否在文件
8	內很多地方都作出了修改?若是這樣的話,我們不如用文件作為根據,這
9	樣會比較參考《藍紙草案》為佳。
10	
11	<i>財經事務局副局長區璟智女士:</i>
12	
13	多謝,主席。各位早晨。其實,如果今次參考完這份文件覺得適當,
14	以後的每一個部分我們都會用這個方法處理。第I、II部分,由於我們沒有
15	具體的修訂,因此用回原文,各位可比較容易參考。以往我們每次開會商
16	討後也會有修訂,所以我希望一併寫進去,大家就不用參考兩份文件。如
17	果各位覺得今次的做法恰當,以後我們就採用這個方法。
18	
19	主席:
20	
21	好的。我們開始審議之前,或許我請委員會秘書或法律顧問介紹一
22	下我們應參考的列表,即是就先前的意見、政府的回應、法律顧問的疑問、
23	同事們的疑問所擬備的列表,讓各位議員可以作為對照。秘書,請問我們
24	應該看哪份文件,有什麼列表是應該注意的?
25	
26	秘書林葉慕菲女士:
27	
28	主席,議員或者可以參考CB(1) 1379/00-01號文件,該份文件在5月
29	29日已經交給各位議員。

30

Bills Committee on

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

1	財經事務局副局長區璟智女士:
2	
3	林太,是否可以告訴我們政府文件的編號?
4	
5	秘書林葉慕菲女士:
6	料フ、浸水水肿目粉曲成器川的
7 8	對了。這份文件是秘書處發出的。
9	財經事務局副局長區璟智女士:
10	
11	即是沒有政府文件的編號?
12	
13	秘書林葉慕菲女士:
1415	我們應該已經提交給政府。
16	
17	<i>主席:</i>
18	
19	文件是一定會提交政府的,日期就是5月29日, reference
20	CB(1)1379/00-01(01) °
21	
22	秘書林葉慕菲女士:
23	口机中亚克祖州的安思之州目CD(1)1469/00 01/01)赌文州 网子文
2425	另外由政府提供的有關文件是CB(1)1468/00-01(01)號文件,剛才主席也提過。接著就是CB(1)1485/00-01(01)號文件,這一份文件是政府就市場
25 26	意見提出新的意見及作出回應。
27	
28	· · · · · · · · · · · · · · · · · · ·
29	
30	各位都應該收到這些文件。法律顧問,請問在我們擬備的對比表

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1	中,有哪些文件是應該參考的?
2	
3	助理法律顧問顧建華先生:
4	
5	多謝,主席。有關的文件主要是我們在討論政策方面問題時曾提交
6	的對比表,但對比表其實沒有提及比較細微的草擬問題。因此,除非議員
7	在這方面有特別的問題,否則未必會有太大的幫助。其實有關草擬的問題,
8	我們的意見已在較早前提交給政府,亦已獲得政府接納。或許可以一提的
9	是:關於第91條 —— 提供資料,據我的記憶所及,我們正等待政府確認
10	有關的規定是否與《個人私隱條例》不會有任何抵觸。
11	
12	另外一個關乎背景的問題是關於結算所方面的。因為結算所原本是
13	一個並非以盈利為主要目的的機構,當時是以擔保的形式成立的一間公
14	司,由數間大銀行提供資金,並有聯交所參與,作用是提供一個結算的機
15	構。但結算所現在已成為港交所的附屬機構及上市公司的一部分,而且控
16	制相當大量的市場敏感資料。上述問題純粹是提出來供議員參考,讓議員
17	考慮是否對目前的草擬法例感到滿意,認為這方面已有足夠的安排。
18	
19	<i>主席:</i>

2021

關於這個問題,我們主要討論哪幾條條款?

2223

助理法律顧問顧建華先生:

2425

有關結算所方面,應該在第III部的第3分部,即第37條至第58條。

26

27 主席:

28

29 好的。各位同事,在這方面,我們就這兩個問題請政府先作出簡短 30 的回應。區局長,關於第91條,政府是否還有文件要交給我們?

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1	

財經事務局副局長區璟智女士:

3

2

4 我要問一下我們的同事黃國玲女士,她有否與律政司署的同事澄清 5 第91條與《個人私隱條例》是否有抵觸?

6 7

財經事務局助理局長黃國珍女士:

8

9 我們已經去信私隱專員公署,正在等候他們確認。我們初步覺得是 10 沒有問題的。

11

12 主席:

13

14 我們下一個階段可能就這方面會發出補充文件,請各位議員注意。 15 另外,就關於結算所的第37至第58條,政府是否希望在這階段作一個總括 16 的回應?

17

財經事務局副局長區璟智女士:

19

18

20 我們可以簡單地回應,稍後到第3分部,我們再詳細看看有關制衡 21 的條款,讓大家考慮是否有此需要?剛才顧先生也提到:結算所通過日常 22 結算交收的運作,可能收到很多商業上敏感的資料。但我相信解決的方法 23 是有的:首先,為了方便推行交收結算系統,資料是一定要提交的,個別 24 的市場參與者及結算公司之間有合約的關係,應該已解決這些敏感問題的 25 處理方法。另外,剛才顧先生也提及:由於這個機構現在是一個牟利的機 26 構,會否擔憂這些資料在商業運用上會出現濫用的情況呢?證監會其實也 27 有一系列的監管措施,例如在利用這些資料時要通過一些規章。這些規章 28 需要由證監會作出書面審批,證監會亦有權要求結算所修訂這些程序和規 29 章。第3分部也很詳細地臚列證監會及結算所之間的規管關係,議員稍後可 30 以詳細參考這方面,研究有關規管是否過多還是過少。

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1	
2	<i>主席:</i>
3	
4	你提到的規章是獨立的,即不在條例之內。
5	
6	<i>財經事務局副局長區璟智女士:</i>
7	
8	交易所自已可以制定規章,由證監會作出審批。這些規章不是附屬
9	法例。
10	
11	<i>主席:</i>
12	
13	好的。
14	
15	財經事務局副局長區璟智女士:
16	
17	Mr DICKENS現在是否需要補充?
18	
19	Chairman:
20	
21	Do you wish to supplement at this point?
22	
23	Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures
24	Commission:
25	
26	The only thing I would add at this point is: were the situation to arise – and we
27	believe under the rules at the moment it cannot arise – where the clearing house or the
28	exchange company, which also has sensitive information about, for example, the financial
29	position of broking clients, attempts to commercially exploit that information for purposes
30	other than their statutory duties under section 38, we can step in under clause 75 and give

《2000年銀行業(修訂)條例草案》委員會

them a direction to resolve it, "to forthwith take such steps as are specified for the progress of

1

2	remedy the conflict of interest". "Conflict of interest" is actually defined as a conflict
3	between their interests and the interests of the proper performance of the functions conferred
4	by the Ordinance. So we have actually got quite a range of checks and balances, but there is
5	the one that would be most specifically addressed to this situation.
6	
7	Chairman:
8	
9	Okay. So I will leave it at that. I will leave it to members if they wish to raise
10	specific points when we come to that. All right?
11	
12	請議員參閱CB(1)1468/00-01號文件,中文版本是CB(1)1499/00-01
13	號文件。我們就利用這兩份文件開始審議第III部,我會隨即逐條讀出條次,
14	請各位提出問題。同時,政府方面若就該條次有任何修正,也請政府簡略
15	地解釋。
16	
17	第18條 —— Interpretation of Part III。請問這方面有沒有問題?如
18	果沒有問題,接著是Division 2,第19條 —— Recognition of exchange
19	company,此處是有修正的,請區局長或其他同事解釋。
20	
21	財經事務局副局長區璟智女士:
22	
23	請鄭劍峰先生解釋,黃國玲女士可作補充。
24	
25	高級助理法律草擬專員鄭劍峰先生:
26	
27	我們的修訂,最主要修訂是第(1)(c)款和第(1)(d)款,原來的第(1)(c)
28	款和第(1)(d)款訂明:任何人不得協助營辦證券市場或期貨市場,除非他是
29	在第(a)款所指的人士,又或是一間認可的交易公司。這兩個條款,在諮詢
30	期間有意見認為可能產生以下的情況:有些人士在香港作出協助,但所協

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1	助的是一間在海外的交易所公司。有關的意見認為,這條的涵蓋範圍過於
2	廣泛,因此我們作出修正,如果那一間交易所公司的運作違反了我們的條
3	例,協助這些公司的運作才是違法的。
4	
5	<i>主席:</i>
6	
7	這方面還有沒有問題?
8	
9	<i>余若薇議員:</i>
10	
11	我希望當局解釋一下第19(1)(a)條下的3個小節,第(i)節就很清楚,
12	能否對第(ii)及(iii)節作出解釋?
13	
14	<i>主席:</i>
15	
16	鄭先生。
17	
18	高級助理法律草擬專員鄭劍峰先生:
19	
20	第(i)節是現在的聯交所;第(ii)節是有關認可交易所的控制人,其
21	實就是現在的港交所。第(ii)節提到:如果現在的港交所是作為一個控制人,
22	港交所屬下的認可交易所公司也可以營運一個證券市場;第(iii)節提到:港
23	交所本身若屬認可交易公司,港交所亦可以自已營運一個證券市場,這就
24	是第(iii)節的意思。
25	.
26	<i>主席:</i>
27	
28	Audrey °
29	Λ # # # # B
30	<i>余若薇議員:</i>

30

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	能否再重覆第(iii)節的意思?
3	
4	高級助理法律草擬專員鄭劍峰先生:
5	
6	第(iii)節,有關的認可交易所控制人,也即是港交所,如果本身是
7	一個認可交易所公司,即在這個條例下獲得認可,港交所是可以營運一個
8	證券市場的。
9	
10	<i>主席:</i>
11	
12	曾鈺成議員。
13	
14	<i>曾鈺成議員:</i>
15	
16	主席,已經修訂的第(1)(c)款是甚麼意思?即"in contravention of
17	this subsection",就是指第19(1)條嗎?
18	
19	<i>主席:</i>
20	
21	鄭先生。
22	
23	高級助理法律草擬專員鄭劍峰先生:
24	
25	其實,剛才也大概解釋過,第(1)(c)款原本的意思是:任何人如非(a)
26	段提述的人士,均不可以協助營運一個證券市場。當然,那些不是(a)段所
27	提述的人士,可能包括海外的交易所公司。我們認為這項條文有可能影響
28	到某些人士在香港協助一些海外的交易所公司的運作,而我們認為不需要
29	就此作出規管;於是就改為:如果有關的運作違反此條款,就這間公司的
30	營運提供協助,才算是違法。

