

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 Monday, 16 July 2001, at 9:30 am
in Conference Room A of the Legislative Council Building**

- Members present** : Hon SIN Chung-kai, (Chairman)
Hon Margaret NG, (Deputy Chairman)
Hon Albert HO Chun-yan
Hon Eric LI Ka-cheung, JP
Dr Hon David LI Kwok-po, JP
Hon NG Leung-sing
Hon Bernard CHAN
Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP
Hon Ambrose LAU Hon-chuen, JP
Hon Abraham SHEK Lai-him, JP
Hon Henry WU King-cheong, BBS
Hon Audrey EU Yuet-mee, SC, JP
- Members absent** : Hon James TO Kun-sun
Hon Jasper TSANG Yok-sing, JP
- Public officers attending** : Parts VI, VII & VIII of the Securities and Futures Bill

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

Mr Danny LEUNG
Division Head, Banking Development Department, Hong
Kong Monetary Authority

Ms Sherman CHAN
Senior Assistant Law Draftsman

Part VIII of the Securities and Futures Bill

Mr Frank TSANG
Assistant Secretary for Financial Services

Mr Michael LAM
Senior Government Counsel

- Attendance by invitation** : Parts VI, VII & VIII of the Securities and Futures Bill
- Mr Andrew PROCTER
Executive Director, Intermediaries and Investment
Products, Securities and Futures Commission
- Mr Stephen PO
Director, Intermediaries Supervision Department,
Securities and Futures Commission
- Mr Joe KENNY
Consultant, Securities and Futures Commission
- Mrs Mary AHERN
Legal Consultant, Securities and Futures Commission
- Part VIII of the Securities and Futures Bill
- Mr Paul R BAILEY
Member of the Commission and Executive Director,
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

**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 **主席：**

2
3 各位同事，會議現在正式開始。

4
5 我希望提醒各位，政府已於7月13日發出函件，就證券商協會有限
6 公司，即The Institute of Securities Dealers Limited的信件作出回應。我們
7 上次會議結束前，已就第VI部第150條進行討論，今天的討論應由第151條
8 開始。政府已於7月13日向各位發出有關第VII部的委員會審議階段修正案
9 的中、英文本，亦已透過cc mail，向各位發出有關第VIII部的委員會審議階
10 段修正案的中、英文本。可能不是很多同事收到這份郵件，但當局今天可
11 能亦會向各位提供一份copy on table。

12
13 我們今天的討論由第151條開始。 Margaret.

14
15 **副主席：**

16
17 主席，我們在上次會議上有否討論關於制訂規則的方法？

18
19 即有關rule-making方面的情況。我們有否討論這些問題？讓我解釋
20 我所指的是甚麼。第VI部多項條文也涉及SFC may make rules的問題，其中
21 包括兩個形式。第一，請參考有關文件的英文本第9頁第142條。這條涉及
22 一些條件……或許讓我以英文表達。

23
24 It is simply that because I am reading from the English version, it is rather difficult
25 for me to put that into Chinese. Under clause 142 what we see in (1) is that if you become
26 aware of an inability to meet the Financial Resources Rules, then you have to notify and
27 immediately cease business. If you do not, then you commit an offence. While you do that,
28 that is okay. However, this is subject to conditions to be imposed by the Commission.
29 What happens is that the contravention of these conditions would become a criminal offence.
30 I think this is how it works. My concern is that there is a power given to the SFC in advance,

**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 to create situations where someone may commit an offence. We do not know in advance
2 what these conditions are. If you comply with the conditions you do not commit an offence.
3 It is when you contravene these conditions that you commit an offence.

4
5 So the contravention of these conditions, which we do not know in advance,
6 constitutes an offence. My question there is: how does one ensure that the conditions
7 imposed are not arbitrary so that you have an arbitrary power in advance of making
8 something criminal. This is the first situation. I do not know if that was discussed last
9 time.

10
11 The second kind of situation you will find on page 23. This I think we are more
12 familiar with, which is that the SFC can make rules in certain matters, so that the
13 contravention of these rules without reasonable excuse would constitute an offence. We
14 have discussed that on many occasions. I understand the reason why the SFC wants this
15 flexibility. It is because of market demand.

16
17 Mr Chairman, I have no problem with the concept of leaving the SFC a degree of
18 flexibility. I accept that there is justification. However, what we are seeing here is a
19 creation of criminal offence by subsidiary legislation. The legislature does not know in
20 advance what precise acts would constitute a criminal offence, so this power is given to the
21 SFC, and it is only when the details come out that we could delineate what is a criminal act
22 and what is not a criminal act. I understand that these rules are subsidiary legislation. My
23 question is: it appears to me that this is a negative vetting. Would that be sufficient? The
24 question is whether you have not an advance power of criminalization. You make this
25 negative vetting subsidiary legislation. Is that sufficient?

26
27 You consult the Financial Secretary. I have no doubt of that. Is it as a matter of
28 practice? I think in answer to some of the questions, you also consult practitioners, the
29 industry and so on? What are the safeguards that you will, as a matter of course, consult,
30 and that the process of consultation will have more effect on the rules you are going to make.

**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 You know that some of us have suggested at an earlier stage that the consultation should be
2 made statutory and so on. So I put these two questions together – whether negative vetting
3 is sufficient; whether we should not go for positive vetting; whether we should make it a
4 statutory requirement to consult and set up the mechanism for consultation.

5
6 Thank you, Mr Chairman. I am concerned with a sort of “in advance” flexible
7 power of criminalization approach and I am looking for a kind of mechanism in order to
8 ensure that this will not be arbitrarily used.

9
10 **主席：**

11
12 副局長，請講。

13
14 **財經事務局副局長區璟智女士：**

15
16 多謝主席。副主席提出的是很重要的問題，即有關將來這些條款在
17 程序上或實際運作上會怎樣安排的問題。這些《財政資源規則》等並不是
18 新訂的，而是已存在於現時法例內的。對於如何處理這些規則，立法會亦
19 有慣常的做法和經驗。舉例來說，證監會去年建議更新《財政資源規則》。
20 當《財政資源規則》提交立法會時，立法會亦成立了一個委員會，進行詳
21 細審議。據我瞭解，該委員會用了大概一年的時間，仔細地審議每項新的
22 要求，業界亦有機會再次就規則表達意見。

23
24 我相信立法會進行的審議工作是非常有效的。所以，對於這些規
25 則，是設有審議程序的，立法會過往亦曾進行這些程序。可能議員們亦有
26 這方面的經驗，主席也可能曾參與這個委員會的審議工作。所以，立法會
27 的議員可以就這個程序進行研究。對於我們來說，審議的工作也相當充足。
28 另外，副主席亦提到，最主要的是事前向業界諮詢，因為在很多情況下，
29 這些規則也涉及業界日常的運作，而在制訂規則上，最重要是使規則實際
30 可行。那麼，我們現在就這方面作出了甚麼努力呢？雖然現在已經存有一

**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 套《財政資源規則》，但證監會的同事在條例草案尚未通過前，在現時已開
2 始研究如何因應合併這些條例更新和合併有關規則。

3
4 證監會已成立了一個工作小組，跟業界商討怎樣草擬這些規則。有
5 關擬稿現時尚未完成。證監會透過工作小組的形式制訂規則擬稿後，會再
6 進行詳細的市場諮詢。副主席剛才亦提到，我們計劃將來在第XVI部加入法
7 定的諮詢條文，把現有的諮詢安排，較為綱舉目張地在法例內訂明，讓大
8 家可以安心。

9
10 第三方面，例如即使第VI部訂明，證監會獲賦權訂立規則，主體法
11 例亦訂明，證監會必須諮詢財政司司長，以作為制衡。業界亦接受這是一
12 個制衡措施。另外，主體法例亦列明刑罰的上限，作為一個指引。當然，
13 有關刑罰本身究竟是針對哪些違規行為，亦要在有關規則內清楚列明。

14
15 **副主席：**

16
17 主席，我知道這些條文大部分是現有的法律條文，但法律顧問亦表
18 示，這些條文並不是完全取自現有的條文的。在某程度上，證監會的權力
19 是被擴大了，例如這些條文擴闊了有關規則的範圍、加重了有關的刑罰等。
20 所以，這些條文並不是完全沒有改變的。

21
22 至於政府當局就業界的意見所作的回應，我們曾接獲當局就第VI
23 部提供的列表。該文件的政府文件編號是Paper No. 6A/01，立法會文件編號
24 是CB(1)1705/00-01(03)。在該文件最後部分的general comments中，有關
25 “Rule-making power of the SFC”的部分亦有提出這個問題。所以，我們正討
26 論甚麼問題，應該是非常清楚的。

27
28 為何我總認為純粹透過negative vetting和經立法會通過是不足夠的呢？第
29 一，據我的理解，透過negative vetting通過的規則，其實是已經生效的。所
30 以在某程度上，屆時已存有緊迫性。或許法律顧問可以再出解釋。第二，

**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**

立法會整體議員會以小組的形式審議這些規則，結果是立法會會以投票的方式處理。當立法會工作繁忙時，該小組未必每次也能夠專注地和仔細地審議這些規則。為何證監會需要擁有訂立規則的權力呢？因為證監會認為，這些規則涉及市場和投資工具在實際運作上的具體情況。如果純粹待屆時的立法會有關的小組聽取業界的意見，或雙方表達意見，恐怕不能達致有關的效果。況且，這個做法亦不能處理我們最初的憂慮。我們的憂慮是，業界提出的意見向來亦很強烈，並且很有條理，但就消費者方面，我們卻得不到這樣的反應。在這種情況下，立法會的審議亦會受到很大的規限，但我們進行審議時亦不可單憑想像消費者的情況。

副局長剛才提到，當局將會在第XVI部提出一些機制或加入一些條文。第一，即使當局尚未完成有關條文的草擬工作，副局長可否較詳盡地解釋有關機制的情況呢？第二，有關機制會否影響這部的條文呢？

財經事務局副局長區璟智女士：

有關的諮詢機制將會廣泛地適用於整條主體法例內提及的規則、指引及守則。

副主席：

這機制是否我們已曾討論的機制？

財經事務局副局長區璟智女士：

我們還未討論第XVI部，我們在上次會議上原則上答允草擬這個機制。

副主席：

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 這機制是否原有的機制？

2
3 **財經事務局副局長區璟智女士：**

4
5 這是原本沒有的機制，是源於議員們提供的很好的意見。當時有議
6 員問及現時證監會諮詢工作的情況。證監會同事當時亦已作出交代。然後
7 有議員提出，既然證監會向來亦有進行這些工作，大可嘗試把一些具體的
8 安排納入法例之內，好讓大家安心。我們正就這方面進行工作。

9
10 **主席：**

11
12 第XVI部是Miscellaneous，即包括條例草案較前部分沒有包括的事
13 情。

14
15 **財經事務局副局長區璟智女士：**

16
17 適用於以上15部的安排，或不屬任何一部的類別，也可列入第XVI
18 部。

19
20 **主席：**

21
22 可否就這個機制的整體政策方向作出描述？

23
24 **Deputy Secretary for Financial Services Ms AU King-chi, JP:**

25
26 Maybe I will ask Andrew to elaborate a bit more.

27
28 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
29 **Securities and Futures 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 I think, Chairman, that it is, as Miss AU said, very much a reflection of the
2 observations that were made at an earlier stage of consideration of the bill. It will basically
3 replicate the existing practice. It will require that there is reasonable public consultation in
4 respect of a draft of a set of rules, or a code, or guidelines; and that there will be a publication
5 and a document that is a follow-up to that consultation. There will also be publication and
6 publicity and information available to Members of the Legislative Council in respect of that
7 public consultation.

8
9 In that respect it will look very similar to Financial Services Authority provisions,
10 which Members have some familiarity. There would be, however, a need to recognize that
11 what is reasonable consultation and what is necessary will depend to some extent on the
12 complexity of the legislation, how novel it is, how urgent it is. The clear requirement under
13 the proposal is that there be a transparency of the process, publication of a draft, a calling for
14 proper public consultation and a follow-up document showing what the consultation has
15 elicited by way of comment. Where the Commission has or has not accepted those comments,
16 and the reasons for not accepting any comments. All that would be available to Legislative
17 Council.

18
19 **Deputy Chairman:**

20
21 Just as a final point, Mr Chairman, whether this Bills Committee considers it to be
22 sufficient we will go into when we reach that particular Part, but as far as this part is
23 concerned, since that process is also applicable to this Part, would the Administration
24 consider making that express in this Part, so that people can see that this rule-making power is
25 also governed by the mechanism in Part XVI?

26
27 **財經事務局副局長區璟智女士：**

28
29 請陳律師解釋有哪幾種草擬的方法？
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 **Chairman:**

2
3 Please.

4
5 **高級助理法律草擬專員陳子敏女士：**

6
7 正如局長剛才所說，我們的想法是在第XVI部制定一些一般適用的
8 條文。事實上，現時第XVI部已訂有一條關於規則的條文。各位可參閱第384
9 條，即第C2353頁。這條大致界定證監會可在一些情況下訂立規則。該條第
10 (7)、(8)、(9)及(10)款亦訂明，在某些情況下，某些規則是所有條文也適用
11 的。這裏所指的規則，是全條條例草案內訂立的任何規則。我們的想法，
12 是在第(7)、(8)、(9)及(10)款訂明這點。我們將會採取的做法，是訂明任何
13 根據本條例所訂立的規則，也需符合某些要求。我們希望在這部分訂明後，
14 所有的讀者及使用者便可一目了然，知道某些規則必須符合某些要求才適
15 用。由於條例草案內很多部分也訂有有關規則，我們希望在這部分列出這
16 個規定。

17
18 **主席：**

19
20 我們屆時再作討論吧。余若薇議員。

21
22 **余若薇議員：**

23
24 主席，第142條提到條件的問題。規則與條件是不同的。關於規則，
25 剛才副主席及副局長也曾提到，證監會需要作出諮詢等。但對於條件，證
26 監會則無需作出諮詢，亦沒有明文規定這些是甚麼條件。第142條提到，在
27 很多情況下，證監會也可藉口頭通知的形式，向有關方面施加這些條件。
28 我們在審議這項條文時亦曾提到這個問題，當局現時亦已就這條作出修
29 訂，主要的修訂載於第(7A)款。

**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 但我仍然關注到，即使當局已作出有關第(7A)款的修訂，可能仍不
2 足夠。第一，口頭通知是否包括電子郵件？第二，據我理解，很多業界亦
3 歡迎證監會藉口頭知施加有關條件，因為這個做法較為便捷。我希望知道，
4 根據過往的運作情況，藉口頭通知施加條件的方式是否運作良好？如果
5 是，便可解除我部分的疑慮。

6
7 但我的主要疑慮，是這些藉口頭通知施加的條件，很多時也會產生
8 有關證據的問題或造成爭拗。例如誰通知誰這些條件、給予這些通知的人
9 有否這項權力，或他的職位是否賦予他施加條件的權力等。接到這些通知
10 的人即使相信他，也應取得署名的紀錄。另外是生效時間的問題。根據第
11 142條第(2)款的寫法，證監會可藉給予口頭通知施加條件，亦可藉口頭通知
12 更改這些條件。此外，第(5)(a)款訂明，證監會suspend某法團的licence時，
13 必須作出書面通知。但證監會亦可施加條件，使有關法團有限度地繼續進
14 行有關活動，而給予這些條件的形式，卻可以是口頭通知。例如第(5)(b)款
15 訂明，證監會可藉給予口頭通知施加條件，第(6)款亦訂明，即使證監會以
16 書面形式表明有關條件，亦可藉給予口頭通知的形式作出更改。

17
18 另外，如果有關法團違反這些條件，便須承擔刑事責任。第(11)款
19 提到有關刑事責任的問題。但有關法團違反的，只是以口頭形式通知的條
20 件，並且其中可能會出現誤會或爭拗的情況。因此，在運作上有否出現這
21 些問題呢？但證監會可以書面形式作出通知，亦可藉給予口頭通知的形式
22 作出更改，這情況實在令我有點擔憂。是否必須採取這種寫法呢？

23
24 **財經事務局副局長區璟智女士：**

25
26 多謝主席。

27
28 稍候請Mr PROCTER詳細解釋實際的運作情況。我在上次會議上亦
29 曾提到，證監會有時會遇到一些情況，例如一些業界從業員在早上9時15分
30 致電證監會，表示由於一些突發事故，不能辦到《財政資源規定》內的某

**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 些規定，但又希望可在10時開市，以免妨礙對客戶提供的服務。證監會可
2 能在短時間內便可決定這是可行的，並認為只要該從業員作出某些事情，
3 便可保障投資者。在這種情況下，業界人士可能選擇證監會藉口頭的形式
4 作出通知，然後再以書面形式作出通知。這個做法可讓該從業員繼續營業，
5 而無需暫停業務。在實際運作上，證監會正採取這種做法。至於第(7A)款，
6 正如余議員剛才提到，如果當事人不安心，認為書面通知較好，這款亦為
7 當事人提供選擇的空間。我們希望可藉這款，解決不同情況下不同業界人
8 士的需要。請Mr. PROCTER解釋實際運作上的情況。

9
10 **余若薇議員：**

11
12 主席，在Mr. PROCTER未解釋實際的運作情況前，可否亦請他解
13 釋，究竟以口頭形式和以傳真形式作出通知的分別何在？如果證監會給予
14 口頭通知，表示該從業員可以在10時進行買賣，或直接以署名的傳真作出
15 通知，有甚麼分別呢？為何不採用具有真憑實據的形式，而必須藉口頭的
16 形式作出通知呢？

17
18 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
19 **Securities and Futures Commission:**

20
21 Chairman, I think it is important to remember that all of these discussions about
22 conditions – that is, discussions between the SFC and a registrant – take place in
23 circumstances where the registrant is prohibited from trading. They have to cease
24 operations, cease dealing, immediately they become aware of a breach of the Financial
25 Resources Rules. So there is often very critical time pressure, and the reputational damage
26 that can be caused to a firm through an inability to trade. Even for 30 minutes at the start of
27 the day, could be tremendous.

28
29 Unfortunately, what typically happens is that we become aware of this issue early in
30 the morning – 8:30 am or 9:00 am. We have about an hour usually to make a decision about

**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 whether to allow somebody to trade. It is not very long to get on top of what can be quite a
2 complex set of facts, but we do our best, having regard to the need to protect investors.
3 Nonetheless, to allow a firm to trade if it does not look to be a particularly serious problem, or
4 it is at least a problem they are addressing in an appropriate way, we often allow them to trade
5 subject to conditions, typically restrictions on the volume of their trading.

6
7 It is actually my view, and certainly I think the SFC's view that permission to
8 impose conditions orally is in the best interests of the firm, because it may well be the
9 difference between that reputational damage occurring and not occurring. Of course there is
10 subclause (7), which says that where we do impose conditions orally then they have to be
11 reduced to writing as soon, as reasonably practicable. That means in effect "forthwith",
12 unless you have a good reason not to do it. We well recognize, I think, that there can be
13 ambiguity in discussions, although we are very careful to make sure that where there is an
14 oral discussion that needs to the imposition of a restriction, we make it as clear as possible.
15 We do the usual sorts of things, asking people to repeat it back to us, so there is no
16 misunderstanding. Notwithstanding that, there is a risk, and so subclause (7A) is there. The
17 industry said that in fact they might like to go straight to written conditions. We have said:
18 "That would be your choice. We think that there is a risk involved in some cases. That is
19 your choice and that is why (7A) is there.

20
21 So far as the question about the distinction to be drawn between oral conditions and
22 conditions by fax or email is concerned, I should let Miss CHAN answer that. My
23 understanding is that "document" for these purposes and "in writing" picks up the notion of
24 electronic transaction and communication anyway. So basically we are talking about face-
25 to-face verbal communications or telephone verbal communications, and the rest. I think
26 that is the way I would look at it. The rest is communication in writing for these purposes.

27
28 That leads on, I think, to a question that was asked as part of the first set of
29 questions, and that is the transparency of the process, and the concern that the conditions
30 imposed must be reasonable and appropriate in the circumstances. Of course there are 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 general law requirements that the SFC must act reasonably. There is also a requirement here
2 expressly set out that reflects the general law requirement for procedural fairness, and so
3 someone is given a right to be heard. In this case they must be heard before a condition can
4 be imposed, as a matter of fairness. Of course if they have fled the jurisdiction fairness
5 changes in its nature. There is an express requirement of fairness.

6
7 There is also an obligation of transparency, in that once a condition is imposed,
8 conditions that appear on someone's licence will appear on the public register. So there is
9 public transparency of conditions that are imposed as well. I guess the critical question is:
10 "What about the possibility of misunderstanding or ambiguity?" There has actually only
11 been one case in the last 4 years, to my recollection, where there was a dispute about the
12 terms of a condition. In fact it was a restriction. It was not a restriction imposed by us. It
13 was a restriction imposed by the Stock Exchange. It happens to have been a restriction
14 imposed in writing, and it did not obviate the possibility of confusion. In fact there was
15 quite a bitter dispute about whether that condition imposed in writing meant one thing or
16 another, and in the end we actually thought the written form of the condition was ambiguous.

17
18 Of course, written or oral, you can still have uncertainty and you can still have the
19 possibility for dispute arising.

20
21 ***Hon Audrey EU Yuet-mee, SC, JP:***

22
23 Mr Chairman, it could be due to the translation, but I did not ask the question about
24 fairness. I was really concerned about certainty. I mean, I take your point of course, there
25 can be dispute, even if the condition is in writing, but I think it would at least reduce dispute.
26 I mean, the conditions you said would be considered to be imposed, and decided on in a very
27 short period of time. Very often conditions can vary from circumstances to circumstances.
28 You say some of the conditions would be like restriction on volume, and it is precisely
29 because of that that I really cannot understand why it is not possible to have conditions by
30 email or by fax. This would be really as speedy and as efficient as something on the telephone,

**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 which can give rise to disputes and misunderstandings and questions of authority and
2 questions of timing as to when it should take effect and so on.

3
4 It is really my concern. If the people in the trade, in particular if the Honourable
5 Henry WU says that he is very happy to live with that provision, then of course I have to
6 respect his view for it. It just seems that it is a very uncertain and unsafe system to rely on
7 when you are talking about matters decided on in great urgency, and that could give rise to
8 major disputes and conflicts.

9
10 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
11 **Securities and Futures Commission:**

12
13 Mr Chairman, I do not disagree that reducing the condition to writing reduces the
14 risk of uncertainty, and that is really why (7) is there, but I think we are really not talking
15 about a situation in which the SFC would prefer to impose conditions orally. We actually
16 understand and entirely agree with the need for certainty, and would very much prefer to get
17 plenty of notice of a concern and an issue. I think it is really a practical issue. We know
18 from experience that what happens is that we get a phone call early in the morning; people
19 then have to come down to our office and explain what can be quite complex and shifting sets
20 of facts and circumstances, in a very short period of time.

21
22 We do, as I have said, try to reduce the risk of reputational damage to them, but we
23 do still have a very clear statutory obligation to reduce conditions to writing as soon as
24 reasonably practicable. That is a heavy onus. It is not something that means we can just
25 drift around for a few hours while we think about how to express the discussion. We do
26 have a very clear onus there, but I think also there has been a good deal of discussion with the
27 industry about this clause. I think we are satisfied that the way in which it is structured now
28 does reflect practical experience and a desire to both protect investors and avoid reputational
29 damage.

**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 **主席：**

2
3 先請Margaret，接着是Bernard。

4
5 **Deputy Chairman:**

6
7 Mr Chairman, I am very conscious that all this condition and amendment of
8 condition is in the circumstances of 142(1) – in other words, a criminal situation has already
9 arisen. If you do not have any other provision, that person would have already committed a
10 criminal offence, unless it ceases trading immediately. So in a way you are offering some
11 degree of flexibility to the industry. I am not surprised that the industry welcomes the
12 existence of these provisions.

13
14 I think when Audrey is concerned with certainty, I am very concerned with any
15 loophole for arbitrariness. In other words, would the situation arise when you are more
16 ready to give lenient conditions to certain people, amendment of conditions to certain people
17 who are already in this situation which, under the statute, is criminal and gives rise to criminal
18 liability because of protection of investors and so on; whereas other people will be held under
19 a very stringent kind of “no deal/no discussion”.

20
21 Mr Chairman, my question really is: is this sort of imposition or condition or
22 amendment of condition subject to any kind of transparency or appeal? Would the public be
23 in a position to feel reasonably assured that this power will not be used to allow certain people
24 greater leeway, while others are held to very stringent requirements?

25
26 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
27 **Securities and Futures Commission:**

28
29 I think that is a fair question. I guess Ms CHAN is about to tell us which clause
30 covers the appeal points, so I will let her do that. On the transparency point, we would have

**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 an obligation to include on the register a condition of this sort. That is actually also not a
2 trivial matter. In fact it is because of that that we often have situations where registrants
3 come along and give voluntary undertakings to both ourselves and the exchange and the
4 clearing houses, to avoid the imposition of conditions. That would not necessarily avoid a
5 breach of the Financial Resources Rule, so it would be a question of a particular condition;
6 but certainly in terms of transparency it would appear on the register, and there is an appeal
7 provision as well. The appeal would go to the tribunal.

8
9 **主席：**

10
11 陳律師，請講。

12
13 **高級助理法律草擬專員陳子敏女士：**

14
15 載於第C2471頁的第37、38和39項，也訂明有關決定可予覆核的有
16 關條文。

17
18 **Chairman:**

19
20 Bernard.

21
22 **陳智思議員：**

23
24 主席，對於余若薇議員提到，可否以fax的形式作出通知方面，我亦
25 贊同Mr PROCTER的論點，胡議員可能亦有這方面的經驗。在實際市場運作
26 上，時間可能很短促，即使證監會以fax的形式作出書面通知，相信也需要
27 經很多人批准，並可能需進行一些legal procedures才可，而不是隨便寫上幾
28 句便可作出書面通知，所以程序其實並不簡單。我希望就這方面請Mr
29 PROCTER回應。

**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 另外，即使透過電話作出通知，當局有否進行電話錄音呢？業界的
2 擔憂是證監會作出通知後加以否認。在這種情況下，當局有甚麼辦法跟進
3 呢？我認為進行電話錄音的做法較以fax的形式作出通知實際。

4
5 此外，對於副主席提出的問題，程序覆檢委員會亦會作出處理。程
6 序覆檢委員會曾經研究一些cases。換句話說，對於SFC以不同的方法處理
7 相類個案的情況，我們是會研究的。我們會考慮是存有不公平的情況，還
8 是另有原因。事實上，我們亦曾處理一、兩宗這類cases，所以我們是設有
9 跟進程序的。

10
11 **主席：**

12
13 副局長。

14
15 **財經事務局副局長區璟智女士：**

16
17 請Mr PROCTER confirm現時把證監會與經紀的電話通話錄音的安
18 排。

19
20 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
21 **Securities and Futures Commission:**

22
23 It would not simply be a matter of a phone conversation. We would not, in these
24 sorts of circumstances, rely on a phone discussion. In fact, it would typically be something
25 that comes to our attention as a matter of a phone discussion, and there could be procedural
26 requirements within the SFC for recording a note of that discussion. However, we would
27 invariably insist upon a meeting, and a meeting for this kind of issue would involve Mr PO,
28 myself and probably one of the senior directors as well. That meeting would also be the
29 subject of a note. In fact we would invariably use fax to confirm any conditions that were
30 imposed. We would actually go further and we would invariably ask for confirmation for

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 receipt of the fax and an understanding of the terms as set out in the fax.

2
3 I am not sure about the particular cases to which you refer and in which you suggest
4 there was a different outcome in similar situations involving Financial Resources Rules issues,
5 so I cannot really speculate on how that arose. The differences are infinite, and I do not
6 think it would really help to say what happened in two particular cases with which I am not
7 familiar.

8
9 We have to ensure consistency and transparency, and that is an issue we discussed
10 in answer to the previous question. The fact is that the primary concerns we have are in
11 respect of investor protection and also the protection of the integrity of the clearing and
12 settlement system. What quite often happens is that there is a real uncertainty about whether
13 or not in 2 or 3 days' time a particular registrant would be able to meet their clearing and
14 settlement obligations. Usually we will impose restrictions, and this is not simply a matter
15 of breach of the Financial Resources Rules, but restrictions more generally, where we have a
16 level of uncertainty about their capacity going forward. Those restrictions are also the
17 subject of notification, and it is actually in those situations where we very often get
18 undertakings from firms that they will not trade or not trade above certain levels, to avoid the
19 imposition of restrictions. That is in circumstances where they have not yet breached the
20 Financial Resources Rules, but where there is a concern that they may not be able to meet
21 their obligations going forward.

22
23 The further thing we do in those situations is to ensure that the communication
24 between the firm and ourselves is very frequent and very detailed. So there would normally
25 be a daily reporting requirement, a daily requirement to calculate financial resources rule
26 return, and a daily requirement to report on trading volumes. That would have to come to
27 the SFC at the end of each day.

28
29 **Hon Bernard CHAN:**

**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 Mr Chairman, I am not so sure that Andrew had my exact translation. I was
2 saying that in the case of a timing issue, if it does violate the Financial Resources Rules, you
3 were saying that you have a very short period of time – say less than an hour in the morning –
4 to deal with it. You still do not have a meeting and notice of meeting?

5
6 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
7 **Securities and Futures Commission:**

8
9 Normally we do, actually. Normally there...

10
11 **Hon Bernard CHAN:**

12
13 And you have time for that, and not time for writing something informal?

14
15 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
16 **Securities and Futures Commission:**

17
18 The problem is not so much how long it takes to write something down, but it is
19 understanding what we should write down. The difficulty is normally one where a firm
20 has – I do not mean to imply any criticism of the firms because it is obviously for them a
21 matter of critical importance. Usually what has happened is that the firm has been scrambling
22 around for a couple of days, knowing that they have a problem coming. When they just
23 cannot put it off any longer, when they realize that they cannot get themselves out of the
24 situation, they'll say: "We're in a mess. We need some help". That is why they turn up
25 early in the morning.

26
27 That is human nature. That is exactly what most people would do. They turn up
28 not with a beautifully presented presentation on their financial circumstances, but with "We
29 are in a mess. This is what is happening. Can you help us?" In fact, it is not simply a
30 matter of understanding what financial circumstances they are in and what potential shortfall

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 they have in the Financial Resources Rules, but also what their typical trading patterns are;
2 what their exposure is; what the exposure of the clearing and settlement system is to them on
3 a normal day.

4
5 Actually fashioning conditions like trading caps, for example, that balance investor
6 protection, integrity of the system and danger to reputation, can be quite tricky. You do not
7 want to set the limits too low so that everyone immediately knows this firm is in trouble,
8 because that is exactly what will bring a firm down. On the other hand, you do not want to
9 set it so high that they are in default in 2 days' time, and people turn around and say to the
10 SFC: "You knew about this. Why didn't you prevent it?"

11
12 The discussion is actually really about the detail, and it is never straightforward.
13 You never get a very nice, clear, neat presentation. So I understand the tenor of several of
14 the questions this morning, about the desirability of reducing these conditions to writing, and
15 it is a desire we absolutely share. All we are trying to do, I think, is preserve the possibility
16 for an alternative mechanism. If we could have a discussion in a relaxed atmosphere, sit
17 around, think about it, get back to them, reduce things to writing and give them plenty of time
18 to start trading the next day, that is what we would prefer; but experience shows that that is
19 not very often the luxury that we have.