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1	
2	曾鈺成議員:
3	
4	主席,我不明白其中的邏輯,因為(a)段是:只有3類人士才可以營
5	辦證券市場, 意思是這個證券市場顯然是不包括海外的, 是嗎?即第(1)(a)
6	款所提到的證券市場,很清楚是本地的,第(1)(c)款依然是一模一樣的字眼,
7	即營辦的證券市場,為什麼一下子又成為海外的證券市場?同一subsection
8	提到那幾個營辦的證券市場,是否有不同的解釋?
9	
10	高級助理法律草擬專員鄭劍峰先生:
11	
12	當然沒有不同的解法。第(1)(c)款的意思是:如果這個證券市場是
13	由並非(a)段所提述的人營辦,任何人不得協助營辦證券市場。並非(a)段的
14	所提述的那些人,當然可以包括海外的人士。
15	
16	<i>曾鈺成議員:</i>
17	
18	在(a)段已經說明並無其他人士。營辦證券市場的只有3類人,並沒
19	有本地和海外之分。總而言之一開始就說明:現在香港只允許這3類人士營
20	辦證券市場,而任何人均不得協助不是那3類人營辦的證券市場,這是很合
21	邏輯的。但如果說不能協助任何人營辦的證券市場,在這裏是有抵觸的話,
22	那就只有營辦者並非那3類人的情況,是嗎?
2324	方 织 贴
	高級助理法律草擬專員鄭劍峰先生:
2526	第(1)款是禁止任何人在香港營辦一個證券市場。但是第(c)段所說
27	的協助,也是說在香港作出協助。即是說,在香港協助一個不是在(a)段所
28	提流的人,而那些人十是可以在海外的。

29

30

余若薇議員:

《2000年銀行業(修訂)條例草案》委員會

1	
2	主席,是否可以這樣說:第19(1)(a)條只是在境內有管轄權,在境
3	外營辦任何這樣的市場都不是犯法的,所以根據第(c)段、第(d)段,任何人
4	協助境外那些人做事並不犯法,因為並沒有觸犯上述條例,因為上述條例
5	只是禁止在境內營辦。是不是這樣的意思,鄭先生?
6	
7	高級助理法律草擬專員鄭劍峰先生:
8	
9	是的,我的意思是這樣。
10	
11	<i>主席:</i>
12	
13	曾鈺成議員,這個邏輯是否清楚了一點?
14	
15	<i>曾鈺成議員:</i>
16	
17	我覺得很難明白。因為營辦證券市場是一件很清楚的事情,而一開
18	始就已經提到只有3類人可以營辦證券市場。
19	
20	<i>主席:</i>
21	
22	關於第(c)段,可否比較一下修訂前和修訂後的情況。在作出修訂
23	前,(a)段訂明什麼人可以營辦證券市場,這些人以外的人不能營辦證券市
24	場,而不得營辦證券市場的規定,是指境內的,因為這個法律只是在境內
25	有效。所以根據(a)段,除第(a)(i)段、第(a)(ii)段和第(a)(iii)段所指的人士,
26	不得在本地營辦證券市場。如果(c)段沒有修改,就是不得在香港協助其他
27	人,即第(a)(i)段、第(a)(ii)段、第(a)(iii)段以外的人士營辦證券市場。但是
28	他可以協助一些海外營辦的證券市場在海外或在香港的一些運作。那些海
29	外的機構可能不是在香港營辦的市場,只是有部分業務在香港運作而已。

30

倘若僅是協助他運作都不可以,這項規定的範圍就太廣泛了。是否這樣的

1	意思?鄭先生。
2	
3	高級助理法律草擬專員鄭劍峰先生:
4	
5	這是因為我們在諮詢期間,有業內人士提出這樣的關注。於是我們
6	就酌量因應意見而把規定收窄,而作出現在的修訂。
7	
8	<i>主席:</i>
9	
10	那些提出上述意見的人曾否參閱過你現在所作出的修訂,而他們是
11	否明白?因為議員不明白一些條文不足為怪。但是,所牽涉的營辦人士或
12	者有關人士,在看到這個草擬時,是否也是認為很清楚?
13	
14	Chairman:
15	
16	Would you please explain? Have you tested it against the market – this drafting?
17	
18	Mr Gerald D GREINER, Senior Director, Supervision of Markets, Securities and Futures
19	Commission:
20	
21	We have tested it against the comments that we received, and if I understand those
22	correctly, it was that someone in Hong Kong might, for example, assist the New York Stock
23	Exchange, operating in New York, about a problem in Hong Kong – and that they should be
24	able to do that. We think the CSA responds to that concern.
25	
26	Chairman:
27	
28	Yes. That is not, however, my question. My question is that after a lot of
29	explaining, even members seem to understand it now; but have you tested the drafting on the
30	market, to see if it is also clear to them?

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

《證券及期貨條例草案》及

1	
2	財經事務局副局長區璟智女士:
3	
4	我們並無具體告訴其中一兩間公司,不過這個是很容易辦到的。
5	
6	<i>主席:</i>
7	
8	你嘗試一下,因為條文是要清楚的。查看一下他們是否覺得很明白
9	
10	<i>財經事務局副局長區璟智女士:</i>
11	
12	即是說希望用家能達到他們想要的目的。
13	
14	<i>主席:</i>
15	
16	是正確的。
17	
18	財經事務局副局長區璟智女士:
19	苏华人 司颂组建林。
20	政策上已經很清楚,我們不想包括在法例內。
21 22	· <i>主席:</i>
23	
23 24	關於第19條,另外還有一個部分,在第(5)款有一些修改。區局長
25	是否也是由鄭先生向我們解釋?
26	
20 27	財經事務局副局長區璟智女士:
28	烈 <u>机争切问的风色凉音又工。</u>
28 29	這個其實很簡單,因為在諮詢過程中,市場上提出很強烈的意見
30	認為類似的違規行為,是否要承擔如此嚴格的法律責任?我們回應市場的

1	意見而作出修訂,加入"沒有合理辯解"而給予當事人一個自辯的機會。
2	
3	<i>主席:</i>
4	各位有沒有問題?Audrey。
5	
6	Hon Audrey EU Yuet-mee, SC, JP:
7	
8	Can I ask what has happened to subsection (b) which is deleted? Is that supposed
9	to be incorporated in subsection (i) already? This is the CSA in subsection (5). 19(5)(b)
10	is deleted. Is that not right?
11	
12	Chairman:
13	
14	Yes.
15	
16	Hon Audrey EU Yuet-mee, SC, JP:
17	
18	This deals with failing to comply with a condition. Why is this deleted, and is this
19	already somehow incorporated elsewhere? Or is there a particular purpose for deleting that?
20	
21	財經事務局副局長區璟智女士:
22	
23	這是回應市場人士的一個意見。他們認為,在規管過程當中,如果
24	證監會施加了某一些條件要求市場營運者遵守,證監會已通過其他渠道確
25	保市場營運者會遵守這些新的條件。因此,他們認為:如果不遵守這些新
26	的條件,是否應該刑事化?我們曾與證監會商量,覺得遵行是重要的。但
27	既然他們已經有其他渠道作出其他處分,刑事化可能是較為嚴重。這個問
28	題,請Mr DICKENS作出補充。
29	
30	Chairman:

1	
2	Mr DICKENS, anything to add?
3	
4	Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures
5	Commission:
6	
7	Yes. This actually lines it up with the licensing provisions, where breach of the
8	condition of a licence is not an offence, but it is a ground for revocation, or possible grounds
9	for revocation of the licence or for discipline. That is the approach we wanted to take here.
10	Frankly, at a technical level it helps us a lot, because if a breach of a condition is going to
11	create an offence, you have to draft the condition with great particularity.
12	
13	Chairman:
14	
15	Absolutely.
16	
17	Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures
18	Commission:
19	
20	Whereas if a breach of a condition merely has administrative consequences,
21	admittedly serious administrative consequences, then we can draft the conditions in a more
22	sensible and commercial way, without having to have the sort of particularity that goes with
23	offences. We actually prefer this, and it brings it into line, as I say, with the licensing
24	provisions.
25	
26	Chairman:
27	
28	Okay?
29	
30	Hon Audrey EU Yuet-mee. SC. JP:

Bills Committee on

Securities and Futures Bill and Banking (Amendment) Bill 2000

《證券及期貨條例草案》及 《2000年銀行業(修訂)條例草案》委員會

1	
2	Yes. I understand.
3	
4	Chairman:
5	
6	Right.
7	Hon Audrey EU Yuet-mee, SC, JP:
8	
9	Chairman, can I go back to section 18?
10	
11	Chairman:
12	
13	Yes; certainly.
14	
15	Hon Audrey EU Yuet-mee, SC, JP:
16	
17	The definition of "shareholder controller". Is there some way of making it clearer
18	Because I had some difficulty when I was reading through it to understand the last part of it.
19	When it says "more than 35 per cent of a voting power at any general meeting of the
20	corporation", that is easy to understand; but then it goes on to say: " or of another
21	corporation of which it is a subsidiary" Do you mean the company's holding company,
22	like that? Is there some easier, more direct way, of expressing it?
23	
24	Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures
25	Commission:
26	
27	It is meant to be the company's holding company. The wording is just carried, as
28	I understand it, straight over from(indistinct)
29	
30	Chairman:

《2000年銀行業(修訂)條例草案》委員會

1		
2	Where? Okay.	
3		
4	Hon Audrey EU Yuet-mee, SC, JP:	
5		
6	I mean, if everyone understands what it means. It is just that you have to spend a	
7	little bit more time in trying to work it through. That is all. The other thing I wanted to ask	
8	is about subsections (2) and (3) in section 18. I find it a little bit difficult to follow. Can	
9	you explain what is meant by "in so far as it has effect for that specified purpose"? I mean	
10	it seems a little bit odd to say that it is a charge partly for some purpose, and then it is a	
11	charge partly for some other purpose; and then it has effect for that specified purpose. How	
12	does it actually work?	
13		
14	Chairman:	
15		
16	Mr GREINER.	
17		
18	Mr Gerald D GREINER, Senior Director, Supervision of Markets, Securities and Futures	
19	Commission:	
20		
21	Madame Chairman, the market charge is one of the matters that has a special	
22	treatment in insolvency law. It is mentioned in some of the later clauses, and this section	
23	was to limit that reference to those situations where the charge related directly to the market	
24	charge, and not where it related to other matters. That is because sometimes a clearing	
25	house takes a general charge over collateral and property for all purposes, and this was an	
26	attempt to limit that to just the market charge, which was the key charge that needed the	
27	special insolvency treatment.	
28		
29	Hon Audrey EU Yuet-mee, SC, JP:	