20
21 **主席：**

22
23 胡經昌議員。

24
25 **胡經昌議員：**

26
27 多謝主席。多謝各位關心經紀業的情況。其實我們的工作小組單就
28 這個問題，已討論了個多小時，以收集業界多方面的意見。我亦贊同政府
29 代表的論點，因為對於遵守FRR方面，我們很多時也是要依賴銀行的。如果
30 銀行很遲才向我們作出通知，我們便要待較遲的時間才可瞭解我們的財政

**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 資源狀況。正如政府的代表提到，口頭通知的做法“有辣也有不辣”。

2
3 但工作小組經過個多小時的商討後，也認為證監會應該以書面的形
4 式作出通知。原因很簡單，證監會來電時，通常不是致電dealing room，而
5 是致電辦公室，而辦公室的電話是沒有錄音設備的，所以可能會出現爭拗
6 的情況。如果有關經紀行出現錯誤，可能是由於當局通知時有所遺漏，或
7 是有關經紀對某一個condition有所誤解，但也“死無對證”。

8
9 部分經紀的做法是當證監會來電時，他們會覆電話給證監會，以免
10 該人偽稱為證監會的人員。一些經紀或會以裝有錄音設備的電話與證監會
11 聯絡。但並不是所有經紀也會採取這些做法的。另一些經紀卻絕對不相信
12 以電話方式作出的通知，所以他們要求當局就這方面制訂一些措施。其實，
13 這是頗為擾民的事情，所以工作小組經過商討後，認為當局應以書面形式
14 作出通知。由於我們的工作小組不是經常舉行會議的，所以我只能集合較
15 多議題後才一併在小組會議上討論。因此，對於政府提出有關第(7A)款的
16 方案，我還沒有提出與工作小組商討。可能政府曾就此與個別團體商討，
17 但我們的工作小組尚未就這個問題正式進行討論。

18
19 第二，政府表示，如果證監會作出書面通知，便需要經過很多程序，
20 以確保有關通知的內容正確。但理論上如果證監會施加一些conditions，亦
21 應首先把這些條件記錄下來。有關紀錄是否已經妥善呢？如果其中某些條
22 件不夠清晰，屆時會否出現問題呢？在這大前提之下，我們代表業界的工作
23 小組認為，證監會應作出書面通知。既然政府就第(7A)款作出修訂，可
24 能已與個別團體進行商討。但由於時間不足，我們的工作小組還沒有就第
25 (7A)款的修訂進行討論。

26
27 另外，就電話錄音的問題，如果證監會把有關電話錄音，可否解決
28 這個問題呢？證監會現時可否把與業界就施加條件進行的電話對話錄音
29 呢？雖然這個做法可能只會保障證監會，而未必可以保障業界，但這個是
30 否證監會現有的措施呢？多謝主席。

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
2 **財經事務局副局長區璟智女士：**

3
4 主席，我希望作出補充。正如胡議員剛才提到，我們在《藍紙條例
5 草案》發出後，一直以來亦與業界保持聯絡。我們亦曾把這項修訂呈交香
6 港證券經紀業協會參考。他們認為只要政府向業界提供選擇，已能達到他
7 們的要求。這是我們在近幾個星期與香港證券經紀業協會商討所得的結
8 果。

9
10 正如胡議員剛才提到，以口頭作出通知實在是“有辣也有不辣”，但
11 最重要的是業界人士亦知道，在某些情況下，書面通知較為方便；但在另
12 一些情況下，他們卻希望證監會作出口頭通知，以便他們即時運作，而他
13 們亦希望證監會讓他們從兩者中作出選擇。制訂第(7A)款的目的，是希望
14 當局可以聽取和處理業界不同的聲音，並使業界可按個別情況自行作出不
15 同的選擇。

16
17 第(9A)款亦訂明，當事人必須獲得合理的陳詞機會。在這種情況
18 下，當事人便可以作出選擇，而不致錯失選擇的機會。業界對這項條款，
19 實在有不同的意見。一些希望證監會作出口頭通知，另一些卻希望證監會
20 作出書面通知。我們給予業界選擇的目的，是希望可以採納各方面的意見。

21
22 **主席：**

23
24 胡經昌議員，我認為這個問題會直接影響經紀行業。所以，如果經
25 紀業希望完全rule out oral notice的選擇，便應向政府清楚表明。如果你們
26 只表示written notice會較好，而最後當局取消oral notice的選擇，實在不知
27 會對經紀業構成甚麼影響。

28
29 **胡經昌議員：**

**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 主席，我剛才也提到，由於時間有限，工作小組尚未討論這個問題。
2 如果工作小組在討論這個問題後得出的結論，認為政府的建議是可行的，
3 我亦不會提出異議。

4
5 主席，證監會尚未回應我剛才提出的問題，即如證監會在致電有關
6 經紀時已進行電話錄音，能否部分解決這個問題呢？

7
8 **Chairman:**

9
10 Andrew.

11
12 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
13 **Securities and Futures Commission:**

14
15 I take it that by “recorded” Mr WU means taped. The answer to that is “No”, but
16 we would never impose conditions in a telephone discussion. Nor would we ever impose
17 conditions by ringing the dealing room, to take another hypothetical example. These
18 discussions are so important that we only hold them with dealing directors of the firm,
19 together with their Chief Financial Officer, if there is one; and we only hold them face-to-face,
20 and we only reach views about these things face-to-face, so that we reduce the margin for
21 error, the possibility of misunderstanding. The idea that we would use a telephone
22 discussion to impose these kinds of conditions is just not a reflection of the reality.

23
24 **Chairman:**

25
26 But you record meetings?

27
28 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
29 **Securities and Futures 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 Well, we do not tape meetings of that sort either, actually. That would, I suspect,
2 intimidate people more than anything. What we do, with all telephone discussions of this
3 sort, and with all meetings of this sort, is that we take a written note. That written note is
4 then reflected in the correspondence and the written communication that follows, and the
5 reduction of conditions to writing.

6
7 In fact what appears in clause 7, this idea that as soon as reasonably practicable we
8 should reduce any oral conditions to writing, is basically the existing practice. That is what
9 happens. If we cannot put them in writing in the necessary timeframe then we would
10 immediately reduce them to writing as soon as we can. We do not sit around idly. We get
11 back and we set these things down in writing. We sent them off and we ask for confirmation.
12 We ask for any expressions of doubt or questions to be put to us immediately.

13
14 Actually we had that experience that I described before: written communication
15 leading to a dispute some months later where it was said that an exchange participant had
16 exceeded a trading cap that had been imposed by the exchange on them. There was a
17 dispute about what the trading cap meant.

18
19 **主席：**

20
21 胡經昌議員。

22
23 **胡經昌議員：**

24
25 主席，Mr PROCTER剛才提到當面通知，這便不是電話通知了，
26 而據我理解，情況是有關經紀會接到電話通知，而不是當面通知。在法例
27 上，“orally”不一定是當面的意思，對嗎？我的意思是“orally”不單是指當
28 面，例如透過電話通知亦是“orally”，對嗎？如果是當面通知，則是另一回
29 事，但如果透過其他方式，例如透過電話通知也算是“orally”作出通知，會
30 否與Mr PROCTER剛才所提出的有所不同呢？他表示如果真是當面通知，便

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 應該清楚寫明。

2
3 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
4 **Securities and Futures Commission:**

5
6 Chairman, I think we are talking about two different things here. There is no
7 question that “oral” includes telephone, and I actually said that in answer to one of the earlier
8 questions. My point was rather that we do not have these kinds of discussions by telephone,
9 and I can assure everyone here that there has never been a situation in the last 5 years where a
10 condition of this sort has been imposed by telephone. It just has not happened.

11
12 **胡經昌議員：**

13
14 Mr PROCTER剛才提到，“orally”亦包括透過電話通知的意思。雖然
15 過往並無出現這種情況，但這條的效果會否使證監會將來不一定當面作出
16 通知，而可以是透過電話作出通知呢？如果情況是這樣，便需要在有關條
17 款清楚訂明了。

18
19 **主席：**

20
21 如果把你的說法在這條文內清楚訂明，便要rule out電話這個途徑。

22
23 **胡經昌議員：**

24
25 我們討論的重點，是當局有否作出written notice。如果當局作出書
26 面通知，當然沒有問題，但如果當局沒有作出書面通知，或按照現時的程
27 序，只是透過電話作出通知，是否仍然會產生問題呢？

28
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 那麼你是否希望保留透過電話作出通知這個途徑呢？

2
3 **胡經昌議員：**

4
5 對於第(7A)款現時的寫法，我們的工作小組要開會討論後才可得出
6 結論。然而，Mr PROCTER剛才提到，證監會向來亦不是透過電話作出通知
7 的。究竟情況是否這樣，我實在不太清楚，但似乎大家一直以來亦提到透
8 過電話作出通知的問題。

9
10 **主席：**

11
12 我希望你先弄清楚這個問題。Andrew剛才的答案是過往5年亦沒有
13 出現這種情況。 Bernard.

14
15 **陳智思議員：**

16
17 主席。我原本的問題只是個十分簡單的問題，但現在的討論似乎越
18 來越複雜。Mr PROCTER提到，證監會可能需要在很短的時間內作出一項批
19 准或permission，使有關經紀可繼續經營。實際情況可能是有關情況在上午
20 8時或9時之後才發生，而10時便開市。我的問題是，證監會會否在知道有
21 關情況發生後，通知有關負責人到證監會開會。待會議結束後才作出批准
22 呢？即使假設有關的公司位於中環，時間是否足夠呢？我最初還以為所涉
23 及的是某些marginal cases，所以證監會透過電話作出批准便可。

24
25 但根據Mr PROCTER剛才的解釋，過往從來沒有這類情況發生，而
26 在每個case，證監會也要求負責人到SFC作出解釋。但在這麼短的時間內要
27 完成這些程序，是否可行呢？多謝主席。

28
29 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
30 **Securities and Futures 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
2 Chairman, I know that part of this discussion is the distinction between “can” and
3 “would”. I think the wording is that: “we could, but we don’t”. That is what I have said.
4 In terms of Mr CHAN’s question about the practicality of dealing with these things at short
5 notice, it is really a question of fact, and the situations vary in their complexity. The degree
6 of cooperation and assistance we get from firms varies, as also does their capacity to (I was
7 going to say “understand” and I think that is fair, actually, as well) understand their own
8 circumstances and explain it to us. It does vary significantly as well.

9
10 We do our best to get through the things as a matter of urgency. Our experience is
11 that these sorts of situations really are only safely dealt with in face-to-face discussions
12 because of the nature of the issues that arise. You actually have to sit down and have a
13 detailed discussion with people, in which they are forced to answer very clear, structured
14 questions. You cannot simply rely upon them to come in and tell you what the situation is.
15 That is not a discussion that is easily had over the telephone, which is why we avoid it.

16
17 **Hon Bernard CHAN:**

18
19 And you have ample time to discuss this?

20
21 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
22 **Securities and Futures Commission:**

23
24 Usually no. Usually we do not have anywhere near enough time, but we do it
25 anyway. I mean, we get through it as best we can, but we have to balance in all these
26 situations the question of investor protection. There are three issues, as I have said:
27 investor protection, the clearing and settlement system integrity, and the firm’s position. The
28 firm’s position also of course includes the position of its own clients in some situations,
29 particularly where it is a margin lender, and damage to the firm’s reputation might damage the
30 firm’s clients if their shares have been re-pledged to a bank, for example.

**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 **Chairman:**

3
4 Margaret.

5
6 **Deputy Chairman:**

7
8 Mr Chairman, my question is really about another part, about 147.

9
10 **主席：**

11
12 Let me finish this. 我希望提出一個很簡單的問題。在上次會議上
13 有議員提到關於中介人士的名冊，並提到日後當局可能在中介人士的名冊
14 內，列入當局向他們施加的條件。當局是否把算把現時提到的這類條件也
15 列入名冊內呢？其中一些條件的有效期可能只是一、兩天，這些條件會否
16 一直保留在名冊內呢？

17
18 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
19 **Securities and Futures Commission:**

20
21 That provision, Chairman, was a provision in respect of Part V, where, as I explain,
22 we have a rule-making power to set out the terms in which we keep the register. I said that
23 in future we would keep the register in a way, which included conditions. There are some
24 minor conditions where in the past the Executive Director of the Commission has had
25 discretion not to include them on the face of a licence – some supervisory conditions. But
26 these are conditions of such important that they would not fit within that category. So the
27 answer to your question is “Yes”, and that would be reflected in the rules.

28
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 好的。Margaret，妳是否希望就第147條提出問題？

2
3 **Deputy Chairman:**

4
5 Mr Chairman, I understand this part generally like this: the Commission makes
6 rules. Then in the rules the Commission may specify that if you contravene certain of these
7 rules without reasonable excuse, then you will be exposed to certain criminal liabilities, and
8 that is one level of penalty. But if you contravene certain rules with intent to defraud, for
9 example, then you would be exposed to higher criminal liabilities. I think that is the general
10 scheme of things. In 147, one sees it in (4). If you go through (1) it is general; in (2) it is
11 somewhat more specific, without limiting the generality. Then (3) and (4): you have here
12 singled out a person who, with intent to defraud certain things, and so on - - also referring to
13 the rules.

14
15 If you contravene certain rules with the intent to defraud, then you have specified
16 penalty under (c)(i) and (ii). Then you have (5): this is “without reasonable excuse”.
17 Then you have (6), which refers to “intent to defraud”. My question is this: I am slightly
18 puzzled. There may be something that I have missed. Are these to a certain extent
19 duplicates? Why is it considered to be a good idea to write it in this way?

20
21 **Chairman:**

22
23 Sherman.

24
25 **高級助理法律草擬專員陳子敏女士：**

26
27 多謝主席。為符合政策上的需要，第(4)款已訂明一些涉及刑事責任
28 的特定情況。這款明確訂明，如果有關人“with intent to defraud”，例如造假
29 帳或在帳目內刪除某些項目等，便要負上刑事責任。制訂這款的用意，是
30 無需留待有關規則特別訂明，某些人士不可作出某些事情，然後才指明有

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 關人具有刑事責任。我相信是由於當局在政策上已確定有關人須為這些行
2 為負上刑責，所以便在此條文內訂明。

3
4 **副主席：**

5
6 妳的意思是否第(6)款也會指明，日後制訂的某些規則亦會訂明，遇
7 有類似犯罪意圖的情況，有關刑責必定會很重，而當局在主體法例內亦會
8 寫明，不管當局日後在第(6)款下所訂的規則如何，但凡出現第(4)款所訂的
9 行為，便會視為十分嚴重的刑事罪行？妳的意思是否這樣？

10
11 **高級助理法律草擬專員陳子敏女士：**

12
13 是的。其實我的意思是我們無需理會規則的內容有否交代這些情
14 況，因為此條文已經把情況明確地寫出來，而規則內亦不可存有與此條文
15 有所衝突的內容，否則有關規則便可能視為越權。

16
17 **副主席：**

18
19 換句話說，由於主體法例訂有第(4)款，證監會日後在第(6)款下制
20 訂的規則亦不可與第(4)款有任何矛盾，對嗎？

21
22 **高級助理法律草擬專員陳子敏女士：**

23
24 對，是不應有任何矛盾的。

25
26 **副主席：**

27
28 多謝主席。

29
30 **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

O.K.，讓我們討論第151條。胡經昌議員，請講。

胡經昌議員：

多謝主席。我希望跟進我們曾討論的問題。我們在過往的會議上曾討論關於第145(2)(k)、147(2)(d)、148(2)(f)及144(2)(i)條。簡單來說，這些條文規定，當一個人知道他沒有comply the rules或程序時，便須通知證監會。假設他沒有作出通知便屬犯罪，這點副主席剛才也有提到。當時政府的代表提到會考慮提出CSA，以澄清這些有關人應作出而沒有作出的行為，即所謂知情的情況。

當時我們為甚麼會把這些情況加入法例之內呢？原因是我們作為一個良好市民，是應該就這些情況自願作出通知的。我們當時也提到不希望當局把有關通知作為檢控的證據。但現時卻看不到當局曾就這方面下過任何功夫。政府可否作出解釋呢？由於這項罪行也相當嚴重，既然當局要求有關人自願作出通知，沒有理由把懲罰定得那麼重。條例草案中亦有頗多條文與這方面有關，所以希望政府作出解釋。

財經事務局副局長區璟智女士：

多謝主席。對於這點，我們在回應市場人士提出的意見的文件內，已提到我們屬意作出修訂，以解除市場人士的疑慮。我們一方面鼓勵他們，假如他們違反規則，應預先向證監會作出通知。但如果我們同時制訂規則，訂明如有關人違反規則，便會受到刑事懲罰，可能很多人也不知如何是好。現在我們屬意的修訂，是如果有關人察覺，他們因為實際上的困難，而不能遵守某些規則，並已就此通知證監會，這些資料的使用便會受到很嚴格的限制，包括證監會不可以這些資料，對該人進行刑事起訴。這個做法與較後部分第VIII部的條文所訂的相當類似。

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 **胡經昌議員：**

2
3 第VIII部？我們討論第VIII部時會否refer到這部分呢？

4
5 **財經事務局副局長區璟智女士：**

6
7 不會，我們會特別就這部分引進具體的修訂。

8
9 **主席：**

10
11 是否若有關人向證監會作出通知後，證監會便不能對他提出起訴
12 呢？這是我們需要留意的。

13
14 **財經事務局副局長區璟智女士：**

15
16 這類規則最主要是有關商業操守及行為等。其實證監會很希望知道
17 有關人有否違反這些規則，好讓證監會作出補救措施。我們考慮到這點，
18 便建議如果有關人違反了這些規則，必須先通知證監會。就保障投資者方
19 面，這個做法比隱瞞事實好。如果有關人因避免受罰而不通知證監會，證
20 監會在保障投資者方面便更加困難。相反地，我們是希望幫助他們解決困
21 難的。既然我們鼓勵他們通知證監會，便希望他們不會憂慮因說出違規的
22 情況，使證監會向他作出刑事起訴。所以，若他們主動告訴證監會有關資
23 料，證監會便不可以有關資料作為日後對他提出檢控的佐證。

24
25 **主席：**

26
27 妳剛才所指的是條例草案第VIII部的哪一條？請妳在討論該條時提
28 醒我們吧。

29
30 **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

1

2 第180條。

3

4 **主席：**

5

6 第180條，是嗎？

7

8 **財經事務局副局長區璟智女士：**

9

10 對，第180條。

11

12 **主席：**

13

14 O.K.，請胡經昌議員在討論該條前預先準備。接着是討論第151條。

15

16 **副主席：**

17

18 主席，第151條第(3)款也訂有一些條件。證監會是否必定會就這些
19 條件作出很簡單的書面通知呢？

20

21 **主席：**

22

23 這條也訂明是“in writing”的。

24

25 **副主席：**

26

27 關於這類條件，我們剛才提及有關第142條的情形便不會出現，對
28 嗎？

29

30 **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

1
2 對。

3
4 **副主席：**

5
6 主席，我沒有其他問題了。

7
8 **主席：**

9
10 接着是討論第151條的中文本。如果各位沒有問題，接着便討論第
11 152條。

12
13 **何俊仁議員：**

14
15 對於這部所訂的其中一些措施，如果有關人不遵守，便須負上刑事
16 責任。但亦有部分措施不會引致刑事後果的，例如違反第143條的後果是暫
17 時吊銷牌照。上一部第137條是有關指明程序的規定，這部有否訂明類似的
18 程序規定呢？例如就違反第142條的規定而進行的程序，是否包括給予有關
19 人陳詞的機會呢？

20
21 **財經事務局副局長區璟智女士：**

22
23 何議員是否擔憂這項條文沒有訂明程序上的具體規定呢？

24
25 **何俊仁議員：**

26
27 第137條所訂的，是上一部的程序規定。但這部是沒有程序上的規
28 定的，對嗎？

29
30 **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

1
2 我明白了。我們剛才提到第(9A)款時，亦提到該款訂明有關人有合
3 理的陳述機會。這是否已回答你的問題呢？

4
5 **何俊仁議員：**

6
7 對不起，是哪條的第(9A)款？

8
9 **財經事務局副局長區璟智女士：**

10
11 我們剛才提到的是第142條第(9A)款。

12
13 **Chairman:**

14
15 Page 9.

16
17 **財經事務局副局長區璟智女士：**

18
19 對了，Page 9所載的第一句。

20
21 **何俊仁議員：**

22
23 是的。

24
25 **財經事務局副局長區璟智女士：**

26
27 即第VI部。

28
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 第(9A)款是新訂的。

2
3 **何俊仁議員：**

4
5 第(9A)款是新訂的。那麼這款是在哪條以下的呢？

6
7 **財經事務局副局長區璟智女士：**

8
9 第142條。

10
11 **何俊仁議員：**

12
13 第142條。但這項規定也適用於第143條的，是嗎？

14
15 **財經事務局副局長區璟智女士：**

16
17 第143條也應該訂有這項規定的，即載於page 15的第(7A)款。

18
19 **主席：**

20
21 好了，接着是討論第152條的英文本。李家祥議員，請講。

22
23 **李家祥議員：**

24
25 我希望代表會計業界提出一個問題。第152條部分的內容是關於
26 accounts and audit rules。這條訂明，證監會會在這條法例以外具有rule-
27 making power。證監會正就有關的rules諮詢香港會計師公會。在這個階段，
28 雖然我不希望詳細討論有關的內容，因為這些rules還沒有公開發表，但我
29 認為有需要指出，對於audit report format，業界與證監會有相當大的意見分
30 歧。有關的商討現時仍在進行。

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

我只希望簡單地提出一點，會計界需要遵守很多不同的要求，其中一項要求是在擬備核數師報告時需要遵守國際的會計準則或international reporting standard。當然，證監會也有提出一些要求，並很希望我們能符合這些要求。我們原本的建議是把核數師報告分為兩個部分。一個部分先符合國際的會計標準，而在另一個部分便可以遵從證監會的要求。但證監會現時的要求是把這兩個部分併合，業界認為這個做法非常困難。Audit report不單是為證監會而擬備的，亦須遵從一些國際的準則。現在我們仍就怎樣符合各方面的要求進行磋商。第384條提到rule-making power時也有涉及這方面的問題，但ordinance的內容則不會提到規則的內容。我只希望把這個問題記錄在案。在我們支持通過法案的這個部分前，我也希望首先得到各位原則上的同意，否則我便會持非常保留的態度。

財經事務局副局長區璟智女士：

主席先生，證監會現正就有關的細則及審計報告的形式安排，與會計師公會密切地進行磋商。我們近期聽到李議員提出的意見後，也很關心。我們在上星期亦已與HKSA跟進，他們至今還沒有回覆。當然證監會會就這方面很積極地聽取他們的意見。

主席：

接着是討論第152條的中文本。如果各位沒有問題，接着是討論第153條的英文本。這條有一些改變。胡經昌議員，請講。

胡經昌議員：

多謝主席。我希望就第153(2)條提問。我們在上次會議上也曾提及，如果我們的行業或licensed corporation解僱auditor，便需要在一天內作出合理申報。其實所謂合理的時間也很緊迫。但政府的解釋是時間性很重要，

**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 所以我相信業界基本上也可以接受這點。

2
3 但如果是auditor辭職，licensed corporation是否也需要在一日的期限
4 內作出通知及解釋呢？這部分訂明，假如有關的licensed corporation並不知
5 情，便無需作出解釋，即“where no such circumstances exist...”。在一般情
6 況下，我們也希望知道有關會計師辭職的原因，但一日的時間是否太短促
7 呢？如果只是要求我們向證監會作出通知，我們是可以辦到的。但如果要
8 求我們提供解釋，便較為困難了。若是核數師突然辭職，必然是有原因的。
9 我們也希望知道其中的原因，但我又不能夠向證監會表示，該名核數師並
10 沒有原因突然辭職。

11
12 我們在上次會議也曾提及，而各位亦較為關注的問題是，我們需要
13 在一日之內完成在我們的權力範圍以外的事情。如果只是通知證監會，應
14 該是沒有問題的，但如果需要提供其他資料，相信便很困難。

15
16 **財經事務局副局長區璟智女士：**

17
18 主席先生，我相信胡議員應該是提到第152條第(2)款，是嗎？

19
20 **主席：**

21
22 第42頁。

23
24 **財經事務局副局長區璟智女士：**

25
26 對。據我的理解，這款所訂的，其實不是指持牌人士需要做的事情，
27 而是指持牌人士所委任的核數師需要做的事情，即不是持牌的經紀行，而
28 是被委任的核數師需要通知證監會。

29
30 **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

換句話說，核數師需要作出兩次書面通知。

財經事務局副局長區璟智女士：

如果他辭去核數師的職位，便需要通知證監會，解釋為甚麼他決定不再擔任那間經紀行的核數師。所以，不是由經紀本身作出通知。

主席：

即核數師除了要向經紀行作出書面通知外，也要向證監會作出書面通知。

胡經昌議員：

我明白了。

主席：

各位對於第153條有沒有其他問題？如果沒有，接着是討論這條的中文本。

副主席：

就第153條，第(3)(b)款的中、英文本的改動有所不同。可否請法律顧問作出解釋？

主席：

有關第153條第(3)款的中、英文改動，對嗎？

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 **副主席：**

3
4 是的。我們可以見到，在第153條第(3)款的英文本中，第(a)款和第
5 (b)款前部分已經刪除；但在中文本中，除了第(a)款被刪除外，整條第(b)
6 款也被刪除，並在第153條最前的部分加入了一些內容。

7
8 **主席：**

9
10 是英文本刪除的部分較少，還是中文本刪除的部分較多？有關的英
11 文本載於Page 42，而中文本載於page 27。Sherman.

12
13 **財經事務局副局長區璟智女士：**

14
15 請陳律師作出解釋。

16
17 **高級助理法律草擬專員陳子敏女士：**

18
19 這是文字上的改動，只是mark up的表達方式有所不同而已。我知道
20 我的同事改動了第(b)款的一些字眼，但最終的用意主要也是為了刪除第(a)
21 款的條文。

22
23 **副主席：**

24
25 主席，只是寫法不同吧。

26
27 **高級助理法律草擬專員陳子敏女士：**

28
29 只是刪除的方式或表達的方式可能會令各位混淆而已。

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 **主席：**

2
3 請法律顧問作比研究及比較。如果發現存有問題，請通知我們。

4
5 **高級法律顧問李裕生先生：**

6
7 主席，我們事前已就這點作出研究。中、英文本在法律上的意思是一樣的，應該沒有問題。

8
9
10 **主席：**

11
12 好的，謝謝。接着是討論第153條的中文本。如果各位沒有問題，
13 接着是討論第154條——Immunity。這條是否關乎持牌人士的auditor？各位
14 有沒有問題？李家祥議員，請講。

15
16 **李家祥議員：**

17
18 主席，我相信各同事已曾聽過我所發表的意見，我亦不希望重複太
19 多的觀點。但我希望在記錄上反映業界對這條條文的看法。我只是希望把
20 意見記錄在案，因為到這個階段，我們已經過這麼長的磋商和討論，所以
21 我不打算在字眼上作出任何改動。我知道政府、證監會與我們的業界已就
22 這個問題花上很多精力。

23
24 對於業界而言，就舉報或傳達資料，尤其是有關reporting方面，如
25 果我們可以幫忙，我們也會盡力而為。我們亦願意承擔社會責任。業界希
26 望我能夠清楚地向立法會和政府反映，在現今社會進行核數工作時，會計
27 師會有很多機會接觸到fraud reporting一類的情況。事實上，現代審計的方
28 法已不再是跟以往一樣，就逐項交易審查底稿，而是採用一個系統性的方
29 法或system audit的手法。主要的做法是審查帳目報告的機制，因為現在的
30 公司的規模較為龐大，帳目也比較複雜。事實上，我們也沒有足夠的時間

**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 和精力就逐項交易審查底稿，尤其是我們需要在很短的時間內便要提交有
2 關的報告。我們根本不可能重新覆查很複雜的帳目中的每一項交易。

3
4 由於我們採用系統性的system audit，根據作出報告的方式或方法來
5 審查核數報告，根本很少機會或沒有可能找出那間公司所發生的詐騙情
6 況。我不希望在這條條例草案通過後，就像Drug Trafficking and Organized
7 Crimes(Amendment) Bill 2000一樣，令人產生一個錯誤的期望，以為這條條
8 例草案通過後，證監會便會接到數百個有關詐騙的報告。業界希望我清楚
9 地表達這個訊息，即使這條條例草案獲得通過，核數師發現詐騙情況也會
10 是一個例外的情況。而在日常運作上，亦不會有很多機會發生有關情況及
11 提供報告。我希望代表會計界表達，政府和證監會也很有耐性地跟會計界
12 進行詳細的磋商。就這方面的事情，我們已作出很大的讓步。我們希望在
13 這個階段，大家也不再提出任何修訂。

14
15 **主席：**

16
17 何俊仁議員。

18
19 **何俊仁議員：**

20
21 其實，在當局於去年提交《白紙條例草案》時，我們也曾討論這個
22 議題，並聽取香港會計師公會代表的意見。李家祥議員沒有出席上次會議。
23 我們在該次會議上也有提出意見，認為香港應在這方面與先進國家看齊。
24 我瞭解李家祥議員所提出的情況，核數師不可能清楚瞭解及查證每件事
25 情。但我們的要求不是這樣。如果核數師真的知道，或有任何機會掌握到
26 一些令他們有理由懷疑存有欺詐情況的資料，他們應否有責任作出舉報
27 呢？

28
29 我相信純粹向核數師提供豁免，是沒有作用的。我認為核數師不應
30 單向委託他的董事會負責，而是對整體的股東負責。所以，我們現時仍在

**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 研究階段，務求使核數師的責任與國際先進國家，例如美國、英國和澳洲
2 等看齊。我明白會計界已就這個問題進行長時間的商議，但我認為我們不
3 應在這方面落後於其他國家，況且這也不是一個苛刻的要求。如果其他國
4 家辦得到，為甚麼我們辦不到呢？

5
6 **主席：**

7
8 李家祥議員。

9
10 **李家祥議員：**

11
12 讓我稍作解釋吧。何議員的看法是有所根據的，但並不是全部屬
13 實。會計界非常重視這條條例草案。我們曾經諮詢幾位律師及大律師，亦
14 曾通過國際的網絡，翻查所有先進國家不同條例的寫法。

15
16 我希望清楚地說明我們的觀點。何議員引用的可能是美國證監會所
17 採取的方法。美國證監會規定核數師有責任作出報告，但這個責任是很清
18 楚訂明的。各位需要明白，我們的法例規定核數師遵守的指引，跟美國的
19 制度是非常不同的。最大的不同之處，是美國的法例能夠把 fraud、
20 mismanagement等很清楚地以法例的形式界定，而有關定義亦相當狹窄。如
21 果政府或各位議員能夠把 fraud或核數師要作出報告的範圍清楚寫明，我們
22 也不介意遵從。對我們來說，這個做法可能更為簡單。

23
24 現時最大的問題，是核數師需要報告 suspected fraud。在香港的法
25 例下，“fraud”的定義是非常寬鬆的。各位應該還記得幾宗案例，例如佳寧
26 案件，法庭最少用了4、5年的時間進行審訊，而雙方亦花費了過億元的訟
27 費。政府認為有關情況屬訛騙，而辯方並不同意。最後在法官作出判決，
28 認為有關情況不屬訛騙後，才可界定訛騙的定義。

29
30 在香港的法例下，訛騙的定義需根據事實作出衡量，而有關定義亦

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 比較寬鬆。在並無法律的framework的情況下，要求會計師承擔那麼大的責
2 任，決定詐騙有否存在，是沒有可能的。我們認為，由於我們的framework
3 與美國的完全不同，如果斷章取義地把美國的法律用於香港的情況，會對
4 會計業界造成很大的傷害，我們亦會無所適從。我們既不是法庭、也不是
5 法律專家和律師，我們怎可單方面決定哪些情況是fraud呢？這是我們辦不
6 到的。無論我們運用多少資源也辦不到，更何況我們遇到這些情況的機會
7 實在很小。如果我們無法斷定有關情況是否訛騙，我們應否向政府舉報呢？
8 現在我們就是連suspected fraud也向政府舉報，實際上已經是向政府提供幫
9 助的了。

10
11 第二，我們認為參與corporate governance或公司管治的人很多，包
12 括公司董事、公司秘書、公司的內部會計師、律師等。沒有理由只要求會
13 計師承擔這個責任。沒有理由因社會人士一個假設，認為我們會有較多機
14 會遇到這些情況，便要求我們負上這個刑事責任。我們不是犯罪的人，亦
15 不是製造麻煩的人，我們只是負責進行核數工作的人，而這項工作是根據
16 《公司條例》而進行的。當局並沒有理由歧視會計師，要求會計師獨自承
17 擔這方面的所有責任。

18
19 在社會的角度來看，這項要求亦是非常不公平的。我們不是犯罪的人，
20 沒有理由要求我們承擔很重的刑事責任及作出報告。這個要求根本不
21 符合法律精神。美國證監會的做法是採用codify或mechanical的方式。如果
22 香港可以辦到這點，我相信是可行的。但我相信，要修訂所有的香港法例
23 後才能做得這點，這個做法在某程度上比現時的做法還要好。但是如果只
24 是在條例草案下制訂這個要求，而抽離現實情況，會對會計界造成很大的
25 不公平和傷害。我們極力反對這個做法。

26
27 **主席：**

28
29 副局長，請講。

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 **財經事務局副局長區璟智女士：**

2
3 多謝主席。我們似乎在討論兩項不同的條款，自從《白紙條例草案》
4 發行至今，會計界對第154條是毫無異議的。第154條是建基於現有的條款，
5 而且是針對持牌人士而制定的。如果持牌人士在財政上出現困難，或在法
6 律上不能遵從某些指定條款所訂的要求，核數師須根據第153條所訂的須報
7 告事項，即reportable matter作出報告。

8
9 我們在第153條亦已嘗試臚列核數師需要通知SFC的情況。這是核數
10 師必須承擔的責任，這亦是社會責任的一部分，以協助證監會保障投資者。
11 對第154條，會計界是毫無異議的。