30

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	It is probably too technical for me. I am still not following. I mean, when there
2	is a charge, does it mean that you can actually tell that part of it is a market charge, and part of
3	it is for some other purpose? Can you actually apportion that or divide that?
4	
5	Mr Gerald D GREINER, Senior Director, Supervision of Markets, Securities and Futures
6	Commission:
7	
8	You can relate it to a market charge/market contract in the factual circumstances, if
9	there is one outstanding, for example. If there is not, then it would not apply as a market
10	charge and therefore would not constitute one. It is narrowing its application.
11	
12	Hon Audrey EU Yuet-mee, SC, JP:
13	
14	Is there some simple way of giving us a concrete example of how a charge is partly
15	a market charge and partly for some other purpose?
16	
17	Mr Gerald D GREINER, Senior Director, Supervision of Markets, Securities and Futures
18	Commission:
19	
20	Let me try this example. In the clearing house settlements occur on a net basis,
21	and someone has an obligation to deliver securities to the clearing house; and they might post
22	collateral to cover that obligation. In that case the collateral has a charge and it is a market
23	charge. Assume that obligation is met; the dealer delivers the stock and therefore the market
24	charge obligation is satisfied and the market charge no longer exists. So for all other
25	purposes that property is charged but not as a market charge, because it is not covering the
26	market contract or the net settlement obligation.
27	
28	Hon Audrey EU Yuet-mee, SC, JP:
29	
30	So the situation only occurs if the market charge is cleared? Then you know what

1	it means.	
2		
3	Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures	
4	Commission:	
5		
6	Strictly speaking, no. I can deposit property and charge it with the clearing house.	
7	The definition of "market charge" itself - (b) of that definition - ties it to the purpose of	
8	securing liabilities arising in connection with ensuring the settlement of a market contract.	
9	So if the collateral is there for my general obligations to CCASS or HKSCC, it is only a	
10	market charge in so far as I have outstanding liabilities in connection with ensuring the	
11	settlement of a market contract.	
12		
13	Now, at the point of default you are able to put sums of money on that and say:	
14	"There's \$3 million worth of collateral, but only 1 million relates to settlement of liabilities".	
15	So only that 1 million is protected from the normal insolvency regime, and the other 2 million	
16	is not. That is what all this is trying to do. Because we exclude a lot of insolvency law in	
17	order to make the settlements work, we are trying to limit it down to the very dollar that	
18	makes that settlement work, and not to the general purposes of the HKSCC. We may have	
19	liabilities to it for other reasons that are not about settlement of contract.	
20		
21	Chairman:	
22		
23	Does that make it better?	
24		
25	Hon Audrey EU Yuet-mee, SC, JP:	
26		
27	Well, it certainly does not sound as if you can easily tell at any given time how	
28	much of a charge is market charge and how much of it is not. I mean, it is not something	
29	you can tell at any given time, and this is what you are saying to me.	
30		

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1	Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures
2	Commission:
3	
4	Yes. That is right.
5	
6	Chairman:
7	
8	Is that right – that we cannot tell at any given time?
9	
10	Mr Gerald D GREINER, Senior Director, Supervision of Markets, Securities and Futures
11	Commission:
12	
13	You can certainly tell after the
14	
15	Hon Audrey EU Yuet-mee, SC, JP:
16	
17	Yes; after the event, when it comes up to settlement.
18	
19	Mr Gerald D GREINER, Senior Director, Supervision of Markets, Securities and Futures
20	Commission:
21	
22	In advance of the event, everything happens every day, and there are market
23	contracts that have to be settled, and there are other obligations. You can measure the
24	market contract as a dollar amount; you do not know whether you need the collateral until
25	there is a default, and in some defaults you may not need the collateral at all; but if you do
26	need the collateral at that point, you could tell how much was covered by the market charge.
27	Again, you can see the total amount, but that does not come to bear unless there is a default.
28	So you could measure the total amount and know what was there and what the market charge
29	was covering, but until there is a default, the collateral would not be used. I do not know if
30	that helps.

1	
2	Chairman:
3	
4	In other words, the way I understand it is that although it is true that at any given
5	time you cannot readily tell, when the time comes for this to bite, you have no problem
6	identifying it, as a matter of practice.
7	
8	Mr Gerald D GREINER, Senior Director, Supervision of Markets, Securities and Futures
9	Commission:
10	
11	You put a dollar amount on the table; yes.
12	
13	Chairman:
14	
15	Okay. So these people seem to feel that it works, although again I do not know
16	what this is all about. I think logically I appreciate what is going on. Okay? Anything
17	else in clause 18?
18	
19	中文文本的第18條,各位有沒有任何問題?如果沒有問題,第19條
20	的中文文本,請問有沒有問題?
21	
22	何俊仁議員:
23	
24	我希望澄清一點:根據這裏的寫法,似乎除了聯交所之外,還可以
25	有其他的認可交易所。但我就不是很明白,現在聯交所就是
26	
27	<i>主席:</i>
28	
29	剛才已經提問了,請鄭先生再解釋第(ii)和第(iii)節的意思,好嗎?
30	

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高級助理法律草擬專員鄭劍峰先生:

2	
_	

1

3 第(i)節是很清楚的,就是指聯交所;第(ii)節是指現在的港交所,

- 4 任何認可的交易所公司的控制人,就是港交所,這是第(ii)節的效力。第(iii)
- 5 節就是如果港交所本身根據這條例成為認可交易所公司,本身亦可以營辦
- 6 證券市場,這是第(iii)節的效力。

7 8

何俊仁議員:

9 10

主席,究竟有沒有第(ii)和第(iii)節所指的交易所存在?

1112

財經事務局副局長區璟智女士:

1314

15

16

17

18

我嘗試就非法律條文解釋,其實這是反映現實的情況。以前還沒有合併的時候,有聯交所和期交所;合併之後,港交所就是一所母公司。既然專營權已給予子公司,母公司就提議:不如在條例草案寫清楚一點,如果母公司又是子公司的控制人,就可以涵蓋在內;如果子公司又是母公司的控制人,都是同一機構的話,其實就是包含了整個機構。意思只是將這

19 信

個概念寫清楚一點而已,實際的效果其實是一樣的。反映了合併之後,在

20 我們的規管架構內,港交所和聯交所之間可能出現的關係。

2122

何俊仁議員:

2324

這是不會影響專營權的問題?

2526

財經事務局副局長區璟智女士:

2728

其實是確立他們現有的狀況。鄭先生,我的說法是否正確?

29

30 主席:

1	
2	就第19條,是否還有其他問題?Audrey。
3	
4	<i>余若薇議員:</i>
5	
6	第19(1)(a)(iii)條,中文文本是寫"本身屬",為什麼要用"屬"字,
7	因為英文是寫"is"?
8	
9	<i>主席:</i>
10	
11	可能是他們的行規。鄭先生或區局長,是否會解釋為什麼會用"屬"
12	字。
13 14	財經事務局副局長區璟智女士:
15	别粒争扬问则问女但场省女工。
16	我們會就中文文本事宜,向律政司的同事提問,但他似乎沒有出
17	席。
18	
19	<i>余若薇議員:</i>
20	
21	主席,順便問一下,這個不算是有問題的;但我察覺到中文文本的
22	行文跟英文有點不同,有點改變。在中文文本,第(a)款下面是用(i)、(ii)、
23	(iii)的,接著另一行就寫"則不得營辦證券市場";而英文的行文是只有第(a)
24	款,即是中文文本就把"operate a stock market unless the person is — "那句
25	句子切斷了。我們說要對稱,這個當然是不對稱的。我並不是反對,如果
26	一定要這樣的寫法,我當然要接受。
27	
28	<i>主席:</i>
29	
30	負責中文文本的律政司同事今天沒有出席,是嗎?

1	
2	我們可以請教自已的法律顧問,他們也有看過這個條文,認為這個
3	中文文本是沒有問題的。或者我請法律顧問解釋一下有關的情況。
4	
5	高級助理法律顧問李裕生先生:
6	
7	主席,中文文本的舖排方式,意思上跟英文是完全一樣的;只不過
8	是文字安排先後的問題。我們覺得沒有問題,可以接受這個版本。
9	
10	主席:
11	
12	請你再解釋"本身屬"的"屬"字。為什麼要用"屬"字?
13	
14	高級助理法律顧問李裕生先生:
15	
16	這只是一個表達方式而已,中、英文的意思是一樣的。
17	
18	<i>主席:</i>
19	
20	以往曾否用過這樣的字眼?
21	
22	高級助理法律顧問李裕生先生:
23	
24	我暫時不能解答,但是這樣的一個"屬"字,在其他的條例都有同樣
25	的用法。
26	
27	<i>主席:</i>
28	
29	我純粹從一個中文文字方面來看,如果屬實,就是"It is true";就
30	是"is"和"屬"這兩個字會有這樣的用法。

1	
2	第19條,還有其他的問題嗎?接著就是英文本的第20條,第20條也
3	是有修正的。區局長,請問由哪位同事作出解釋?
4	
5	財經事務局副局長區璟智女士:
6	
7	這個是我們就法律顧問的一個建議作出回應,目的是為了增加透明
8	度。
9	
10	<i>主席:</i>
11	
12	我覺得最有用的做法,就是比較條文在修改前和修改後的意思。如
13	果有關修訂純粹是令條文更清晰,就指出是令條文更為清晰,讓我們清楚
14	知道修改的原因。
15	
16	財經事務局副局長區璟智女士:
17	
18	這個修訂純粹是增加透明度,讓市場人士知道證監會批准了哪些財
19	經新產品。
20	
21	<i>主席:</i>
22	
23	即是加了一個要求,要刊登憲報。
24	
25	第20條英文,有沒有問題?如果沒有問題,中文文本的第20條,請
26	問有沒有問題?中文文本第20條,沒有問題。
27	
28	英文文本第21條,第21條第(2)(b)款也是有一個修正的。請區局長
29	解釋。
30	

1	財經事務局副局長區璟智女士:
2	
3	我請Mr DICKENS從規管概念上解釋為何作出這個修訂。
4	
5	Chairman:
6	
7	Mr DICKENS, it is deleted. Please explain to us.
8	
9	Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures
10	Commission:
11	
12	The public comments, and in fact HKEx's comments as well, were very
13	uncomfortable about the idea that the exchanges' public interest obligation should go so far as
14	to override any applicable law. The theory was that they should abide by the law, and we
15	totally agree. To the extent that the concern was about HKEx's duties to its shareholders
16	under company law, they are overridden anyway by clause 90(4), so that all of this clause was
17	doing before it was altered was giving them legal immunity, providing they were acting in the
18	public interest; and that went far too wide.
19	
20	Chairman:
21	
22	Any questions here?
23	
24	如果沒有問題,接著是中文文本的第21條 —— 認可交易所的責
25	任,請問有沒有問題?。如果沒有問題,接著是英文的第22條 —— Immunity,
26	etc.,也有一個修正的。區局長,請問由哪一位同事作出解釋?
27	
28	財經事務局副局長區璟智女士:
29	
30	這個也是回應法律顧問一個法律上咬文嚼字的問題,在政策上是完

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全沒有改變的。我請鄭先生幫忙解釋。

2

1

高級助理草擬專員鄭劍峰先生:

4

5 我們首先參考第(1)款的修正,現行的藍紙草案提到那一類的法律責 6 任是可以豁免的:第一,交易所在第21條之下的責任;第二,交易所本身 7 的規章之下的責任。現在的修正是:在規章之下的責任,除了包括責任之 8 外,還包括在規章之下所行使的權力。我們將"duties"改為"functions";即 9 是除了在第21條之下的責任,還包括在公司規章之下的職能。在附表1的定 10 義下,這種職能包括責任和權力。

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Chairman:

13

14 Audrey.

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Hon Audrey EU Yuet-mee, SC, JP:

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I would like to ask about section 22(3). This is also in connection with sections 21, 22, and the duties and the functions of the exchange. Now, if the exchange fails to meet any of its duties or any of its rules, what is the effect of that? Section 22 suggests there is some form of immunity, but 22(3) says: "Any failure of the exchange company to comply with the rules does not prevent the matter for being treated for the purpose of this ordinance as done in accordance with the rules, so long as the failure does not substantially affect the rights of a person entitled to require compliance with the rules". What does the last part mean? And also, if I am a member of the public who is somehow substantially affected by the exchange's failure to meet its duties or its functions under this ordinance, do I have a right of action? Can I sue for damages?