12
13 我相信大家剛才討論到的是第369條。第369條所訂的並不是一個責
14 任，也不是針對持牌人士而制訂的。該條是指，如上市公司存有欺詐的行
15 為，而如核數師在核數過程中察覺到這個情況，他可選擇向證監會或其他
16 執法機構作出報告。如果他選擇這樣做，便能免去他的法律責任。所以這
17 兩項條文是有些不同的，第153條的涵蓋範圍較闊，而第154條的涵蓋範圍
18 較窄。因此會計界對第154條是沒有問題的。

19
20 **李家祥議員：**

21
22 這兩條條文是有commonality或相關的，所以我希望在第一時間便提
23 出來。

24
25 **主席：**

26
27 何俊仁議員有沒有補充？

28
29 **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 由於我們過往已多次討論這個問題，所以我不希望再詳細討論，好
2 像進行辯論一樣。但我認為核數師不一定要認為，他必須確定有關人犯了
3 罪才作出舉報，甚至認為他作出舉報便等於裁定有關人有罪。作出舉報只
4 是向監管機構提供資料，使該機構可研究是否存有問題。

5
6 另外，我要強調一點，核數師的責任不只是向股東和投資者負責。
7 我認為向證監會提供這些資料，可使證監會能行駛這項權力，再進一步核
8 實有關情況。這是保障投資者和股東的一個重要機制。至於你憂慮到，有
9 關要求核數師作出舉報的範圍並不清晰的問題，這是可以討論的，例如當
10 局可否更清晰地制訂要求核數師作出舉報的範圍。

11
12 你提出的另一個問題，是為甚麼不要求其他界別作出舉報。我相信
13 我們無需討論法律界的問題，因為律師和客人之間存有一個很特別的關
14 係。相信各位也會同意，這是一個很特殊的關係，而保密是非常重要的，
15 也是整個制度的核心。但核數師方面，核數師接觸到的很多資料，尤其是
16 財務資料，是最敏感和最核心的資料。如果存有任何欺詐行為，核數師所
17 接觸到的，應是最核心的資料，而核數師的地位是中立的，是需要提出a fair
18 view of有關公司的財政狀況的。所以，我認為要求核數師發現存有問題時
19 作出舉報，並不是個不合理的要求。事實上，不只是美國，其他國家也訂
20 有同樣的要求。

21
22 **主席：**

23
24 第153條的reportable matters是針對中介人士的；第154條訂有一個
25 豁免；而第369條是關於上市公司的，各位有機會時可再詳細討論。李家祥
26 議員，我們歡迎你提供會計師公會所作出研究的結果，供法案委員會參考。

27
28 **李家祥議員：**

29
30 我們現在正整理有關資料，稍後便可向各位提交。

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 **主席：**

3
4 好了，接着是討論第154條的中文本。如果各位沒有問題，接着是
5 討論第155條的英文及中文本。

6
7 如果各位沒有問題，接着是討論第156條的英文及中文本。胡經昌
8 議員，請講。

9
10 **胡經昌議員：**

11
12 主席，就第156條，其實業界也曾提出意見。這是新訂的條文，大
13 家也很擔憂這項條文會被濫用，相信我們也多次提出這個問題。

14
15 第156(b)條提到，若某人指有關經紀沒有按照他的指示行事，導致
16 他原本可賺取的金額減少或虧蝕，證監會可委任一名核數師作出全面審查
17 和審計，或就任何個別事項作出審查和審計。其實這個範圍相當廣泛。雖
18 然政府告訴我們，已就此訂有一個機制，以及如果有關人胡亂作出這樣的
19 指控，他亦需要繳付有關的費用，但我相信業界仍然未能完全信納政府可
20 以這樣做。

21
22 另外，第(7)款就誹謗法方面提到，“以真誠而並非惡意做出的每項
23 陳述，均享有特權”。這情況由誰決定呢？我對此十分擔憂，有關人可能找
24 到一些資料，但這些資料可能十分複雜。我相信我過往也曾提到，證監會
25 委任的核數師的收費是不便宜的。除非所涉及的是一間很大規模的經紀
26 行，如果涉及的是小規模的經紀行，而該經紀行勝訴，當然沒有問題，但
27 即使是打和，那經紀行也可能要倒閉。

28
29 在這個機制下，有關經紀行除了要在敗訴後繳付訟費外，還有甚麼
30 責任？這是一項新的措施，業界對這件事情亦十分擔憂。通常政府委任的

**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 核數師也是收費很昂貴的。如果法庭作出判決，裁定訟費由訴訟雙方各付
2 一半，情況便對經紀行十分不利。也第(7)(b)款只是很簡單地提到這點，但
3 由於第(7)(a)款是有關該人本身的資產，還可以.....

4
5 **主席：**

6
7 條例草案訂有第(7)(a)和(b)款嗎？

8
9 **胡經昌議員：**

10
11 對不起，應該是第156(1)(a)和(1)(b)條。第(1)(a)款所訂的，是有關
12 經紀行如果處理該人的資產，而第(1)(b)款是有關該人作出的instructions，
13 即指示。在這種情況下，我們需否重新考慮其中一些情況呢？其實這款會
14 產生很大的問題，因為涉及證監會委任一名auditor進行審查及審計。

15
16 **主席：**

17
18 副局長，請講。

19
20 **財經事務局副局長區璟智女士：**

21
22 第156條主要是就保障投資者的利益而提出的。現有的法例載於《證
23 券及期貨條例》內，我請Mr PROCTER稍候向大家解釋，現時和將來的運作
24 的大概情況。

25
26 第156條訂有一定的制衡，例如第(4)款要求證監會在委任核數師前
27 必須信納若干的條件。大家可以參考第(4)(a)、(4)(b)等款。胡議員剛才也曾
28 提出，證監會有權要求提出要求的人士支付有關的費用，而不一定是由其
29 中一方支付。條款內亦訂有制衡措施，也訂有上訴的機制。或許請Mr
30 PROCTER just to explain briefly, how it would operate in practice?

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 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
3 **Securities and Futures Commission:**

4
5 Chairman, the clause picks up some aspects of the existing section 91 of the
6 Securities Ordinance, particularly 156(1)(a) in respect of failure to account for assets. It
7 does include a new section, which is (b), and that is failure to act in accordance with
8 instructions. The other thing it does when compared with section 91 is to add several
9 safeguards, and not only subclause (4). If you look at, for example, subclause (3), the
10 applicant must verify statements on statutory declaration, and so there is immediately an
11 exposure in respect of any false declaration that is made.

12
13 There is then subclause (4) where the Commission has to be satisfied of certain
14 things before it can give a direction for the appointment for an auditor. That includes the need
15 to demonstrate a good reason, and in (4)(b) certain interests that have to be taken into account,
16 including the interests of the investing public, or the public.

17
18 There is then, though, subclause (6), a right to be heard in respect of the application,
19 so the Commission cannot simply arbitrarily act upon the allegations made by a client, albeit
20 allegations made on statutory declaration. They have to first hear from the licensed
21 corporation that would be affected by any direction, and then subclause (8) – as Mr WU has
22 already pointed out – includes a power to direct that parties contribute to the costs. I think
23 that is a significant issue in respect of an applicant. An applicant who made a frivolous
24 application, an application that was shown to be frivolous. Let us assume for the sake of
25 argument the unlikely hypothesis that we did not demonstrate the frivolous nature of the
26 application, but nevertheless went ahead and appointed an auditor, and the auditor in
27 examining the matter was able to conclude that there was really no substance to it. That
28 does leave the applicant significantly exposed on questions of cost. Bear in mind that the
29 way it reads, in fact, that it is the Commission that is liable to meet the costs. It is the
30 Commission that makes the appointment, but then the Commission may go on and ask

**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 another party to contribute to those costs. So in fact if you combine all those things together
2 it is pretty unlikely, I think, that a frivolous application would get through the gatekeeper in
3 the first instance. But even if it did, there is a significant risk both to the applicant's purse
4 and secondly to their exposure to swearing a false declaration, if that in fact was the case.

5
6 **Chairman:**

7
8 Audrey.

9
10 **余若薇議員：**

11
12 多謝主席。剛才提到，第(b)段是新的，那麼第(3)款是否原有的呢？
13 可否告訴我們，過往是否有類似這種做法的運作，或這個做法是以其他地
14 方作為藍本的呢？我提出這個問題的原因，是我留意到第(3)款訂明，投訴
15 人或申請人須要就有關資料作出誓章。但很多時候，爭論的內容是否會牽
16 涉一些事實，而不是可單憑有關的帳目或有關文件便可以清楚瞭解呢？我
17 不知道是否每次有關人作出指示時，也是很清晰的，還是當中亦會存有事
18 實的爭拗。

19
20 如果涉及事實的爭論，進行核數工作的人士如何可作出判斷或裁定
21 呢？他只是負責核數的，他如何能告訴當局，由於申訴人或申請人已作出
22 誓章，所以他便可肯定申訴人是對的呢？還是當存有一些事實方面的爭論
23 時，核數師需作出判斷，或當局會進行聆訊，決定信納哪方提供的資料呢？
24 我希望知道這方面的運作。多謝主席。

25
26 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
27 **Securities and Futures Commission:**

28
29 On the first question as to whether or not there is a requirement for verification on
30 statutory declaration in the existing law, there is a requirement. It is not quite in the same

**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 terms. It simply reads: “Every statement in any such application shall be verified by
2 statutory declaration made by the applicant, and shall, if made in good faith and without
3 malice, be privileged”. So that actually combines a couple of sections in the new law,
4 including the one on qualified privilege, and it is obviously a much condensed version.

5
6 On the second point I agree. That is absolutely right, that there will be many
7 disputes where an auditor appointed under this section would serve no useful function; could
8 not in fact usefully advance the Commission’s understanding of the points in issue. I think
9 that understanding is reflected in two things. First of all, what is subclause (4) and the things
10 we need to be satisfied of before we appoint an auditor. In other words there is something
11 useful that can be achieved. I think in the circumstances described in your question, nothing
12 useful might be achieved and we would not make an order, or if we did we would be in breach
13 of our powers. That is also reflected in the fact that notwithstanding we have a similar
14 section in section 91 of the Securities Ordinance, it has never been used, and that was a
15 narrower section, of course. It deals with the client asset dispute. That is because what we
16 do is not to rely on a classic sort of audit situation, but we actually use the skills of auditors in
17 a different way. Auditors are very good at doing control samples and looking at systems and
18 controls, and providing us with information about the adequacy of those systems and controls,
19 and making recommendations in respect of them. That is in fact the way we use them, on a
20 voluntary basis when these kinds of disputes come up. We would use them, I guess, about
21 half a dozen times a year to produce that kind of report to us, where we and the firm that is the
22 subject of a complaint together enter into an agreement with the auditing firm to produce a
23 report. I think that actually reflects our view that very often an auditor will not be able to
24 help in these situations, but there will be somewhere the auditor can actually advance our
25 understanding of the dispute.

26
27 **余若薇議員：**

28
29 多謝主席。對於Mr PROCTER剛才提到的情況，即委任一名核數師
30 進行審核的做法並不恰當，但又有申請人作出投訴時，他們會以甚麼方法

**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 處理呢？或遇有對事實有所爭論時，他們會如何處理呢？

2
3 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
4 **Securities and Futures Commission:**

5
6 In those situations it is really a matter for the Commission then to use its inquiry or
7 investigative powers to determine where the facts lie. There are two ways in which these
8 kinds of disputes come to the attention of the Commission. One is where the allegation may
9 involve a breach of the law, a breach of a code or subordinate legislation, and may give rise to
10 disciplinary concerns or may suggest the Commission of a criminal offence. There of course
11 we would clearly use our investigative powers with a view potentially to disciplinary action or
12 referral for prosecution.

13
14 The other, in fact more common, scenario, is that a client is in dispute with the firm
15 and is seeking some sort of compensation for alleged loss. In those situations the client is
16 very often frustrated by the SFC's response, because we do not enter into those commercial
17 disputes. We do not arbitrate or mediate them. We do not make a judgment about where
18 the rights or wrong lie, and we do not give orders for restitution. We could potentially have
19 that sort of power. It is clearly a power that the FSA has been given under the new UK
20 legislation, where the FSA can inquire into this kind of dispute and of its own motion make an
21 order for restitution either for profits secured by the firm, or for loss avoided, or to
22 compensate the aggrieved client. We do not have any of those powers under the existing
23 law or under the proposed law. A client whose complaint is that they are out of pocket is
24 usually told by the SFC: "There is nothing we can do directly to help you". Sometimes we
25 do get involved to try and bring the parties together, but we do not enter into the dispute at the
26 end of the day.

27
28 It is very often frustrating for the client, because we actually go on and inquire into
29 the possibility of disciplinary breach or criminal misconduct. But even having reached a
30 view about that, we cannot share that information with the client because of the secrecy

**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 provisions. So they are frustrated. They know that we know something that might be
2 important or useful to them, but we cannot tell them. In fact if you look at this provision, the
3 report that is made by an auditor here under these provisions is a report that is made to the
4 Commission, not to the client who makes the complaint; and it will be clear, I think, that it
5 would be exceptional, extraordinary and difficult to think of a situation where it would be
6 necessary for us to make that report available to the client, given the secrecy provisions that
7 would attach to that report.

8
9 That is a long answer, but I hope it has actually demonstrated that what we do in
10 practice is rarely anything to do with the client's actual claim for compensation.

11
12 **主席：**

13
14 李家祥議員。

15
16 **李家祥議員：**

17
18 主席，在諮詢期間，我們也曾提到，會計界對於採用“examine and
19 audit”這個字眼較為憂慮，胡經昌議員剛才亦有提到這點。對於我們來說，
20 “審計”和“審查”，不論就中文或英文本而言，也是兩種十分不同的手法。

21
22 我們也知道，這些是過往的法例也有採用的字眼。政府後期作出的
23 回覆，基本上也十分清楚，表示要求核數師進行full audit或全面審計的機會
24 不多，應該說進行全面審計是例外情況多於正常的工作。當然，該回覆也
25 有指出一些審查的手法，而政府認為是屬於審計工作的，但我相信也不必
26 作出爭論。

27
28 我只是希望清楚確定，從法律的效果而言，現時的寫法是不會製造
29 一個情況，是當局委任核數師時，不一定要要求他一併進行審計和審查。
30 “And”和”or”在法律上的用法是否相通的呢？整個條例草案也是採用這種寫

**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 法，是否表示當局每次委任核數師時，也會要求他進行審查及審計呢？如
2 果是這樣，情況便會很複雜。

3
4 **主席：**

5
6 但核數師大可收取不同的費用吧，對嗎？

7
8 **李家祥議員：**

9
10 這個問題我隨後便會提出。這個問題跟胡經昌議員提到的問題有很
11 大的關係。當然我們不介意同時進行審計及審查。

12
13 **主席：**

14
15 當證監會聘任核數師時，無論是進行審計或審查，也.....

16
17 **李家祥議員：**

18
19 作為專業人士，我們不能只向錢看。最重要的是考慮能否達致有關
20 效用，以及有關法例跟實際的運作會否出現不同之處？當然，我們對於證
21 監會這種做法沒有意見。然而，這項條文的法律效力，是讓核數師選擇，
22 但在大部分的情況下，核數師只是examine有關報告，只有小部分機會或例
23 外情況下才需要進行full audit，亦即是audit的意思。

24
25 **主席：**

26
27 但“audit”並不是一個專有名詞，對嗎？

28
29 **李家祥議員：**

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 “audit”是一個專有名詞。

2
3 **主席：**

4
5 但就這個section而言，並沒有特別就“audit”和“auditor”作界定。

6
7 **李家祥議員：**

8
9 雖然“auditor”是一個很普通的字眼，但在會計師的 professional
10 standard而言，“audit”是有特別的technical意義的，是有不同的意義的。

11
12 **主席：**

13
14 我希望徵詢法律草擬專員的意見。

15
16 **李家祥議員：**

17
18 當然，這項條文所採用的是general term的意思，但audit和examine
19 與成本有很大的關係。如果既audit亦examine，然後才給予audit opinion，
20 那麼成本便會十分高昂。

21
22 我相信根據現時的做法，證監會也需要和會計師清楚討論職權範圍
23 及所需進行的工作範圍。正如余若薇議員剛才提到，核數師是不會作出最
24 後的結論的，他只是進行某部分的工作，然後給予專業意見，以協助證監
25 會作出結論，但這些工作與成本已會有相當大的關係。在某程度上，胡經
26 昌議員所提出的問題也十分正確。證監會在聘用審計師時，會採用甚麼準
27 則呢？因為在行業內共有千多間會計師事務所，當局是否在某程度上會容
28 許這些會計師事務所進行競爭呢？如果不是，而是聘任幾間最大規模的及
29 最昂貴的會計師事務所，是否最符合各方面的利益呢？當局在這方面有甚
30 麼準則呢？有沒有roster system或panel呢？還是只局限於聘任那兩、三間會

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 計師事務所呢？

2
3 **主席：**

4
5 副局長還是陳律師會發言？

6
7 **財經事務局副局長區璟智女士：**

8
9 多謝主席。首先我請陳律師從草擬的角度，解釋“審計”和“審查”的
10 字眼在草擬這條條例草案上的用法。稍後請證監會的同事解釋委任核數師
11 的步驟。

12
13 **高級助理法律草擬專員陳子敏女士：**

14
15 多謝主席。我們在上次會議上聽取李議員提出的意見後，也曾翻查
16 有關的法例。在《審計條例》下，這兩個用詞通常是一組併用的。我們最
17 主要是參考最重要的有關法例，而《審計條例》的情況便是這樣。

18
19 證監會的同事剛才提到，至於有關的舊例，即在第91條下的寫法也是
20 examine and audit”。剛才提到核數師是否需要就某些地方進行audit，而在
21 另一些地方則無需進行audit的問題，就這方面，這項條文在字眼上也有訂
22 明“either generally or in respect of any particular matter”。至於實際的運作
23 情況，我知道證監會是希望有所補充的。多謝。

24
25 **Chairman:**

26
27 Andrew.