28

Chairman:

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《證券及期貨條例草案》及 《2000年銀行業(修訂)條例草案》委員會

Mr GREINER.
Mr Gerald D GREINER, Senior Director, Supervision of Markets, Securities and Futures
Commission:
Continussion.
That is a good question. The intent was to make sure that if there was just a
technical violation of the rules, the immunity provision and the contractual relationship, that
are involved under the rules, would not be upset. But the last part certainly implies that a
person could have an action. It does to me, and the person who is substantially affected, I
think, is given the chance to escape from or get around the immunity provision. That is the
way I read it. It is not clear.
way I lead it. It is not clear.
Hon Audrey EU Yuet-mee, SC, JP:
Yes. It is not clear. I think first of all that it is not clear. Who is the person
entitled to require compliance with the rules? Maybe it is somewhere in this very large Bill,
somewhere that says that some person is defined as a person entitled to require compliance of
the rules. Because my immediate thought of course is of those cases where – I am talking
about the legal cases – you have members of the public suing, for example, the Commissioner
who is in charge of deposit-taking companies, who says: "You failed to look after these
deposit-taking companies. As a result I put my deposit there, and now it's collapsed and
therefore I've suffered a loss". Of course there are cases to say whether members of the
public have a right to sue, and whether in fact the Commissioner has a duty of care to
members of the public.
Having read your sections 21 and 22 and so on, particularly your 22(3), I am not
quite sure whether you are saying the exchange has a duty to members of the public, and if it
fails in its duty, whether members of the public have a right to sue. Maybe that is not

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29

intended, but I am not very clear, having read that.

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1	Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures
2	Commission:
3	
4	Can I perhaps throw some light on it? There is nothing in the statute that says
5	they do have a right to sue, or they are entitled to require compliance with the rules. The
6	people who are definitely entitled to require compliance with the rules have contractual
7	relationships with the exchange, but they are exchange participants and listed companies.
8	There is no case that I am aware of, directly in point, on the duties of an exchange to users of
9	the exchange second-hand, so to speak, or who rely on its performance of its duties.
10	
11	Whether such a duty would be imposed in tort by a court is, I think, an open
12	question. This does not close it off. If the courts are one day going to hold that there is
13	such a duty of care, then they will be covered by the exception to clause (3). But it certainly
14	does not create any greater certainty. It leaves the common law wherever common law is
15	going.
16	
17	Hon Audrey EU Yuet-mee, SC, JP:
18	
19	My leading example would be some breakdown in your computer, in the
20	exchange's computer, and as a result, as a market participant I do not have a contract, but I
21	suffer a huge loss. Can I say you failed in your duty to operate the market efficiently
22	because your computer broke down?
23	
24	Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures
25	Commission:
26	
27	In that particular example, no, because they have expressly disclaimed liability in
28	every piece of paper they issue.
29	

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Chairman:

1	
2	I think we have to distinguish here. I mean, Audrey has identified ambiguity.
3	We have to distinguish whether this is an ambiguity created by the new provision, or whether
4	it is an ambiguity which already exists in the common law, which is not removed or alleviated
5	by the new provision. If it is the latter; then the choice may be leaving it to the common law.
6	If it is the former, namely it is a new ambiguity created by statute; then I would invite the
7	government to consider this again. I am not a good enough lawyer to distinguish whether it
8	is the former or the latter, but is it agreed that it is the latter rather than the former?
9	
10	財經事務局副局長區璟智女士:
11	
12	主席,在政策上,我們也希望讓《普通法》自由發展,如果這條條
13	款引起那個釋義,我們也會作出檢討。
14	
15	<i>主席:</i>
16	
17	區局長,我的意思是希望請專家們解釋,是否由於《普通法》本身
18	有含糊而出現不清晰的地方,而條文卻沒有改善,亦沒有"加重",在這情
19	形下變成由你們選擇是否要做。但如果不清楚的地方是由新條文所"加重"
20	或"創造",你們就要研究如何解決問題。
21	
22	我想問一下專家們的意見,究竟是《普通法》原本有含糊,還是你
23	們所造成的含糊?
24	
25	Mr DICKENS, I hope my question is relatively clear.
26	
27	Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures
28	Commission:
29	
30	I believe it is inherent in the common law, but I am perfectly happy to have another

1	look at it.
2	
3	Chairman:
4	
5	Have a look at it. If you think you have made things a little worse, or you can
6	make things a little better, maybe you should consider it.
7	
8	<i>財經事務局副局長區璟智女士:</i>
9	
10	這在1992年立法時就已有。究竟當時是否已經引進一個新的含糊
11	點,我們還要再查證。
12	
13	<i>主席:</i>
14	
15	好的。
16	
17	何俊仁議員:
18	
19	主席,我希望提問一般性的問題,關於免責的例外情況。倘若是忠
20	實履行職責,一定會獲得免責。除此之外,如果是嚴重疏忽,通常會否使
21	他得到免責?我不知道其他條文會是怎樣的寫法。
22	
23	<i>主席:</i>
24	
25	一般而言,嚴重疏忽是否仍然可以免責?秘書林太。
26	
27	秘書林葉慕菲女士:
28	
29	開會的時候,政府提過會考慮在有關條例加入"with due
30	diligence",即clause 22、clause 39和clause 64。

1	
2	<i>主席:</i>
3	
4	在文件CB(1) 1379/00-01提到。
5	
6	財經事務局副局長區璟智女士:
7	
8	在上次討論完畢後,我們也做了一些研究。我們擬備的一份文件,
9	reference number 是Paper No. 3H/01 (CB(1)1420/00-01(01)), 已發給各位。
10	我們經檢討後,規定在規管架構下的交易所或是結算公司,均須執行一些
11	公共的職能。若其商業利益與執行公眾職能有衝突,亦會要求他們以公眾
12	利益為先。基於這些考慮,我們再考慮例如在第368條,證監會所享有的豁
13	免民事法律責任的測試點,應到哪個程度?我們覺得應該用同一個基準:
14	如果他在執行這些公共責任的時候是真誠行事,就無須負上法律責任。在
15	政策的看法是一致的。
16	
17	另一個有關連的條款,例如第369條,亦是採用同樣的基準。根據
18	第369條,如核數師在舉報時是真誠行事,就可以豁免民事的法律責任。我
19	們覺得這個測試點是適合的。
20	
21	<i>余若薇議員:</i>
22	
23	這個問題是我曾在上次會議上提出的。在clause 59(6)和clause 61(14)
24	是提到"due diligence"和"defence",而在《公司法》內,董事是有一些免責
25	的,我想問的是:董事的免責單是要真誠行事,還是也要有"due diligence"?
26	
27	財經事務局事局長區璟智女士:
28	
29	我不能回答關於《公司法》的問題,因為我們沒有作正面的比較。
30	为什麽我們不嘗試押他們與《公司法》下一般的公司作比較?因为在規管

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- 1 架構下,這幾間公司的規管與一般公司的規管並不相同。舉一個例子:例
- 2 如第21條,我們要求這些公司要聘用稱職的人員,各方面的要求都寫得很
- 3 清楚。如果在法例上已經有嚴謹的規管安排,以及有這麼高的要求,我們
- 4 覺得這個真誠行事的測試已經足夠。

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何俊仁議員:

7

- 8 第一,認可交易所若達不到第21條的要求,我們不知道如何追究;
- 9 第二,雖然他的職責很重要,但始終是一間上市的私人公司,與普通的公
- 10 司或企業比較,是否有很多職責應該有很大的不同之處?

1112

財經事務局副局長區璟智女士:

13

- 14 剛才Mr DICKENS有提過,制衡措施相當多。這間公司的認可首先
- 15 要通過SFC的批准;委任高層人員,例如行政總裁,要SFC的批准;公司的
- 16 規章,即公司內部運作的安排,也是要SFC的批准。在出現利益衡突時,若
- 17 我們發覺他不是以公共利益為先,根據此條例草案,證監會有權向他發出
- 18 指示。在最極端的情況下,證監會甚至可以向他發出限制通知書或是暫停
- 19 職能令,使他可以採取一些補救措施。其實一般的上市公司並沒有這個制
- 20 衡措施。我們希望有全套的考慮。我們曾就這一點與交易所進行磋商,他
- 21 們的回應是,在這麼多的制衡措施下,證監會在規管力度方面,應該有很
- 22 好的發揮;不過,他們也指出:其他執行公共職能的條款在條例下的免責
- 23 標準也是達到這個水平,由於大家都是在執行公共職能,他覺得距離應該
- 24 拉近。

25

26 主席:

27

28 Audrey •

29

30 余若薇議員:

Bills Committee on

	《短芬及别貝除例早条》及	
<	2000年銀行業(修訂)條例草案》委員會	è

1	
2	第22條對一些合約的權利和《普通法》的權利作出了修改,因為這
3	條提到market participant與認可交易所是有合約。但是第22條的意思是否這
4	樣:如果交易所嚴重疏忽,但只要是真誠行事,另外那間公司是不可以依
5	循侵權法或合約要求任何賠償,對嗎?
6	
7	主席:
8	
9	不單是監管的問題,而是是否只要是出於真誠就足夠?雖是出於真
10	誠,但若出現嚴重疏忽,這樣是否也沒有問題呢?問題是在這裏,是否魯
11	莽也是沒有問題?真誠的範圍已經很清楚的,區局長就這一點有什麼回
12	應?。
13	
14	<i>財經事務局副局長區璟智女士:</i>
15	
16	剛才我已作出解釋。就一個機構而言,不論是證監會或港交所,如
17	果他是在執行一個公共職能,我們覺得這個水平應已足夠。
18	
19	<i>主席:</i>
20	
21	即是出於真誠就已經足夠了,嚴重疏忽也是可以接受的。
22	
23	財經事務局副局長區璟智女士:
24	
25	現在的建議就是這樣,我請Mr DICKENS再作解釋, your experience
26	in consultation with the exchange °
27	
28	Chairman:
29	

30

Yes. Mr DICKENS, we are concerned in this very specified point. Is it

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1 2	sufficient? Is that sufficient, or why we do not need to add a due diligence requirement?
3	Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures
4	Commission:
5	
6	I think there are two answers to that. One is that there is a separate due diligence
7	requirement under an affirmative duty in 21(6) to have adequate and properly equipped
8	premises, competent personnel, adequate capacity, and so on. They are meant to exercise
9	due diligence. That is a slightly separate question from whether they should be liable if they
10	do not. I am just giving you some reassurance that they are not going to be sloppy.
11	
12	I think the answer on being sued is that the immunity extends only to their public
13	interest duties, not to their commercial operations. The clearing house and stock exchange
14	run a depository which is not one of their statutory duties. It is a natural adjunct to their
15	business, and if they run that badly they can be sued, just like anybody else.
16	
17	If they are running a negligent trading system they cannot be sued as long as they
18	are acting in good faith, because that is one of their public duties. We feel that it is only fair
19	that if we are going to impose the level of regulation and the public interest on the exchange,
20	and tell it to act in the public interest, even when that is against its commercial interests, and
21	back that up with the Commission exercising a lot of day to day supervisory responsibility as
22	well as having reserved powers, then they should enjoy the same immunity in relation to those
23	public interest functions that the SFC enjoys in relation to its public interest functions.
24	
25	As I think Miss AU pointed out, the auditor, in relation to his one public interest
26	function, will enjoy mere good faith and not liability for negligence. It needs to be
27	remembered that this immunity applies not just to the company but to all the employees, and
28	employees can do things with less than perfect diligence, even while acting in perfectly good
29	faith. They can have commercial consequences; they can have reputational consequences.

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1	It is not that long since junior employees of the Commission found themselves
2	being sued for \$10 billion for not conducting an investigation with due diligence. Now, they
3	were able to point to good faith and that disposed of the action, but it was nevertheless a very
4	unpleasant experience for the officers concerned. They knew they had acted in good faith
5	Whether they could prove that they had acted carefully was a totally different question.
6	
7	Chairman:
8	
9	Okay. So we will leave it as that.
10	
11	何俊仁議員:
12	
13	我還是有一些保留。我要再考慮。
14	
15	<i>主席:</i>
16	
17	好的。中文文本第22條,有沒有問題?英文文本clause 23 — Rules by
18	recognized exchange company, I think there is also an amendment,加了第3(a)款。區
19	局長,請問由哪一位同事解釋?
20	
21	財經事務局副局長區璟智女士:
22	
23	這個純粹是我們在徵詢市場的時候,市場人士認為這些規章的改
24	變,對於他們的運作很重要,他希望我們加一個制衡。建議的制衡措施是要求發展會生物的財政司司馬和奈思氏才會。我們以按領域獨第
25	要求證監會先諮詢財政司司長和交易所本身。我們也接納這個意見。
26	主
27	<i>主席:</i>
2829	漫有一此其他的核正,就具第(5)(A)教和第(5)(A)教。
29 30	還有一些其他的修正,就是第(5)(d)款和第(5)(e)款。
111	

1	財經事務局副局長區璟智女士:
2	
3	我請鄭先生解釋。
4	
5	高級助理法律草擬專員鄭劍峰先生:
6	
7	交易所要求第(a)段及第(d)段所臚列的人士,在交易所規章的要求
8	下作出法定聲明。現在則改為:除了第(a)及第(d)段的人士需要作出法定聲
9	明之外,如果有些人想申請成為第(a)及第(d)段的人士,而交易所規章有此
10	要求,他們也需要作出法定聲明。我們將適用人數的範圍擴大至不只是現
11	在擁有這些身份的人,而是尋求成為這樣的人士的人,同樣需要在交易所
12	的規章要求下作出法定聲明。
13	
14	<i>主席:</i>
15	OK,請問有沒有問題?如果英文文本沒有問題,請問第22、23條
16	的中文文本,有沒有問題?沒有問題的話,我們就討論第24條。第24條沒
17	有修正的。
18	
19	Audrey •
20	
21	<i>余若薇議員:</i>
22	
23	可否解釋一下第23條第(8)款。
24	
25	<i>主席:</i>
26	
27	你參考的是中文文本、還是英文?
28	
29	<i>余若薇議員:</i>
30	

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《2000年銀行業(修訂)條例草案》委員會

1	中文或英文都沒有問題。用英文好了。我希望解釋後面的部份,可
2	否解釋在什麼情況之下適用?
3	
4	財經事務局副局長區璟智女士:
5	
6	我要麻煩Mr Gerald GREINER就這部分作出解釋。
7	
8	Chairman:
9	
10	Did you wish the question to be repeated?
11	
12	Mr Gerald D GREINER, Senior Director, Supervision of Markets, Securities and Futures
13	Commission:
14	
15	No. I am not sure of the answer, in fact. This is from the existing law. Can I
16	read through it quickly, please?
17	
18	Chairman:
19	
20	Please take your time.
21	
22	Mr Gerald D GREINER, Senior Director, Supervision of Markets, Securities and Futures
23	Commission:
24	
25	I do not know, frankly.
26	
27	Chairman:
28	
29	Mr DICKENS?
20	

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

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

Perhaps I can have an attempt. It most commonly arises in the listing situation, although I think it is possible for it to arise in membership. What the subsection is trying to say – and it is existing law – is that you fall under subclauses (6) and (7) to the extent you are acting in your professional capacity, to the extent that you may also be acting in another capacity. For example, a lawyer may be a director, or he may be acting as more than a legal adviser for the company. He may, for example, have drafted the disclosure documents or got himself involved in verifying some of the facts, as opposed to merely representing his client. Then in theory he is governed by the other rules.

In practice, the situation has never arisen. Well, it arose in one Takeovers Committee case, but never in a listing case where that distinction mattered. In the Takeovers case (which is outside this section, but I just give it for what it is worth) a firm of solicitors had got itself involved in advising in a very controversial takeover situation. They very rightly claimed legal professional privilege for most of what they did. The Takeovers Committee nevertheless disciplined them on the basis that at one stage they descended into the dust of the arena and actually drafted the chairman's answers at the relevant shareholders' meeting for him; and those answers were in fact not only wrong, but prepared without due diligence.

The Takeovers Committee said: "Look, that's not what a solicitor does. If you do that sort of thing we're not going to treat you as being covered by legal professional privilege. You're just as amenable to discipline as anybody else". That is what subclause (8) is trying to do. It does it reasonably successfully in the sense that no one has complained about it for quite some years, and that is because of the arrangement under subclause (7) where there is in fact a memorandum of understanding between the stock exchange and the Law Society as to how disciplinary matters relating to solicitors and legal practitioners are to be dealt with.

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1	
2	They are in the course of negotiating with the Hong Kong Society of Accountants,
3	but I have to be frank and say that they have been in the course of negotiating an MOU for
4	something like five years now, and it is obviously a negotiation that is going to take some
5	little time to conclude. Does that help at all?
6	
7	Chairman:
8	
9	Audrey?
10	
11	Hon Audrey EU Yuet-mee, SC, JP:
12	
13	Yes. Thank you.
14	
15	Chairman:
16	
17	Right.
18	
19	Hon Audrey EU Yuet-mee, SC, JP:
20	
21	Madame Chairman, can I ask then in relation to subsection (5), the change that the
22	CSA has criticized? Is that just another way of saying "anyone who applies to become such
23	persons"? The Chinese is very, very odd – "尋求成為該等人". I mean, why cannot
24	people just say "申請" which is the normal way of saying "apply"?
25	
26	<i>主席:</i>
27	
28	鄭先生。
29	
30	高級助理法律草擬專昌鄭劍峰先生:

1	
2	當然,這個我們是可以寫成"申請",但我們撰寫的時候憂慮到"申
3	請"會否過於狹窄?是否有些情況不需要"申請"?所以我們選擇用這樣的表
4	述方式。
5	
6	<i>主席:</i>
7	
8	Anything else? Clause 23?請問中文文本第23條,有沒有其他問
9	題?如果沒有問題,我們就看英文文本 clause 24 — Approval of rules and
10	amendments to rules of recognized exchange company,請問英文有沒有問題?如果沒
11	有問題,請問中文文本第24條:批准認可交易所規章或對該等規章的修訂,
12	有沒有問題? OK, we go to clause 25 — Transfer and resumption of functions of
13	Commission. No change here. Any questions from Members?中文文本第25條。
14	
15	何俊仁議員:
16	
17	我希望提問第24條,認可交易所的規則一直以來都不是附屬法例,
18	是嗎?
19	
20	財經事務局副局長區璟智女士:
21	
22	不是的,所以我們在中文文本嘗試作一個比較精細的分野;在中文
23	文本,我們稱這些為"規章"。如果稱為"規章",其實是交易所、結算公司自
24	己制定的rules,並沒有法律效力,但是就會有一連串的制衡措施。
25	
26	<i>余若薇議員:</i>
27	
28	剛才你提到中文文本就可以有分野,但是英文有沒有rules and
29	regulations,是否可以有分野?
30	

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

《證券及期貨條例草案》及

1	財經事務局副局長區璟智女士:
2	
3	就這問題,我也要請教鄭律師。
4	
5	<i>主席:</i>
6	
7	鄭律師。
8	
9	高級助理法律草擬專員鄭劍峰先生:
10	
11	區分附屬法例的原則,並不是考慮究竟是稱為rules或是稱為
12	regulations。分界線是在於是否有法律效力。香港法律第1章的英文本提到
13	"legislative effect"。第24條訂明這些並不是附屬法例,換句話說,並沒有立
14	法的效果。
15	
16	<i>主席:</i>
17	
18	第(8)款。
19	
20	高級助理法律草擬專員鄭劍峰先生:
21	
22	是的。
23	
24	<i>主席:</i>
25	
26	第25條的英文是否有問題?中文文本第25條 —— 證監會職能的
27	轉移及收回,各位同事是否有問題?
28	
29	If not, we will go to clause 26 — Appointment of chief executive of recognized
30	exchange company requires approval of Commission, any questions here?中文文本第26