28
29 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
30 **Securities and Futures 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
2 Chairman, in respect to the other matters, there is no real room for doubt about
3 what the auditor is going to be asked to do in any of these cases, because as Mr LI suggested
4 in his previous question, we actually have written terms of reference which are produced in
5 draft and discussed with the accounting firm before the undertaking begins. Of course there
6 is no power in the SFC to compel an auditing firm to do one of these things, so there has to be
7 agreement before they agree to undertake the exercise.

8
9 So far as our choice of auditor is concerned, we do two things. First of all we ask
10 the firm itself – that is the intermediary that is to be the subject of audit and/or examination –
11 if it would wish to suggest any names. It depends a little bit on the issue. We have a
12 preference not to use the firm's existing auditors, for obvious reasons, but we do allow the
13 firm itself to identify potential candidates; we do allow the firm itself to actually enter into
14 negotiations with that list of potential candidates over fees. But of course that is not in the
15 context of this particular section. It is the context of those voluntary arrangements that I was
16 describing. That is the process at the moment.

17
18 We also have within the Commission rules about tendering for any of these sorts of
19 jobs that are designed, of course, as you would expect, to avoid the possibility of conflict of
20 interest and to avoid the possibility of favouritism. It is not the case that we simply use the
21 big five, for example. Partly our choice of firms does have regard to the performance of
22 firms in the past, and the performance has not always been as good as we would have liked in
23 some cases, including among some of the big five, perhaps. It has not been ideal in every
24 case where we have used them, so we certainly do not confine ourselves to those firms. The
25 combination of allowing the intermediary to suggest firms and our tendering process I think
26 achieves a reasonable spread, having regard to the need for firms that have some level of
27 experience and competence in looking at securities or futures firms. There are some special
28 circumstances that arise in looking at those firms, so you do need firms that have some actual
29 practical experience of dealing with the industry – and that narrows the scope. That narrows
30 the number of potential candidates down as well.

**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 **主席：**

3
4 胡經昌議員。

5
6 **胡經昌議員：**

7
8 主席，我希望作出跟進。剛才所提到的第156(1)(a)款是現有的條
9 款，相信各位對這款也沒有很大的意見。但第(1)(b)款是新訂的條款，在寫
10 法上看來很容易做到，但實際的情況卻令大家擔憂。

11
12 如果投訴人或申請人作出投訴，證監會會先通知經紀。那麼證監會
13 在甚麼情況下才會聘任核數師進行審計和審查呢？因為如果有關人純粹因
14 經紀沒有按指示行事而導致該人虧本而作出投訴，看起來是簡單不過的
15 了，所以基本上應該是可以解決的，只要找出這件事情有沒有發生便可。
16 為甚麼還需要聘任核數師進行審核呢？我實在不明白在甚麼情況下有需要
17 這樣做，而這正是大家也十分憂慮的問題。如果在條例草案下制定這條條
18 文，我相信會增添你們很多工作，我們也要應付額外的工作，尤其是當股
19 市大幅波動時。

20
21 另外，我們和客戶簽立開戶書時，是訂明一旦客戶落盤，我們便要
22 立刻在市場執行有關指令，這是實際的情況。但是在某些情況下，例如去
23 年地下鐵路公司上市時，有關銀行接獲客戶的instructions後，卻沒有即時處
24 理。這樣的情況是會產生問題的，因為根據有關規則，銀行是應該即時執
25 行有關指令的。在這樣的情況下，有關客戶便可以作出投訴，因為有關銀
26 行在一段時間後才進行買賣盤。政府過往的說法是，客戶如果已經簽立有
27 關開戶書，經紀便可根據指令行事。

28
29 經紀永遠也是以客戶為先的，一旦客戶落盤，我們便即時在市場執
30 行。如果在條例草案內加入了這些條文，日後可能會出現很多不可預見的

**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 複雜情況，所以其實是沒有需要制訂這些條文的。剛才政府作出回應時表示，
2 現在已訂有一個處理有關情況的機制。如果在條例草案加入這些條文，
3 在甚麼情況下才有需要聘任核數師進行審查及審計呢？

4
5 **主席：**

6
7 這問題是關乎第(1)(b)款。

8
9 **財經事務局副局長區璟智女士：**

10
11 我請證監會的同事向各位解釋。但我認為最重要的考慮因素是，如
12 果一名投資者有證據證明，有關經紀行沒有執行他的指示，亦沒有向他交
13 待導致他蒙受損失的原因，亦沒有作出賠償安排，因而使他感到受屈，這
14 做法也是個渠道，可以較公正地由核數師審查問題所在。

15
16 但我也明白業界的憂慮，就是對一些毫無根據的要求，證監會會否
17 因為但凡接獲有關的要求，便委任核數師進行審查呢？Mr PROCTER剛才也
18 曾提到，把制衡歸納起來，共有5方面。第一，證監會須要根據一個啟動點
19 才可作出有關安排，即我剛才提到第(4)款所訂的內容。證監會是不可隨意
20 作出這項安排的。第二，證監會須確保投訴人不會作出虛假的聲明，即他
21 不可撒謊，否則他便要負上刑事責任。這點在第(3)款訂明。第三，如果投
22 訴人所提出的是個無理的要求，他可能要繳付一筆費用。第四，當事人須
23 有陳述的機會。這項制衡是現有條例內沒有的。剛才提到投訴人可能需要
24 繳付費用的制衡，現行條例也是沒有訂明的，我們考慮到業界的憂慮，認
25 為這項制衡會使情況較為平衡。第五，有關投訴是可予上訴的。各位可從
26 這兩方面考慮，這可能會較為全面。我請Mr PROCTER就第(1)(b)款的需要
27 性作出解釋。

28
29 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
30 **Securities and Futures 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
2 Chairman, I think there were three questions that Mr WU asked. In respect of
3 1(b)(i) it was: in what circumstances would we hear from the affected intermediary? That
4 of course is a statutory requirement under subclause (6). We have to give a right to an
5 intermediary to be heard before we can make an appointment.

6
7 The second question I think related to the application of the provisions generally,
8 and Mr WU made some observations about conduct of banks in the context of the MTRC
9 privatization. Let me just say that I do not agree with his characterization of what happened
10 there, but that does not matter for these purposes. It is perfectly possible to imagine
11 situations where it is in the client's best interests for an order to be deferred or delayed or
12 executed over time, and of course that happens quite often. The issue of whether or not that
13 would, in every instance, be a breach of our requirements, is one that has to be judged
14 according to the instructions given by the client, either to the authorized institution which is
15 exempt, or to a SFC registrant; and also to the behaviour of the intermediary, either a
16 subsidiary registrant or an authorized institution which is exempt, because they will have the
17 same obligations in both respects, under the rules as will be made under Part VII or under the
18 codes and guidelines that will be made under Part VII – exactly the same application, because
19 those rule-making powers apply to intermediaries.

20
21 This provision, however, in respect of the appointment of auditors, is limited to
22 licensed corporations; that is only SFC registrants. There is one exception, that an
23 authorized institution which is an associated entity, might be the subject of an appointment,
24 but generally it is only our registrants and not exempt persons. That is because on the
25 banking side the judgment is that the Monetary Authority has sufficient powers of its own to
26 address these sorts of concerns and complaints.

27
28 As to why we think that 1(b) is necessary and whether indeed it might be said to be
29 unnecessary or not a helpful provision, having regard to the powers of the auditor. I have
30 already discussed that I think in respect to an earlier question, that there will be situations

**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 where we do not think an auditor will be able to usefully contribute to a resolution of the facts
2 in issue. That is why subclause (4) is so important in our determination.

3
4 On the other hand, we do think there are real situations and a real likelihood of
5 situations where the complaint of an individual might suggest not only an individual event
6 that is of concern to us, but the risk of other events of a similar nature occurring in the future.
7 Also the real possibility that there have been failures in the past in respect of that same client
8 and in respect of other clients. In those areas an auditor might make a very valuable
9 contribution, first of all in looking at what has happened and actually undertaking some form
10 of audit of the books and records of the firm; and secondly in looking at the systems and
11 controls with a view to preventing any such occurrence in the future.

12
13 **Chairman:**

14
15 Audrey.

16
17 **余若薇議員：**

18
19 多謝主席。主席，胡經昌議員是從業界的角度而感到憂慮，但我卻
20 是從消費者的角度而提出憂慮。我希望證監會或政府會作出解釋。

21
22 Mr PROCTER剛才已經提到，對於某些投訴，證監會會主動啟動有
23 關機制及作出調查。Mr PROCTER剛才亦提到，證監會委任核數師的原因，
24 可能是認為或許會得出一些與公眾利益有關的資料。所以我主要希望就費
25 用方面提問。首先，消費者作出投訴時，證監會會否很清楚地解釋他有甚
26 麼選擇？證監會會否向他說明，如果他選擇聘任核數師這個渠道，他需承
27 擔甚麼風險？既然證監會在調查後得出來的結果，是有關情況涉及公眾利
28 益，為甚麼要透過這個途徑委任核數師，而令到最終的結果，可能是該名
29 消費者要繳付費用呢？

**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 另外，這部分也提到，證監會在作出這項決定時，也須考慮這項決
2 定是否會對投訴人有好處。所以，投訴人便可能會有一個期望，誤以為審
3 查得出的結果，必定會對他有好處。但如果最終的結果對他沒有好處，而
4 他亦要繳付有關費用，他便可能會極為不滿。因為當他作出投訴時，證監
5 會要求委任一名核數師，令他誤會有關投訴必定成功，但怎料證監會卻要
6 求他支付所需的費用，而他的問題也不能得到解決。

7
8 我的問題是：第一，投訴人有否這個選擇？證監會會否向他清楚解
9 釋？第二，他會否預先知道有關的風險？換句話說，證監會會否預先向他
10 講明可能涉及的費用；第三，他有否終止權？例如在審查進行期間，他發
11 現已花上很長的時間，所需的費用亦可能越來越高昂，審查的結果中亦可
12 能有涉及公眾利益的資料，而不一定是他的個案，他可否要求終止這項審
13 查，還是證監會會take over呢？所以，我希望知道消費者需要面對的風險的
14 問題。多謝主席。

15
16 **主席：**

17
18 請講。

19
20 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
21 **Securities and Futures Commission:**

22
23 I think, Chairman, it is our case. It is not really a matter of the complainant asking
24 us to stop a matter, which is their matter in any sense. Once they make the complaint, in this
25 context and in the context of our investigative powers, it really ceases to be their matter. We
26 do not inquire into these cases on their behalf. The judgment about whether or not to
27 continue the matter would have to be the SFC's judgment.

28
29 I think the question of the exposure of the complainant under the clause that would
30 allow us potentially to direct that they contribute to the costs is a significant one. It is one

**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 that exposes them to risk, and in the first instance, as I said before, it is the Commission that
2 would engage the accountant under this provision. So it is the Commission that would be
3 liable. We do not have procedures for this section at the moment, because it does not exist,
4 but I agree that it would be appropriate and indeed necessary for us to set out very clearly for
5 an applicant that there is the risk of them being required to contribute to the costs. I think
6 actually it would be appropriate for us at the commission to make it clear that the
7 circumstances in which that might occur would particularly be where it transpired that it was
8 a frivolous or vexatious request. But it is not their inquiry. It would not be them to stop.
9 It would be the SFC's undertaking and the SFC's appointment of this person, having regard to
10 the issues that are set out in subclause (4).

11
12 **主席：**

13
14 余若薇議員。

15
16 **余若薇議員：**

17
18 主席，如果情況是這樣，實在存有一些問題。第156條第(8)款的範
19 圍是很廣泛的。這部分只是提到“the Commission may,...having regard to the
20 conduct”，接着又訂明“the person making the application to pay a specified
21 amount”。這部分的意思是純粹取決於證監會的酌情權，亦沒有提到證監會
22 需要得到申請人的同意才可作出有關安排。情況是他作出投訴後，如果證
23 監會認為是為了他的好處，便可自行委任一名核數師進行審核，然後決定
24 這名投訴人需要支付的費用。證監會在沒有取得投訴人的同意下便經委任
25 核數師，然後要求他支付費用，這個草擬方式是否過於廣泛呢？當然，如
26 果證監會最後的結論是投訴人要相信證監會，那便沒有討論的餘地，但第(8)
27 款的草擬方式是否過於廣泛呢？這款既沒有訂明證監會須提醒投訴人，或
28 須要取得他的同意，亦沒有訂明所需繳付費用的上限。

29
30 **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
2 對，其實這筆費用有否上限呢？

3
4 **財經事務局副局長區璟智女士：**

5
6 首先，這是個書面申請，即必須由申請人作出投訴，而不是由證監
7 會自行決定進行審查。Mr PROCTER剛才也提出，如果這條條例草案獲得通
8 過，證監會也須要作出程序上的安排或向申請人提供指引，讓他們知道提
9 出申請後，證監會會向他解釋可能出現的後果。

10
11 至於第(8)款的適用情況，請Mr PROCTER向各位解釋。證監會不一
12 定要向投訴人收取費用的，只是證監會可以這樣做而已，該會還要考慮當
13 事人在委任核數師前後的行為等。換句話說，主體法例中也訂一些指引。

14
15 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
16 **Securities and Futures Commission:**

17
18 I think, Chairman, of course while I would exhort you to have faith in the SFC,
19 there is also a righteous judge overlooking all of this, in the form of the tribunal, and the
20 orders under 156(8) are subject to appeal as well. In any event, it cannot merely be an
21 arbitrary decision on the part of the SFC. There has to be a proper reason and a proper basis,
22 and the ordinary administrative law procedures would apply.

23
24 As I said in answer to an earlier question, I think we do need to give some guidance
25 also on the circumstances in which we would ordinarily look to the applicant who has
26 triggered this kind of inquiry. I think the risks are relatively low, because I think the
27 procedures that have to be complied with, and the discretion and the nature of the discretion is
28 such that frivolous and vexatious applications are unlikely to lead to the appointment of an
29 auditor anyway. If they did, and that was the judgment, I think there is some reason for
30 saying that neither the SFC nor the intermediary should have to bear the full costs. There 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 some reason for saying an applicant in those circumstances should have some exposure to
2 liability, but subject to the ordinary administrative law procedures and subject to the right of
3 appeal. It is one of the Schedule 7 decisions.

4
5 **主席：**

6
7 請胡經昌議員先發言，接着是Margaret。

8
9 **胡經昌議員：**

10
11 Mr PROCTER剛才提到，現在已經訂有機制處理有關的投訴，所以
12 我不能理解為何要特別制訂這款來解決這方面的問題。其實，第155(1)(b)
13 條已經訂明，“證監會有合理理由相信某持牌法團或該法團的某有聯繫實體
14 沒有遵從任何訂明規定”，所以我認為證監會的權力已經十分大。第156(1)(b)
15 條就有關投訴或申請所訂的，是由於經紀沒有依照客戶的指示進行買賣，
16 使該人獲得較少利益或虧蝕較多金錢，但其實第155(1)(b)款所訂的安排，
17 已經完全足夠解決這方面的問題。既然這兩款同樣是有關appoint auditor，
18 為甚麼還要在這款重申呢？

19
20 另外，第VI部首部分的title訂明，即英文本的第C1769頁或中文本
21 的第C1768頁訂明，這部是“關乎中介人的資本規定、客戶資產、紀錄及審
22 計”的。所以，有關經紀沒有按照指示行事而令到客戶獲得較少利潤或虧蝕
23 較少的情況，其實與這部無關。第156(1)(a)條是關乎資產的，所以應納入這
24 部。但把第156(1)(b)條納入這部，似乎並不恰當。我剛才也曾提到，既然
25 第155(1)(b)條已經訂明，若經紀沒有按照指示行事，證監會便可作出各樣
26 安排，那為甚麼還要加入第156(1)(b)條呢？

27
28 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
29 **Securities and Futures 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**

Chairman, I think the fact that we have certain powers that we could use does not exclude the possibility of a complementary, and in some circumstances, better power, better procedure or better way of dealing with the matter. I think that is all this provides. It provides an alternative course of action. There are a lot of safeguards that attach to it as well. The provisions in 155 are in some respects narrower than the 156(1)(b) provision, and again I think that is appropriate. Again there are safeguards there that I think would adequately address the risk of misuse of this provision; and I do not think in the circumstances and in the exercise of the discretion as it is set out, that there is really a significant risk that the SFC is going to go amok with this provision, and start appointing auditors wherever a complaint comes in from a client that alleges that a broker did not perfectly fulfil instructions. I just do not think that that is a realistic risk, having regard to the section and the way it is drafted.

Chairman:

Margaret.

Deputy Chairman:

Mr Chairman, I would just like to make the point that this is precisely the kind of provision in which you can see the industry and the consumer may take different views. That is why, when we earlier suggested that there be consultation, you can see that it is on this type of thing that the industry will have lots of chances, like the very articulate Honourable Henry WU just now shows, to make very strong representations; whereas the SFC would have to sort of act on behalf of people in the dark. I would emphasize again that here there is a very useful purpose in setting up a kind of consumer panel to ensure that there are procedures set up for this sort of thing. It is not a question, but of course the Administration is welcome to respond.

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 余若薇議員剛才曾經舉手表示希望發言，是嗎？

2
3 **余若薇議員：**

4
5 對，多謝主席。主席，我仍然對第(8)款的寫法有很大的保留。這款
6 所訂的情況，是委任auditor進行審查和審計的權力在於證監會，終止審查
7 的權力也在於證監會。證監會必然會在有理由的情況下才會作出這些安
8 排。那為甚麼還需要制訂條文，訂明提出申請的人需要繳付某些費用呢？
9 除非申請人所說的並非實言，否則證監會必需在作出調查後，才可委任核
10 數師進行審查。

11
12 如果存有某些情況，是申請人需要支付費用的，可否在條文內清楚
13 訂明呢？如果採取這種草擬方式，控制權便不在申請人。他向證監會作出
14 報告，只是希望證監會作出調查，但結果是他需要承擔風險。雖然證監會
15 的做法必須正確，否則投訴人便可以提出上訴，但該人其實不是必須願意
16 付錢才可提出上訴的。當局是否訂有機制，規定證監會須預先得到投訴人
17 的同意，或預先向他講明所需繳付費用的上限，才可進行審查呢？因為他
18 是不可以終止這項審查的。當這項安排一經啟動，主動權便落在證監會，
19 那麼他怎樣能控制呢？如果是在法庭進行的訴訟，當事人也可在某階段提
20 出終止，但根據這項條文所訂的安排，是不可以的，而且範圍更可以廣泛
21 至為着公眾的利益而進行審查，所以實在令人憂慮。一旦該人作出投訴，
22 而證監會亦委任了核數師，那該人可以怎麼做呢？

23
24 我認為證監會必需向消費者提供保障。我認為如果投訴人說謊，這
25 是可以考慮的原因，但如果是因該人的行為或conduct而要求他繳交費用，
26 便存有問題，因為證監會必定是已對他的行為作出審查，才審查有關經紀
27 行的帳目。為甚麼證監會最終會具這麼廣泛的權力，要求申請人支付費用
28 呢？

29
30 **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
2 要求投訴人支付費用是一個問題，但最重要的是他必需預先知道需
3 要支付的費用。另外他需否支付這筆費用，可能也是一項爭議。

4
5 我也贊同余若薇議員的意見，即使該人需要支付費用，證監會應否
6 在他正式簽名申請投訴前，向他說明所需負擔費用的上限呢？否則，如果
7 投訴人希望追討的款額是一萬元，但他卻需要付出兩萬或三萬元的審計費
8 用，倒不如證監會事前向他說明，讓他可決定撤銷申請。

9
10 副局長，請講。

11
12 **財經事務局副局長區璟智女士：**

13
14 建議制定第(8)款的精神，是……

15
16 **主席：**

17
18 我明白，雙方也有本身的理由。

19
20 **財經事務局副局長區璟智女士：**

21
22 制定這款有兩個主要原因。第一，申請人可能會因而獲得利益，因
23 為提出申請可能會有助他日後獲得賠償。第二，正如主席剛才提到，業界
24 也憂慮到，如果申請人無需負上任何責任，便可能會鼓勵了一些無聊的申
25 請。所以我們便引進這項三方也可能需要繳付所需費用的安排。

26
27 但我理解余議員的顧慮，即恐怕當事人申請時，可能不知道日後需
28 要承擔部分的成本。對於這點，我們會考慮可在立法上還是行政上作出安
29 排，使證監會可以作出安排，令申請人容易明白實際的情況。

**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 讓我們稍後再作研究，找出我們在立法上或正如Mr PROCTER剛才
2 提到，在指引上較清晰地寫明有關情況。如果我們容許公眾人士向證監會
3 提出申請，必定需要一套申請手則。我們可以作出安排，令當事人清楚明
4 白可能產生的後果。

5
6 **Chairman:**

7
8 Yes, please.
9

10 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
11 **Securities and Futures Commission:**

12
13 If I may say a couple of things by way of supplement to your observation. First of
14 all the question of any fee or any amount that was required to be paid by either the applicant
15 or the licensed corporation, for that matter, would clearly be a judgment or decision that was
16 potentially prejudicial to their interest. So clearly the usual rules of procedural fairness
17 would apply, and clearly there would be an obligation on the part of the SFC to give them a
18 right to be heard in respect of any possible and prospective order. I think the idea of setting
19 at the outset an amount, an absolute amount, by way of exposure, is difficult because what
20 happens is that applicants quite often elaborate, for want of a better word, on their case as the
21 matter progresses. What begins as a simple, narrow, confined complaint can often expand to
22 some series of allegations that are many times more complicated or wider. Secondly, I think
23 that in any of these issues to do with costs and fees, although I have already said that the
24 frivolous and vexatious would in fact be weeded out at the outset because of the procedures
25 that we have to go through. It would be truly exceptional for one to get through the gate.

26
27 There are other questions that arise. There may be, for example, an application
28 that we in hindsight regard as vexatious. We might nonetheless judge that the licensed
29 corporation had been so obstructive and unhelpful in its dealings with the auditor, the SFC
30 and the applicant, that it has also contributed significantly to the costs of the matter, and so it

**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**

ought to bear some responsibility. I think there is a further possibility, and this is, I think, the most realistic one; and that is that it will very often not be the single confined matter that is the subject of the applicant's original complaint which sets the scope for the audit or examination. It will very often be a more general audit and examination triggered by the applicant's complaint, but not confined to the applicant's complaint.

I know, of course, that means that on one view the applicant is actually exposed to a wider range of costs, but on the other hand one could hardly imagine that it would be fair on the part of the SFC to ask the applicant to pay for that more wide-ranging inquiry. Even if it transpired that they were being frivolous or vexatious. I think it would be difficult at the outset to say to any particular person: "This is the extent of potential liability", because it will not be possible to judge at the outset just what would be fair at the end of the day; and at the end of the day that is our obligation – to be fair in our dealings with the applicant and the licensed corporation, if we intend to make this kind of order. Fairness does have to be judged in all the circumstances at the time when the decision is made.

主席：

先請李家祥議員發言，接着請Sophie發言。

李家祥議員：

主席，我希望澄清一點，我不希望議員或法案委員會誤解，以為會計師的成本是完全失控的。

我只是希望解釋實際的程序和會計師怎樣幫助客戶控制成本。如果我能夠清楚解釋這些程序，或許同事們會得到較多啟示。Mr PROCTER剛才也曾提到，在開始審查工作之前，會計師已經很清楚地定出職權範圍，並必須向證監會提供清楚的估計成本，因為不單是申請人需要控制成本，證監會也需要這樣做，他們必定需要取得fee quote。當然，會計師提供的建議

**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 費用不一定是申請人最終需要繳交的費用，期間亦可能會發生很多事情，
2 例如證監會或申請人要求把職權範圍擴大。在這個情況下，會計師通常也
3 會提出第二次的費用建議。

4
5 另外，會計師在工作上也需要作出應變，例如若接受調查的公司很
6 不合作，不願意提供任何資料，令會計師失去預算，會計師也會擬備中期
7 報告，或定期通知申請人有關收費的資料，例如說明該月份的收費，以及
8 到該階段為止，他的工作能否按照原定target進行等。為甚麼會計師會進行
9 那麼多程序呢？原因是要幫助聘用他的人控制成本。在某程度上，若聘用
10 會計師的人認為他不能再負擔所涉及的成本，他也可以終止審查。這是我
11 們一般的做法，尤其是簡單的調查工作，會計師通常也可以做到這點。情
12 況大致上可分為兩類：第一類是會計師需要進行指定的工作，尤其是搜集
13 資料。即委任會計師的人對問題已有相當認識，所以會計師只需搜集證據，
14 研究證據是否足夠，這些工作比較容易；第二類，是該人只是懷疑存有某
15 件件事，而會計師需要進行一些具體的工作，完成報告後才可知道該項懷
16 疑是否有根據。這些工作便較為困難。

17
18 根據證監會剛才所講，會計師要進行第一類工作的機會比較多，第
19 二類工作，即翻查某項懷疑是否真確的情況會比較少。這類工作只會在很
20 特別的情況之下才會進行。據我估計，就成本控制來說，當然Mr PROCTER
21 較熟悉這方面的情況，但我的估計是會計師每次就成本作出調整時，亦會
22 有機會與有關人士作出商討，並視乎他是否接受該成本才繼續進行審查。
23 如果他表示不繼續進行審查，那便會由申請人自己平衡這個做法對他的好
24 處與壞處。我相信任何人作出這類決定時，也不會單為社會的利益，也要
25 考慮他能否負擔所需費用。這個機制是否可以幫助各位理解有關的情況
26 呢？

27
28 **Chairman:**

29
30 Mr PROCTER.

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 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
3 **Securities and Futures Commission:**

4
5 Chairman, if I might suggest one way of looking at this and perhaps going forward
6 in respect of this notion of conduct, that being a trigger point for the exercise of the discretion
7 under subclause (8). Obviously we want to avoid a situation where someone genuinely
8 comes forward and makes a complaint – it may be for a relatively small amount – and then
9 finds himself exposed to fees that swamp the amount that is the subject of the complaint.
10 Certainly that is not the intention. The use of conduct as the trigger point in (8) is really to
11 pick up the kinds of notions I mentioned about half an hour ago, in terms of complaints which
12 are frivolous or vexatious, or conduct which contributes to incurring unnecessary costs in the
13 audit and examination.

14
15 Perhaps one way of looking at it, and one way we might consider resolving some of
16 the concerns, would be to break out the notion of conduct and say that where we consider
17 exercising our power under (8) having regard to conduct. We should do so where the
18 complaint itself has been frivolous or vexatious, or the applicant, or indeed the licensed
19 corporation, by reason of their conduct have contributed to the incurring of unnecessary costs
20 in the matter. That is obviously what we mean, and I think everyone agrees that that is
21 basically what ought to be the trigger; and I think it should not be too difficult to insert
22 something along those lines.

23
24 **主席：**

25
26 Sophie。

27
28 **梁劉柔芬議員：**

29
30 主席，I think if we look at 155 and 156 in the bigger context, at least as a layman

**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 the way I look at it is that 156 allows an application in writing by a person with regard to all
2 these possible failures. It then says, if you look at 156(1), that the Commission may appoint
3 an auditor to do all these other things, and then of course the other problems that we were
4 discussing in the last half hour or 45 minutes.

5
6 Of course the Commission may at that point in time be alerted to the fact that the
7 licensed corporation or whoever - the associated entities - might have committed some other
8 things that would have triggered 155. Am I correct to assume that? If that is the case then
9 all that discussion in the last half hour - - who is responsible for the hiring? Of course it is
10 the SFC on behalf of the applicant, but if it is an application and the facts of that application
11 are big enough to trigger 155, then all that problem of who pays is out of the question. But if
12 it is something relating more to the applicant himself, then of course 156 kicks into place, and
13 I guess all that concerns us then. I think it limits it to a certain degree. It is only the
14 applicant's own interests that would really carry forward with 156. Am I correct to assume
15 that?

16
17 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
18 **Securities and Futures Commission:**

19
20 I do not think so, actually. I think 156 is not limited just to the subject matter of a
21 particular complaint. What the two sections do is posit different triggers, which in both
22 cases would allow more general examination and audit. I accept that we have to be, in the
23 latter case, limiting the exposure of the applicant, and I think if we can do that by reference to
24 very closely tying their exposure to their own inappropriate conduct, I think that is reasonable.

25
26 **Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP:**

27
28 Chairman, if I can follow up, what I am trying to address is that the narrower aspect
29 we have been discussing for the last half hour - - if it really is taken on by 156 and it is more
30 relating to the applicant's interest. Because if it is a wider interest, public interest at large,

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 then probably 155 would kick in.

2
3 **主席：**

4
5 其實只要訂有第155條，即使申請人認為費用昂貴，但他仍然認為
6 有需要進行審查，他便可以運用第155條。第156條只是附加的途徑而已。
7 Andrew.

8
9 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
10 **Securities and Futures Commission:**

11
12 Yes. They are just different thresholds, I think, but both could give rise to exactly
13 the same inquiry, actually.

14
15 **主席：**

16
17 胡經昌議員，請講。

18
19 **胡經昌議員：**

20
21 政府剛才也曾提到，第156(1)(b)條是關乎conduct的問題，也就是
22 instructions 的問題。該條所訂的“failure to act in accordance with
23 instructions”，是涉及conduct的問題。但第VI部的大標題其實也與這個問題
24 無關。這部應該是關於“Capital Requirements, Client Assets, Records and
25 Audit Relating to Intermediaries”的。第156(1)(a)條是關乎“assets”的，所以
26 納入這部便屬恰當，但為甚麼有關conduct的問題也適宜納入這部呢？

27
28 **主席：**

29
30 但我相信這個問題很容易解決，當局只要修訂標題便可。

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 **胡經昌議員：**

3
4 主席，當局當然可以作出修訂，但這個做法是不正確的，對嗎？

5
6 **主席：**

7
8 我認為問題在於在政策上是否有需要進行審查。 Margaret.

9
10 **Deputy Chairman:**

11
12 Mr Chairman, we have spent quite a lot of time on this point, but I think this is a
13 very important point. It has to do with the Bill but it exceeds the Bill itself, because the way
14 I look at it is: the SFC has a duty under the Ordinance to see to it that the consumer, the
15 investor, gets a fair deal; and that the market operates in the manner envisaged by the law.
16 How does the SFC do that? It does that by actively, proactively, policing, monitoring the
17 players. It also does it on complaint from members of the public. So you can see that in
18 fact when someone who has been aggrieved makes an application to the SFC, to a certain
19 extent it is assisting the SFC to run the system of regulation, so it would be quite wrong for
20 the applicant to share too large an amount of the cost. You do not want to discourage people
21 from doing that. In fact you want to encourage people to do that.