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

1	條 —— 認可交易所最高行政人員的委任須經證監會批准,有沒有問題?
2	
3	Clause 27 — Production of records, etc. by recognized exchange company
4	There is one amendment here, in fact, several. 請問區局長,哪位同事會作出解
5	釋?
6	
7	財經事務局副局長區璟智女士:
8	
9	或者我請Mr. DICKENS解釋。
10	
11	Chairman:
12	
13	Mr DICKENS, would you explain the CSA pertaining to clause 27 to us, please?
14	
15	Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures
16	Commission:
17	
18	It is clause 28. Sorry. That is what confused me.
19	
20	Chairman:
21	
22	I am sorry. I missed the headline. 27, any questions?如果沒有問題,中文
23	文本第27條 —— 認可交易所交出記錄等,有沒有問題?這裏是沒有修正
24	的。
25	
26	如果沒有問題,我們就討論第28條。
27	
28	Yes, Mr DICKENS?
29	
30	Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures

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

1	Commission:
2	
3	The new subclauses (1A) and (1B) were put in effectively to make the nuclear
4	deterrent a little less nuclear. What we have is a power to order the exchange to stop doing
5	things or to withdraw its recognition. Obviously if you just withdrew the recognition of the
6	exchange company, even from a specified date, there would be chaos on that date. That
7	would be the end of all transactions on the stock market or the futures market.
8	
9	Similarly with a direction, although you can tailor it a bit better: you might end up
10	with difficulty coming up with adequate phasing-down arrangements. So what (1A) and (1B)
11	are trying to do is give us the ability for an orderly winding-up, so to speak, of whatever the
12	activity is that we are directing them to cease to do. It just gives us a little bit more of a
13	scalpel rather than a sledge hammer.
14	
15	Chairman:
16	
17	Thank you. Yes, Albert?
18	
19	Hon Albert HO Chun-yan:
20	
21	I would like to know how this provision interacts with the Stock Exchange
22	Ordinance. I would have thought that this specific provision should have been put in that
23	ordinance instead of in this Bill, because specifically regulating the operation of the stock
24	exchange.
25	
26	Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures
27	Commission:
28	
29	The Exchange Ordinance will be repealed. This is a consolidation statute. So, it
30	is comprehensive. It has got everything in it, or it will have. An Exchange Ordinance is in

it and the CTO; and they will all hopefully be repealed.
Chairman:
Okay? 28, all right?中文文本第28條 —— 撤回對交易所公司的認
可和指令,停止提供設施或服務。各位同事對中文文本第28條是否有問題?
If not, we will go to clause 29 — Direction to cease to provide facilities or
services in emergencies。秘書提醒我們這部分有一個疑問。首先徵詢各位同事
對第29條是否有問題?如果沒有問題,我希望提出,第29條其實是容許證
監會在緊急的情況之下指令停市的。既然證監會有這項權力,這就是證監
會的職權之一。上次會議也曾爭論過關於行政長官向證監會發出指示的第
11條。證監會既然有權力在緊急情況之下指令停市,如果它不指令停市,
就可以由行政長官指令停市,是否有這樣的效果?如果有這樣的效果,我
們是否可以接受?
區局長,這是政策的問題。
財經事務局副局長區璟智女士:
理論上可以有這樣的效果,不過我們在上次的會議也曾重申,行政
長官不可以隨便發出指令,必須符合法例的限制,例如符合公眾利益,不
可以為個人利益,或為個人與某間公司的利益行事,這是非常高的測試點,
與法例精神是一樣的。他必須在突發的情況下,才作出一些特殊的行為。
<i>主席:</i>
這條條文的第(1)款,英文是: "The Commission may, after consultation with
a recognized exchange company, by notice in written level "and so on. If you look at (2)

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"The Commission may only serve a notice under subsection (1) if it is of the opinion..." So he

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

has to form an opinion. (1) says it has to consult the exchange company. (2) says it has to form an opinion that the "orderly transaction of business on stocks and futures" and so on and so forth, "is likely to be impeded".

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These are the requirements as far as the SFC is concerned. It must fulfil these requirements before it will give a direction to seize or provide facilities. If you look at clause 11 where it comes to the Chief Executive directing the Commission to do such a thing, under (3), these requirements for forming an opinion and for consultation and so on, will not apply. In other words, the Chief Executive can command or direct the SFC to direct an exchange company to seize, offering facilities, without consultation and without forming any opinion. Is that something we would like to see in this Ordinance, if it is enacted?

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為什麼可以這樣呢?

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財經事務局副局長區璟智女士:

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17 我希望回應一下。在上次的會議上討論完畢後,各位要求我們就海 外的運作情況提供一些文件。我們已於5月4號向各位提交了一份文件。關 18 19 於第29條的情況,我們已很清楚地寫明是關於一些危急事故和金融危機 20 等,最終都是為了公眾利益行事。在絕大部分的情況之下,我相信SFC就第 21 29條應該要做的事情是會做得很好。第11條是一個備用的權力。由於行政 22 長官作為行政機關的第一把手,他要貫徹問責。在《基本法》下、在市民 23 的期望下、在立法會要求下,行政機關是有問責性。倘有關方面根據第29 24 條處理不善,各位會向行政機關問責。行政長官作為行政機構的帶領人, 25 可以採取行動,作為最後的一個工具和渠道。但我亦強調,他必須要合乎 26 公眾利益,他也必須要諮詢證監會的主席,他不可以貿然行事。各位都有 27 興 趣 知 道 海 外 的 運 作 情 況 , 舉 例 來 說 , 我 也 曾 在 文 件 內 向 各 位 匯 報 , 例 如 美國的證監會要得到總統的准許才可以停市。在外國的架構下,也有若干 28 的制衡,但我們不要求證監會在發出指令時,必須得到行政長官的批准, 29 30 因為在危急的情況之下,證監會必須做他認為應該做的事。我剛才所提到

的第11條是後備的權力,在逼不得已時才使用。

2

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主席:

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5 我曾聽過這樣的解釋。但根據這個條款,證監會引用第29條指令停 6 市時,須諮詢交易所,他還要達到一個意見,認為是為了市場業務有秩序 7 地進行,他必須這樣做。然而,在第11條第(3)款,行政長官不但可以指令 8 證監會停市,而且當他發出指令時,他無須理會那些得出意見或諮詢某人 9 的那些條文。我質疑為什麼要有這樣的安排?例如美國的證監會要指示停 10 市,都必須經過總統批准。我亦不可以想像證監會在指令停市的時候是獨 11 行獨斷,它也必須經過法律上的諮詢。但為什麼行政長官一聲指令、一聲 12 公眾利益就可以全部都不顧,一個法治的政府是否應該這樣做?我察覺不 13 到為何需要將第29條配合第11條第(3)款,我不明白理據何在,而你所作的 解釋只是一般性的解釋。 14

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財經事務局副局長區璟智女士:

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18 主席,我不贊成你剛才的說法。你所說的行政長官一聲命令,或行 19 政長官根據個人的意見行事,與這條條款的理解是有出入的。我剛才提過, 20 行政長官在行動之前也要諮詢證監會主席,他也不可以一個人獨斷獨行; 21 證監會在那個情況之下也會陳述其看法,包括市場人士和公眾人士的觀 22 點,否則我所加入的諮詢條款也是沒有用的,我們必須有這樣的理解。行 23 政長官每做一件事,不可以一個人去做,行政機構也要向他提出意見。倘 24 若現在正面對很危急的情況,而第29條失效,有什麼補救的渠道呢?我們 25 要討論的是這種情況而已。

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主席:

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是的。雖然證監會經過諮詢後認為停市是不適宜的,行政長官仍可以認為這是符合公眾利益而提出停市。當然行政長官會諮詢證監會的意

1 見。但若行政長官要求證監會指令停市,證監會不肯停市;行政長官就可 2 以凌駕其上,並且不用諮詢、不用得出任何意見,就可以停市。為什麼要 3 有這樣的需要? 4 5 財經事務局副局長區璟智女士: 6 7 也要考慮公眾的利益,因為他須向公眾解釋他的決定。 8 9 主席: 10 11 難道證監會就不考慮公眾利益?整部條例也有提到公眾利益的重 12 要性。不單是一般來說,在細節條文也有提到,剛才證監會的多位同事也 13 解釋過,證監會一定要以公眾利益為出發點。大家所討論的都是公眾利益, 只不過行政長官的公眾利益是凌駕於證監會的公眾利益之上,這是否可以 14 15 讓我們很放心? 16 財經事務局副局長區璟智女士: 17 18 19 我請問議員,在很危急的情況下,若第29條失效時,有什麼補救的 20 措施? 為什麼你會覺得第29條是永遠絕對不會失效的? 21 22 主席: 23 24 對不起,你是說第29條永遠不會失效嗎?很多事情都是會失效的。 按照這個邏輯,任何監管法庭的條例是否都一樣會失效?是否監管法庭的 25 條例失效時,行政長官又有這樣的權力和責任指令法庭行事?法治的意思 26 27 是事先有法律規管。為何要法律完備,就是要它自動運作,不可以由一個 28 人去介入。為何在這條款中,你要有一個人介入?