22
23 Although you are talking about this part of the regulation, in fact it goes wider. It
24 goes to all sorts of other regulations. Therefore, Mr Chairman, I think it is useful for the
25 SFC to consider in general how to set up the kind of system for complaints to be handled.
26 We do not call it “the complaint” under 155 and 156. It says “an application”. I think
27 “application” is only one form of complaint. The auditor is only one form of the cost, so we
28 need a more comprehensive scheme which lists under it different kinds of complaints,
29 applications or whatever, and the different costs to be incurred; and how the incurred costs are
30 to be shouldered; how much of it will come out from the applicant himself? For example, if

**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 there is no question about the system, and this is narrowly confined to that person's particular
2 application, then you might want the consumer or the applicant to pay most of it. Particularly
3 when it does not involve anything like an auditor performing the kind of auditing-examining
4 function we have been describing in the last half hour. What is at stake here is the attitude
5 and the whole culture of the SFC, whether it is a paternalistic one – and I take on board what
6 Mr PROCTER said, that the SFC has to be fair, has to be reasonable in awarding costs; it has
7 to allow for warning; it has to hear the view of the applicant – but this is still, if I may say so,
8 a rather top-down kind of attitude. Is it possible to take a more modern attitude, which is a
9 more partnership kind of attitude, so that things can be set out from the outset, with a bias in
10 favour of the consumer, of the investor, because the SFC has a duty to run this whole system
11 anyway?

12
13 There are two aspects. One is the broader aspect. I would like to see how you
14 could set up that sort of system with very clear guidelines and rules, so that the investor or the
15 consumer, when he complains, when he makes an application, already knows generally the
16 schemes. All these principles you have given in response to what Audrey said will be in fact
17 in writing, so that that person knows. If cost is to be awarded or attributed or distributed in a
18 fair manner, what are the principles you take into consideration when you consider the sharing
19 of costs?

20
21 The main aspect is: in respect of (8) of 156, what are your principles? What are
22 the guidelines that you would set down as to when a person may be expected to pay – and if
23 so, is there going to be a ceiling of what he is going to pay, and is it negotiable and at what
24 time will you tell him? Will you be able to say if it is anything like wandering into 155,
25 because his application has in fact triggered off the whole thing? Then the SFC actually
26 takes over the application, and when that happens the person who made the complaint or
27 application in the first place will only be subject to a very small cost; that kind of thing.
28 Thank you.

29
30 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**

**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**

Securities and Futures Commission:

Chairman, I think one of the difficulties about the discussion – and this will sound slightly defensive – is that I think it is actually this provision which is the exception to the rule that the rest of the way in which complaints are handled – complaints from the public – and the way in which we respond to them is exactly as the Deputy Chair has described it. It is absolutely welcoming and encouraging. There is lots of material that the SFC has publicly available about how to complain to us, what happens with it. We have a very extensive complaints hotline system; we have a very clear process for dealing with public complaints that ensures a consistency of that. I think it would be useful at some stage to describe some more of that and to bring in some of the brochures and material, and even downloads from the website. This is the exception.

It is also the exception in that, I think I am right in saying, it is the only section where a person who made a complaint would be exposed in any way to contribute to the costs of addressing that complaint. It does not arise in any other context. It arises again, as you might expect, as part of a balancing exercise. It was really the industry saying “Well, we could have all sorts of difficult people running around making complaints about us. They ought to be liable if they behave badly, and make a contribution to the costs”. It is actually in that context, I think, that it has come in; but it does not occur anywhere else. There is no other section where we have the power to direct a contribution to our costs by somebody who makes a complaint. I think it is unfortunate that the discussion we have had might have left members with the impression that we are anything less than - - almost desperate, but certainly determined to get public complaint and public assistance for exactly the reason the Deputy Chair describes.

Deputy Chairman:

Mr Chairman, just to follow up, in which case then what we need to do is to put 155 and 156 in context. In anything you are required to do – and I specify the second and

**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 narrow aspect – would you be able to consider that generally if this is a proper thing for you
2 to do, the appointment of auditor and so on. The applicant will not bear the cost, but that the
3 person will have to bear the costs, (a), if it turns out to be a vexatious complaint, or (b), if his
4 interest involved is very large, and he gets to recover quite large costs, and because of the
5 nature of the investigation, it would be fair for him to contribute towards the fees of the
6 auditor; but then you would give him advance notice? Would you be able to do something
7 like that, so that you will not incorporate 155 and 156 into the general system of encouraging
8 complaints without unnecessary costs to the complainant?

9
10 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**
11 **Securities and Futures Commission:**

12
13 My first reaction is just to suggest a slight modification. I think the first two
14 propositions are fine. If it is something that we should be doing anyway, then it would be
15 exceptional to ask some individual member of the public to contribute. If they have
16 themselves contributed to the incurring of costs in the way we were describing a few minutes
17 ago, by reason of their own conduct, then I think they should be potentially exposed to
18 contribute.

19
20 I do not think the third situation is likely to arise, just as a matter of fact, just
21 because of the way these inquiries are conducted and who has access to the reports at the end
22 of them. It is not likely that an individual applicant is going to personally and directly
23 benefit by reason of one of these inquiries, except to the extent that a registrant might say,
24 having read the report “Well, there’s not much point in fighting this claim. I’m going to
25 lose it eventually”, and actually may agree to settle with the applicant; but that would be a
26 collateral benefit, if you like.

27
28 The applicant, will not themselves get access to the report. They will not get it
29 and be able to use it in litigation. I suppose they may be able to subpoena it from the
30 registrant, although even there there may be a problem, given the secrecy provisions. You

**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 see what I mean? There may not be a direct benefit.

2
3 **Deputy Chairman:**

4
5 I know. Mr Chairman, perhaps because there are details involving actual
6 operation, may we just invite the SFC to consider (8), to see if it can be supplemented in any
7 way so that it will show where the costs would lie, in what circumstances the costs would go
8 one way or another; or if it has to be more detailed to the effect of guidelines or whatever; that
9 those guidelines or the existence of those guidelines will be also mentioned in the provision?
10 Thank you.

11
12 **主席：**

13
14 就第156條的討論亦已進行了相當長的時間，相信大家已較為詳盡
15 地表達有關的觀點。

16
17 **何俊仁議員：**

18
19 主席，我有一個基本的問題要向副局長提出。其他法例有否出現這
20 個情況，即有關人向監管機構作出投訴，而該人可能需要繳付審查的費用？
21 這是基本的政策問題。香港亦有很多不同的監管機構，即使是有關人向律
22 師公會投訴某律師行，律師公會也可能需要進行調查，亦要花費很多金錢。
23 如果最後的結果是投訴人不得直，該公會是否會要求投訴人繳付那筆費用
24 呢？這是很基本的政策問題。

25
26 第二，很多同事剛才亦有提到，SFC本身是一個執行公眾責任的機
27 構，證監會在啟動第156條時，主要是履行公眾的法律責任。所以，如果證
28 監會向投訴人收取費用，但其實投訴人是幫助證監會履行這個責任的，這
29 個做法是否有足夠的支持呢？

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 另外，根據證監會剛才的解釋，在某些情況下，由於投訴人的態度
2 或行為的問題，例如他是出於惡意或具滋擾性，所以證監會要求他繳付費
3 用，其實性質已變成罰款，而不是分擔費用。若這個做法屬於罰款，便表
4 示證監會擁有懲罰投訴人的權力。那麼這款應否採用這個草擬方式呢？

5
6 最後，即使當局日後能提出足夠理據，支持要求投訴人繳付費用的
7 做法，我亦不贊同以指引的方式訂明，而必需在條例內清楚訂明。我相信
8 余若薇議員和副主席剛才亦講得很清楚，目前的草擬方式是很難接受的。
9 單是以證監會發出指引的方式寫出這點，我認為亦是難以接受的，也不
10 是一個好的制衡。由於這款的草擬方式過於廣泛，會產生的效果只會是沒有
11 人會作出投訴，或不會要求委任核數師進行調查。

12
13 **主席：**

14
15 副局長。

16
17 **財經事務局副局長區璟智女士：**

18
19 我不是法律專家，但就何議員提出的第一個問題，據我所知，在《證
20 券條例》或《公司條例》下，亦有一個類似的例子。若某上市公司的一撮
21 股東無法得知實際上擁有該上市公司股份的大股東是誰，他們可向財政司
22 司長申請，委任一名調查員調查股份誰屬。這有關的法例下，財政司司長
23 亦可就這項調查要求申請人支付若干的費用，但他並不是必須向申請人作
24 出這項要求的。

25
26 在立法的精神上，這情況與我們現正討論的情況有點相似。第一，
27 我們考慮到當事人可能存有利益，正如Mr PROCTER剛才提到，有關審查可
28 能會對該人日後就要求賠償而作出的訴訟有幫助。第二，我們亦考慮到被
29 調查或被審計一方的疑慮。我們會盡可能制訂一些條款，阻嚇或避免有人
30 作出無理取鬧或無聊的申請。所以，如有類似的個案出現，我們主要也是

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 考慮這兩點，而不是懲罰申請人，也不是否定這項調查或審計工作存有公
2 眾利益的考慮。

3
4 **何俊仁議員：**

5
6 主席，副局長剛才所提出的情況是很清楚的，是關乎有關人要求一
7 個機構替他調查某些事情。由於問題很清楚，所以所需的費用亦可預先決
8 定，亦並不涉及行為的問題。這類清晰的情況是不同的考慮。但如果有關
9 機構要考慮投訴人的conduct會否是無聊的或具滋擾性，要求投訴人繳付費
10 用的做法便變為懲罰性質。

11
12 **財經事務局副局長區璟智女士：**

13
14 其實我們剛才亦曾討論，第(8)款所指的行為，是針對被審計的人士
15 和申請人，我希望這個草擬方式可以平衡這兩方面。我聽到議員有很強烈
16 的意見，希望投資者能獲得較充分的保障。我們剛才提出的建議，是我們
17 可以嘗試較清楚地寫明有關申請人，即投資者本身行為的情況。例如若他
18 的有關行為牽涉到無理取鬧或無聊的申請，我們才考慮要求他繳付有關費
19 用。另外，正如我剛才所說，這是一個新的申請制度，證監會日後亦要設
20 定一些申請手續。證監會可能需要在申請指引內告知申請人，如果他作出
21 無理取鬧的投訴，後果是他可能需要繳付有關費用。我認為這兩方面可以
22 一併進行。

23
24 **主席：**

25
26 政府表示會再研究第156條第(8)款。

27
28 結束會議的時間應該是12時30分。我希望藉以下的時間，討論其他
29 事項，因為我收到一些同事的意見，表示7月底會有很多同事外遊。事實上，
30 已有接近半數的同事表示不能出席7月27日的會議。所以我擔心出席人數不

**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 能constitute quorum。但根據我現有的資料，7月16、17、18及19日會議的
2 quorum，分別有10、9、9和9位議員表示將會出席。這些會議全部也是在這
3 個星期內舉行的，所以quorum應該沒有問題。

4
5 我徵詢各位的意見的原因，是我擔心quorum的問題。另外，亦有同
6 事向我詢問，是否可以取消7月27日的會議。但由於我們的進度不是很理
7 想，如果我們取消7月27日的會議，便可能需要在9月舉行會議。我希望就
8 這方面諮詢各位的意見。副主席。

9
10 **副主席：**

11
12 我認為若保留在7月27日舉行的會議，風險便會較大。安排會議在9
13 月份第2個星期開始舉行會較好。

14
15 **主席：**

16
17 我希望聽取各位的意見。副主席建議9月份第2個星期開始舉行會
18 議。 Sophie。

19
20 **梁劉柔芬議員：**

21
22 因為有幾位同事剛才也提出這個問題，反正我們在7月27日前還安
23 排了一、兩次會議，我建議由委員會秘書進行諮詢。如果我們現在決定在9
24 月份第2個星期舉行會議，而屆時委員們不能出席，便會出現quorum的問
25 題。

26
27 **副主席：**

28
29 主席，我所提的第2個星期是指由9月3日開始的那個星期。

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 **主席：**

2
3 9月3日好像較為早。

4
5 **李家祥議員：**

6
7 我肯定我在那段時間不會在香港。我並不是阻止各位在那段時間安
8 排會議。但由於我們經常增加會議，而時間表亦經常變動，很可能會有委
9 員不能出席會議，並且無法提出他希望討論的問題。如果主席決定在9月2
10 日開始安排會議，很抱歉，我當時不在香港。

11
12 **主席：**

13
14 那麼9月10日後，你會在香港嗎？

15
16 **李家祥議員：**

17
18 應該會的，我大約在9月12或13日便會回港。但我希望我不會錯失
19 討論的機會，尤其是與會計業有關的事項。按照現時的進度，我最低限度
20 也希望可以在最後一次會議，即立法會在10月份正式復會時，讓同事們有
21 機會代表某些sector表達意見。按照現時的進度，這個情況應該不會發生，
22 但我不敢保證，因為不能清楚知道討論的進度。

23
24 **主席：**

25
26 請各位留步，完成最後2分鐘的討論。胡經昌議員。

27
28 **胡經昌議員：**

29
30 由於法案委員會近期增加了一些會議，而我亦要出席其他會議，所

**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 以我未能出席法案委員會的會議。我很贊同李家祥議員的意見。第一，希望
2 法案委員會會安排機會，讓我們再就一些事項提問。第二，這條條例草案和
3 業界有很大的關係，而政府現時亦提出了很多CSA，一些是技術性的，另一
4 些不是技術性的。在這個情況下，我希望就政府的CSA和業界溝通。但單是
5 今次討論的內容，亦有40多項CSA，其中一些亦較具爭議性。因此，政府可
6 否盡早向我們提供這些資料呢？即使政府無法在7月份備妥所有的CSA，我亦
7 希望政府在會議前先向我們提供CSA，好讓我跟業界的有關小組進行討論。
8 否則，當法案委員會討論有關CSA，而我還沒有機會和業界討論時，我便很
9 難向委員會作出反應。多謝主席。

10
11 **主席：**

12
13 請問政府方面大概會在甚麼時間完成就各部提出的CSA呢？

14
15 **財經事務局副局長區璟智女士：**

16
17 我們現在已經可以向各位提交第VIII部的CSA。其實，我們希望盡
18 可能在本月完成第IX、X、XI和XII部的CSA，然後向各位呈交，讓各位有
19 足夠時間研究。

20
21 **Chairman:**

22
23 Sophie.

24
25 **梁劉柔芬議員：**

26
27 主席，其實據我的觀察，我們的討論根本跟不上政府呈交的CSA。
28 我們在會議上尚沒有討論政府呈交的CSA，所以情況不是政府沒有呈交有關
29 文件。反過來說，我們今天討論第155和156條時，共花了45分鐘。如果情
30 況是這樣，我們既然已經到了條例審議的階段，我們可否決定每次會議應

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 討論的部分呢？我知道你可能不同意這個做法，但Members本身亦可充分準
2 備一些特別的提議或特別值得關注的地方，使我們可以預計討論所需的時
3 間。

4
5 **主席：**

6
7 對於Clause-by-clause的審議，所需時間實在很難預計。有誰可以估
8 計到我們要花上這麼長的時間來討論第155、156條呢。我建議由我work out
9 一個schedule，在9月初或9月份第2個星期開始復會。如果訂有一個
10 schedule，我便可以盡早諮詢各位。這個做法總比各位到時不能出席為好。
11 李家祥議員，請講。

12
13 **李家祥議員：**

14
15 但直到7月底為止，我們還會舉行5個會議，所以我們實在無法得知
16 我們屆時的進度。

17
18 **主席：**

19
20 按照現時的進度，即使假設我們這個星期能夠完成有關第VIII部的
21 討論，條例草案共有XVII部，我們亦只是討論了一半的內容。所以，我們
22 必需在9月份召開會議。

23
24 **副主席：**

25
26 主席，我希望提出一個辦法。因為現時政府提交文件給我們參考的
27 時間，跟有關會議舉行的時間，可能不會相隔很長的時間。所以我們今天
28 預備明天的討論資料，明天預備後天的討論資料，便會很難預計所需的討
29 論時間。既然政府亦有充足時間預備有關資料，可否盡早向我們提供，以
30 便我們在9月份可以安排會議一個接着一個的舉行呢？由於我們事先已經

**Bills Committee on
Securities and Futures Bill and Banking (Amendment) Bill 2000
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1 參考有關文件，而文件亦已齊備，只是需要時間進行討論，我們便可以把
2 會議安排得緊湊一點。

3
4 **主席：**

5
6 好的。

7
8 **副主席：**

9
10 但我們今天亦不可作出任何決定，因為要待委員會秘書詢問各同事
11 在港的日期。

12
13 **主席：**

14
15 我們會透過秘書處徵詢各位的意見。我們亦希望在這個星期內work
16 out一個大家也可以接受的schedule。但按現時的情況看來，我們9月份是必
17 需舉行會議的了。因為如果我們留待10月或11月時才舉行會議，便已經很
18 遲了，而且亦會與其他會議的時間有所衝突，倒不如趁9月份便舉行會議，
19 好嗎？多謝。

20
21 **財經事務局副局長區璟智女士：**

22
23 多謝主席。

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