財經事務局副局長區璟智女士:

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就這一點,我知道政府和主席有很多不同的看法。不過我希望重申,市民的期望,立法會對我們問責性的看法,我們在《基本法》下有最後的工具去貫徹問責性和盡我們的責任。既然我們不可以百分之一百向各位擔保這條條款不會失效,我們就需要有一個渠道貫徹我們的責任。

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何俊仁議員:

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主席,有些觀點已在你上次未有出席會議時曾交流過。我們也和主席一樣表達了很強烈的意見,所列舉的例子也是一樣,即如果法庭和立法會失效,行政長官便要指令我們做事。我們對此事的想法是一致的。

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13 第11條的設計,是假設行政長官具有至高無上的智慧,每個架構都 會出錯,那就由行政長官介入,糾正一切,做最適當和最有智慧的事。但 14 15 最大的問題是:上次區小姐提到行政長官會顧全全局,他的着眼點不只是 16 證監會,他還會就證券市場、金管局、金融市場等等作出全盤考慮;所以 17 在概念上而言,實際上是在製造一個超級的監管者,這個就是行政長官。 雖然他平時不會作出監管,但一旦介入,他就是超級的,就可以發出一切 18 19 指令,在稍作諮詢後便可以決定一切。如果是這樣的概念,我們辛苦建立 20 的架構就變得毫無意義了。雖然區小姐相信行政長官,但是整個制度不是 21 相信一個人的問題。我明白區小姐的立場,她的立場亦是政府的立場,她 22 來的目的是為政府的立場答辯。關於我們的看法,主席也很清楚地說明了, 下一步要考慮的,就是需否作出一些修訂。 23

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主席:

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27 各位同事,我無意浪費大家的時間,因為第11條已有很詳細的討 28 論,我也不希望重覆討論。不過,今次會議是特別針對第29條,署方似乎 29 也很清楚地表達了當局的立場。除非同事有其他的意見,不然我的總結就 30 是政府只有這樣的解釋。

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 *財經事務局副局長區璟智女士:*

3

4 多謝何議員的意見。我們曾於上次會議上和議員討論這個問題,而 5 副主席當時未能出席。我們提到一點:不管是《基本法》的規定,還是市 6 民對政府的期望,在維護金融體系的穩定性方面,政府是有一定的責任。 7 證監會監管的是證券及期貨市場,但是因為有跨市場的活動和影響,行政 8 當局是有責任統籌和協調,不單是其中一個監管機構,其他監管機構也可 9 能要在一些行動作出配合。剛才何議員的說法是很正確的,就是行政長官 10 作為行政機關的一把手,需要扮演一個重要角色。

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何俊仁議員:

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主席,在上次的會議上,我忘記提問一個問題:就是為什麼不把證 監會、金管局變成政府的一部分?他們也不需要獨立,全部成為政府的部 門,全部由政府管理,那就達到了效果,為什麼要將他們獨立化?

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財經事務局副局長區璟智女士:

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那其實有一點醜化了整個動機。主席,容許我再重覆一遍,由於市場很多時候受跨市場的影響,在制定風險管理、或與金融體系的穩定有關的政策時,所要參考的金融市場會超過一個。就那方面來說,在香港的層面,每一個規管架構,例如金管局、證監會等,猶如一個團隊般運作,我們不可以將單一個規管機構抽出來,就說這樣做才是正確的。他們現在仍是採用一個團隊的運作模式,而且是很暢順的;但我們不可以確保這個團隊的運作可以百分之百暢順,如果失效的情況真的出現,我們該怎麼做?

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主席:

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區局長,我希望提問一個事實的問題:以前行政長官有沒有權力指

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	令停市?
2	
3	財經事務局副局長區璟智女士:
4	
5	行政長官從來沒有指令停市。
6	
7	<i>主席:</i>
8	
9	行政長官有沒有法定權力指令停市?
10	
11	<i>財經事務局副局長區璟智女士:</i>
12	
13	《證監會條例》在1989年通過時,當時的港督亦都有這個指令的安
14	排。回歸之後,在條例作出本地化後,指令的安排就轉到行政長官身上。
15	副主席那個問題其實是比較具體的,關於行政長官的指令或前港督的指
16	令,舉凡證監會有關這個職能的條款,都包括在內,但是是從來沒有使用
17	過。
18	
19	<i>主席:</i>
20	
21	區局長,根據以前的《證監會條例》,證監會是沒有權力指令停市
22	的,對嗎?還是有權可以指令停市?
23	
24	<i>財經事務局副局長區璟智女士:</i>
25	
26	可以的,成立證監會之初,已經一直都有這個條款。
27	
28	<i>主席:</i>
29	
30	證監會有權指令停市。

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	財經事務局副局長區璟智女士:
3	
4	是的。
5	
6	<i>主席:</i>
7	
8	現在的條款已經很清楚說明:就是行政長官有權指令證監會指令停
9	市。
10	
11	財經事務局副局長區璟智女士:
12	
13	條例沒有這麼具體地訂明,不過各位在闡釋第11條條款時,我只可
14	以說理論上是可以的。
15	A. 46
16	<i>主席:</i>
17	然 2.0 概 日 从 月 天 去 4.0 g ① 图 日 天 1.4 大 。 /回 1.4 大 + 0
18	第29條是從何而來的?我們是否也有一個比較表?
19	
20	Miss AU King-chi, Deputy Secretary of Financial Services Department:
21	Mar Andrew VOLING
22	Mr Andrew YOUNG, can you trace through the efficient table?
2324	Mr Andrew YOUNG, Legal Consultant, Securities and Futures Commission:
25	Mr Andrew 100NG, Legai Consulani, Securities and Futures Commission:
26	Yes, Madame Chairman. It is from section 27 of the Securities Ordinance.
27	1 es, Madame Chamman. It is from section 27 of the securities of dinance.
28	Chairman:
29	Сиш шин.
30	Section 27?

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	Mr Andrew YOUNG, Legal Consultant, Securities and Futures Commission:
3	
4	Of the Securities Ordinance; yes.
5	
6	Chairman:
7	
8	Is it in terms, or is it somewhat different?
9	
10	Mr Andrew YOUNG, Legal Consultant, Securities and Futures Commission:
11	
12	It is similar. "A Commission may order a closure of the unified exchange in
13	emergencies"
14	
15	Chairman:
16	
17	It is exactly similar?
18	
19	Mr Andrew YOUNG, Legal Consultant, Securities and Futures Commission:
20	
21	It is quite close; yes.
22	
23	財經事務局副局長區璟智女士:
24	
25	主席,基本上是和現有的情況一樣。
26	
27	<i>主席:</i>
28	
29	即是一直都有的。
30	

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:
2	
3	主席,我記得有關賦予行政長官權力的第11條是新的,對嗎?
4	
5	<i>主席:</i>
6	
7	不是。何議員,不相同的地方是這樣的,如果你比較以前的第11條
8	和現在的第11條,現在的第11條要詳細許多,特別是第(3)款,是以前所沒
9	有的。以前的第11條只是很概括性地提出總督有這樣的指示,指示證監會
10	行事。
11	
12	財經事務局副局長區璟智女士:
13	
14	何議員,最大的不同點,是在第11條第(1)款加入對行政長官的制
15	衡,也就是剛才我提及的,他必須先諮詢證監會,要合乎公眾利益,而且
16	向證監會提出的要求,必須屬證監會的職能範圍之內。其實在以往兩年的
17	公眾諮詢當中,各位都很憂慮,就是證監會作為一個規管架構,他們理解
18	需要給予證監會足夠的權力,但是證監會若一旦失效,應該怎樣辦?或者
19	有這麼多個機構需要協調的時候,應該怎樣辦?我們的答案是,如果需要
20	協調的時候,其實可以由行政機構扮演這個角色。行政機構現在有權向證
21	監會、金管局、積金局等發出指示,雖然這個權力從來沒有使用過。
22	
23	<i>主席:</i>
24	
25	你多次提出失效,這個條文內沒有提到任何人失效。
26	
27	財經事務局副局長區璟智女士:
28	

我們也提到,現在市場人士覺得這是值得支持的,是一個制衡。但

29

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

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時,可能要多一些步驟。

2 3 主席: 4 5 是的,有些人是希望行政長官全權控制。 6 7 財經事務局副局長區璟智女士: 8 9 這些是諮詢過程當中,公眾和市場人士所提交的意見,希望各位可 10 以考慮。 11 12 何俊仁議員: 13 14 主席,請協助我們理解第11條加上第29條的運作效果。比如在1998 15 年,入市以前,財政司司長不欲入市,如果他有較大的權力,可能會向行 16 政長官提出別的選擇,那他會選擇怎樣做?當局可以多做些什麼事情呢? 比如1998年的情況,是否算是失效呢?市場被攻擊,要被迫入市。我希望 17 18 知道當局多了些什麼選擇?是否停市,或是不准某些人做買賣?我希望知 19 道實際的運作。 20 21 財經事務局副局長區璟智女士:

22

23

24

25

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1

何議員將兩個情況混亂了,這裏是討論停市。行政長官如果真的要 採取行動,我剛才也提到,他必須考慮公眾利益。各位可以參考行政長官 在什麼情況下可以運用這條法例。根據以往的的經驗,這條法例是不可以 圖用的。即使是1998年金融動盪的時候,我們的角色也只是協調規管機構, 令金管局在市場上採取行動時,得到足夠的支持。至於其他規管機構,可 以怎樣幫忙呢?例如在監察大額持倉活動的時候,可能加一把勁;在持倉 上限做一個檢討等。這都是證監會在權力範圍之內可以做的事情。

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

1 主席:

《證券及期貨條例草案》及

2	
3	我們所關注的問題,就是這個草案加大了證監會的權力和職能,而
4	證監會的權力職能在加大後,同時也給予行政長官更大的權力。不過我們
5	還是要逐條條款研究,沒有辦法不提出討論。但現在最直接關係的就是第
6	29條,不過我們已討論了很多,再討論下去也都沒有什麼好處。
7	
8	中文文本第29條 —— 在緊急情況下,指令停止提供設施或服務,
9	請問就中文文本,各位同事有沒有問題?如果沒有問題,英文clause 30 —
10	Contravention of notice constitutes offence 。鄭先生,是否由你作出解釋?
11	
12	高級助理法律草擬專員鄭劍峰先生:
13	
14	我們這裏只加了讓他有一個辯解的機會,就是說,如果他在沒有合
15	理辯解之下違反條例,才算違法。
16	
17	<i>主席:</i>
18	
19	議員有沒有問題?如果沒有問題,就中文文本的第30條 —— 違反
20	通告構成罪行;有沒有問題?
21	
22	Clause 31 — Prevention of entry into close trading market; any questions here?
23	如果沒有問題的話,就中文文本第31條 —— 防止進入停開的交易市場;
24	同事有沒有問題?
25	
26	Clause 32 — Publication of directions; no change here, any questions? $\dot{+}\dot{\chi}\dot{\chi}$
27	本第32條 — 指令的刊登,請問同事有沒有問題?沒有問題。
28	
29	英文文本 clause 33 — Appeals; no change here, any questions from
30	Members?中文文本第33條 —— 上訴;同事有沒有問題?沒有問題。

1	
2	接著我們討論英文文本 clause 34 — Restrictions on use of titles relating to
3	exchanges, markets, etc.; there are numbers of amendment。區局長,是否由鄭先生向
4	我們解釋?
5	
6	財經事務局副局長區璟智女士:
7	
8	是的,這條條例與剛才第(10)款的備註解釋是相同的。鄭先生。
9	
10	高級助理法律草擬專員鄭劍峰先生:
11	
12	除了加入一個免責的條文之外,我們還多加數個名稱,防止有人在
13	沒有證監會批准之下,使用這些名稱。第(2)(a)款,我們多加了數個新的名
14	稱 —— Unified Exchange和 United Exchange。
15	
16	<i>主席:</i>
17	
18	這似乎是基於我們法律顧問所提出的意見。英文文本方面,各位有
19	沒有問題?如果沒有問題,中文文本第34款 —— 限制使用與交易所、市
20	場等有關的稱銜;請問各位有沒有問題?沒有問題。
21	
22	英文文本 clause 35 — Contract limits and reportable open position; any
23	questions? I think there is one amendment at (5), " also without reasonable excuse". I
24	expect it is the same explanation. Any questions? 如果沒有問題,就中文文本第35
25	條 —— 合約限制及須申報的持倉量,同事有沒有問題?沒有問題。
26	
27	英文文本clause 36 — Rules by Commission; no change here, any questions?
28	
29	財經事務局副局長區璟智女士:

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

1	我希望一提的是:第36條下的規則,是具法律效用的附屬法律。
2	
3	<i>主席:</i>
4	
5	各位同事有沒有問題?如果沒有問題,就中文文本第36條 —— 證
6	監會訂立規則。
7	
8	Audrey °
9	
10	<i>余若薇議員:</i>
11	
12	如果這個部份討論完畢,我可否提問一個問題?
13	
14	<i>主席:</i>
15	
16	好的,我們先完成這個部份的討論。中文文本第36條,沒有別的問
17	題;我們就結束了第2分部的討論。在討論第3分部前,余若薇議員是否希
18	望提問問題?
19	
20	Hon Audrey EU Yuet-mee, SC, JP:
21	
22	Thank you, Chairman. I just wanted to ask whether it is a good idea to do some
23	sort of consistency exercise, to go through the various parts. I am not suggesting we should
24	do it, but whether somebody needs to do it, to see whether the various divisions are consistent
25	with one another, because for example, when I look at, say, exchange controllers, let us say
26	section 66, when it talks about rules making, then 66(1)(a) says that a recognized exchange
27	controller can make rules for the performance of his duties under section 63.
28	
29	If you look at the rules-making power, for example, of a recognized exchange
30	company, then it does not talk about making rules for the duties. It talks about making rules

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1	for a number of things. Section 23(1)(a) says: " make rules for such matters as are
2	necessary or desirable (a), for the proper regulation and efficient operation of the market
3	which it operates" and so on and so forth. Then you look at the section that deals with the
4	duties of the recognized exchange companies, and you see that the words are slightly different
5	It says: "It shall be the duty of a recognized exchange company to ensure so far as
6	reasonably practicable an orderly, informed and fair market" which is slightly different from
7	"efficient operation" and so on and so forth. It is just that I do not know whether there is any
8	particular rhyme or reason for some words to be used in this part and some words not to be
9	used in this part, the various divisions; and whether it is a good idea to do some form of a
10	consistency exercise, just to check that they are a mirror image, in so far as is necessary, of
11	each other, or whether you think it is not necessary at all, and this is worthwhile and

1213

14 主席:

15

16 區局長。

17

18

財經事務局副局長區璟智女士:

everybody knows what it means.

19 20

21

22

23

24

25

多謝,主席。第21條與第23條在文字上可能有出入,我也嘗試解釋或請我的同事幫忙解釋。第21條的集中點,其實是討論既然交易所有專營權,須具備什麼公共職能呢?所以第21條是針對public duties —— 公共職能來撰寫的;而第23條是授權交易所訂立一些規章,把交易所在在市場運作上所須訂立的規章全部列出來,涵蓋面可能會較廣泛,不過我們也可以研究是否有些地方需要拉近。

2627

28

29

30

至於余議員剛才提到,這裏有很多分部是針對交易所、結算所、交易所的控制人,條款中確實是有出入的;因為個別運作的模式與活動有不同之處。不過不一定完全不可以一樣,有些地方都應該是一樣的,讓各位較容易作出比較。

1	
2	其實我們多謝法律顧問,他做了一個很詳細的比較表。上次會議完
3	畢後,我們就這個比較表擬備了一份文件,希望可以解答各位的疑慮。那
4	份文件的是5月21日發出的,文件編號是Paper No. 3G/01。如果各位參考這
5	份文件後,覺得有些地方的論據不是很充分,覺得應該可以拉近一些,也
6	可以提出來再作討論。
7	
8	主席:
9	
10	法律草擬方面的其他同事,會否有所補充?鄭先生,會否希望有所
11	補充?
12	
13	高級助理法律草擬專員鄭劍峰先生:
14	
15	基本上條文上若有不同的地方,都是因應個別受規管機構的性質而
16	作出不同的條文。我們已經在文件內詳細列出。
17	
18	<i>余若薇議員:</i>
19	
20	主席,我剛才列舉的例子,比如第66條提到認可控制人訂立規章,
21	他訂立規章是為履行他的職責;但參考其他的條文,就沒有提出訂立規章
22	或規條是為協助他履行職責。我不知道是否有特別的原因,有這樣不同的
23	寫法。
24	→ #
25	<i>主席:</i>
26	/b × 故北南州 叫盐 体 / /
27	你希望政府特別就第66條作出回應,是嗎?還是希望政府就一般的
28	情況作出回應?
29	

余若薇議員:

1	
2	我希望政府回應,是否有一個特別的原因?第66條就提出訂立規章
3	是履行職責;但由於有特別的原因,在第23條就不是這樣的寫法。
4	
5	<i>主席:</i>
6	
7	Let us have a specific explanation on 23 and 66, all right?區局長可
8	否解釋?
9	
10	財經事務局副局長區璟智女士:
11	
12	剛才我已經就第23條作出解釋;至於第63條和第66條的關係,我請
13	黃國玲女士講解,或是Mr DICKENS講解。
14	
15	第63條和第66條,是針對交易所的控制人。交易所控制人的母公
16	司,按常理不會就交易所、結算所的具體日常運作訂立規章,也就是說層
17	次應該比較高一些。所以第66條提到訂立規章的時候,可能都是針對其公
18	共職能而言,也就是第63條所指的公共職能,不過我也請Mr DICKENS幫忙
19	作出解釋,為什麼會有這樣的安排?
20	
21	Chairman:
22	
23	Mr DICKENS.
24	
25	Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures
26	Commission:
27	
28	The reason given by Miss AU is the main reason. 66(1)(a) takes me back to 63
29	and 63 picks up some of these duties we have seen in other places, to ensure that "so far as
30	is reasonably practicable that the stock market operated by the recognized exchange company

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is orderly, informed and fair", and so on. Then there are clearing houses. They have to
make sure that works, that the risks associated with its business are managed prudently, and
that the recognized exchange companies and clearing houses comply with the legal
requirements placed on them.
So the assumption in 66 is that the recognized exchange controller may have higher
level rules telling the subsidiaries what they have to do to discharge their particular duties.
Now, if you end up in the situation we discussed at the very start, under 19(1), where the
recognized exchange controller becomes a recognized exchange company, then it will also
itself have to do the recognized exchange company things. But the assumption is that it is at
a higher level in the chain, so its rules are going to be slightly different.
You could have, in 66, written out all the 63 things, which was the drafting device
used earlier, but it comes to the same thing by a more roundabout route. Well, it uses less
words to get to the same place. It is not more roundabout. It uses less words.
Hon Audrey EU Yuet-mee, SC,JP:
I suppose my question then is: why do you not use less words in section 23?
Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures
Commission:
A question for the draftsman, really. I think it is only because it is only to small
duties.
Chairman:
Of course I understand that consistency is important, but speaking for myself and
from my experience of vetting many various regulations, I think that consistency can be too

1	much of a good thing when there is too much regard for exact identity of use of words. It
2	can give rise to some pretty strange drafting. It has happened in the past when I see
3	extremely strange drafting, particularly relating to Chinese, when I ask for the reason,
4	generally the reason is that the formula is being used so as not to give rise to any queries that
5	may be any different.
6	
7	So I think sometimes this can go too far. I mean, having admitted that drafting is
8	very much a matter of style, I think people must use their sense and be alert to possible
9	conjecture arising from different formulations. That is about as far as it should go. If it
10	does not give rise to any problem, then I should hope the Administration would have some
11	regard for the general flow of the drafting rather than making total consistency a paramount
12	requirement. You have got two views. I am sure you would use your best judgment.
13	
14	If you fall short of them and it creates some kind of ambiguity then I am sure
15	Members would point that out again. Now Members, we are moving to Division 3.
16	
17	我們現在討論第3分部 —— 結算所,有關結算所的問題,例如控
18	制敏感資料等方面的問題,各位會否希望留待下次會議一起審議?
19	
20	<i>余若薇議員:</i>
21	
22	主席,希望留待下次會議一起討論。但可否提問政府,這些條例草
23	案所提到種種責任和職責,如果有違反的話,是沒有後果的,是嗎?
24	
25	<i>主席:</i>
26	
27	是否沒有後果的,區局長?
28	

財經事務局副局長區璟智女士:

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1 如果是有刑事責任的,就一定會在條文內訂明。剛才我提到的,比 2 如交易所自己訂立的規章,規章之內會訂有罰則。 3 4 余若薇議員: 5 6 我不是提問那個 rules 的 consequence; 我是指 duties 的 7 consequence • 8 9 I mean, if you have a long list of beautiful duties, all of them well-written, efficient, 10 orderly and so on and so forth, if there is any breach, if there is a failure, as you said there, 11 what happens? Is there any consequence? 12 13 財經事務局副局長區璟智女士: 14 15 是有後果的。 16 17 主席: 18 19 有什麽後果? 20 21 財經事務局副局長區璟智女士: 22 23 我重覆我先前的說話,比如結算所在運作前,必須得到證監會認 可,就好像原子彈的後果,將認可撤銷,這個是非不得已才可以做的。其 24 25 餘比較中間路線的,證監會可能會提出指示,或者是限制通告,我們稍後 26 在討論第91款、第92款、第93款時,各位都可以看到。其實那些並不是罰

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監會也當然都可以撤換或撤銷他的職能。

則,反而是希望有關機構盡快採取一些補救的措施作出改善,但是撤銷認

可會是最後的板斧。這些機構的第一把手當然也需要得到證監會批准,證

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

1	<i>主席:</i>
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3	那麼證監會的duties 與行政長官那些美麗的責任及又如何?
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5	<i>財經事務局副局長區璟智女士:</i>
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7	在整條條例下有很多職能和權力,各位在討論第XVI部的時候,會
8	看到證監會在什麼情況可以免責,如果不免責的時候,證監會和行政長官
9	亦要負上法律責任;即是受影響的人士是可以追究的。
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11	<i>主席:</i>
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13	我很希望知道怎樣在第11條之下追究。秘書希望各位留意,有一份
14	文件是CB(1) 1174/00-01(02)提到"Sanctions against a recognized exchange and
15	closure of it in emergencies",同時也提到其他地區的做法,好像剛才區局長提到
16	的就是這份文件,各位可以參考。多謝各位出席。
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18	<i>財經事務局副局長區璟智女士:</i>
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20	多謝,主席。
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