

# 立法會

## 研究雷曼兄弟相關迷你債券及 結構性金融產品所引起的事宜 小組委員會

---

---

第三十一次研訊的逐字紀錄本

日期： 2010年3月26日(星期五)

時間： 上午9時30分

地點： 立法會會議廳

---

---

### 出席委員

何鍾泰議員, SBS, S.B.St.J., JP (主席)

涂謹申議員

劉慧卿議員, JP

余若薇議員, SC, JP

林健鋒議員, SBS, JP

黃定光議員, BBS, JP

劉秀成議員, SBS, JP

甘乃威議員, MH

李慧琼議員

陳茂波議員, MH, JP

陳健波議員, JP

梁美芬議員

梁家騮議員

葉偉明議員, MH

葉劉淑儀議員, GBS, JP

### 缺席委員

黃宜弘議員, GBS (副主席)

陳鑑林議員, SBS, JP

石禮謙議員, SBS, JP

湯家驊議員, SC

詹培忠議員

## 證人

公開研訊

證券及期貨事務監察委員會行政總裁  
韋奕禮先生, JP

# Legislative Council

## Subcommittee to Study Issues Arising from Lehman Brothers-related Minibonds and Structured Financial Products

---

---

Verbatim Transcript of the Thirty-first Hearing  
held on Friday, 26 March 2010, at 9:30 am  
in the Chamber of the Legislative Council Building

---

---

### Members present

Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP (Chairman)

Hon James TO Kun-sun

Hon Emily LAU Wai-hing, JP

Hon Audrey EU Yuet-mee, SC, JP

Hon Jeffrey LAM Kin-fung, SBS, JP

Hon WONG Ting-kwong, BBS, JP

Prof Hon Patrick LAU Sau-shing, SBS, JP

Hon KAM Nai-wai, MH

Hon Starry LEE Wai-king

Hon Paul CHAN Mo-po, MH, JP

Hon CHAN Kin-por, JP

Dr Hon Priscilla LEUNG Mei-fun

Dr Hon LEUNG Ka-lau

Hon IP Wai-ming, MH

Hon Mrs Regina IP LAU Suk-yea, GBS, JP

### Members absent

Dr Hon Philip WONG Yu-hong, GBS (Deputy Chairman)

Hon CHAN Kam-lam, SBS, JP

Hon Abraham SHEK Lai-him, SBS, JP

Hon Ronny TONG Ka-wah, SC

Hon CHIM Pui-chung

**Witness**

*Public hearing*

Mr Martin WHEATLEY, JP  
Chief Executive Officer of the Securities and Futures Commission

**主席：**

各位早晨。首先歡迎各位出席"研究雷曼兄弟相關迷你債券及結構性金融產品所引起的事宜小組委員會"的第三十次公開研訊。我們歡迎證券及期貨事務監察委員會行政總裁韋奕禮先生再次出席小組委員會的研訊。

我請各位委員留意，整個研訊過程必須有足夠的法定人數，連主席在內共6位委員。此外，《立法會(權力及特權)條例》所賦予的特權，只適用於研訊的過程。小組委員會《工作方式及程序》第13(g)段訂明，所有議員，包括非小組委員會委員的議員，都應避免在研訊過程以外的場合發表與研訊有關的意見。《工作方式及程序》第23段亦訂明，委員不應披露任何有關小組委員會閉門會議上的內部討論或曾考慮的文件的資料。

我想提醒旁聽研訊的公眾人士及傳媒，在研訊過程以外的場合披露研訊中的證供，將不受《立法會(權力及特權)條例》所保障。如有需要，各位列席人士和傳媒應就他們的法律責任徵詢法律意見。此外，我亦想提醒在公眾席上旁聽研訊的公眾人士，研訊進行時必須保持肅靜。根據《立法會議事規則》第87條，我有權請任何行為不檢或看來相當可能有不檢行為的公眾人士離開會場。

請各委員留意，小組委員會的研訊程序須符合《工作方式及程序》第2段的原則，包括有關程序必須公平，而且須令人看得到是公平，尤其是對利益或名譽可能會被小組委員會的研訊程序影響的各方。此外，《工作方式及程序》第12及13段訂明，在公開研訊中，委員只應為確立與此次研訊有關的事實而提問。委員不應在公開研訊中發表意見或作出陳述。此外，我會決定某條問題或某項證據是否與小組委員會的職權範圍有關，以及是否屬於研訊範圍。我亦有酌情權，決定應否容許委員提出某項問題。

小組委員會在2009年6月9日會議上同意，委員應考慮本身與證監會的關係及是否有參與其決策或工作，自行決定是否作出利益申報及是否出席與證監會證人有關的研訊。就此，陳鑑林議員已申報他是證監會現任非執行董事。他表示為免角色衝突，不會出席與證監會證人有關的研訊。此外，梁美芬議員亦曾申報，她是證監會程序覆檢委員會委員。

我提醒各位，小組委員會已在3月19日會議上同意，今天的研訊將於中午12時結束。我現在宣布今天的研訊開始。

今天研訊的取證範圍集中在今年1月26日及29日高秉忠先生出席公開研訊及韋奕禮先生出席2月9日公開研訊所引起的事宜。請委員注意，提問應與今天的研訊範圍有關，否則我會裁定證人無須作答。

韋先生，小組委員會已同意由證監會秘書長鞏姬蒂女士及證監會首席律師楊以正先生陪同你出席研訊。請注意，鞏女士及楊先生不可向小組委員會發言。證人不得與陪同人士討論，亦不得接收該等人士的任何指示(無論是口頭或書面的)。

韋先生之前出席研訊時已宣誓，所以今天你會繼續在宣誓下作供。

Mr WHEATLEY, you have provided written responses to the issues arising from the hearings held on 26 and 29 January and on 9 February 2010 to the Clerk to the Subcommittee. These documents have been numbered as S56, S57, S58 and S59. Mr WHEATLEY, are you going to formally produce these documents to the Subcommittee as evidence?

**Mr Martin WHEATLEY, Chief Executive Officer of the Securities and Futures Commission:**

Yes, Chairman.

**Chairman:**

Thank you. Mr WHEATLEY, you have also provided a written response to the written questions raised by Mr LEUNG Kwok-hung on 28 January 2010. The document has been numbered as S60. Mr WHEATLEY, are you going to formally produce this document to the Subcommittee as evidence?

**Mr Martin WHEATLEY:**

Yes, Chairman.

**Chairman:**

Thank you. Mr WHEATLEY, in response to the summons issued to you on 3 March 2010, you have provided a set of documents. These documents have been numbered as S61, S62 and S63. Mr WHEATLEY, are

you going to formally produce these documents to the Subcommittee as evidence?

**Mr Martin WHEATLEY:**

Yes, Chairman.

**主席：**

Thank you. 由於韋先生是以英語作答，稍後委員如以中文提問時，請避免一次過提出多條或太長的問題，以方便傳譯工作，並且讓證人可以盡快直接回答問題。請大家留意。

我想提醒大家，每位委員將會有10分鐘時間向證人提問和讓證人回答。委員如想就某份小組委員會文件的內容向證人提問，應指明該份文件的編號，以方便證人及其他委員參考該份文件。

此外，為了善用研訊時間，請委員的提問盡量精簡及具體，而證人亦須明確及切實回應問題。委員無須再三向證人追問同一問題。另一方面，證人亦不須重複已講過的說話或大家已知悉的背景資料。無論證人或委員，必須在主席示意後才可發言。

為使輪候提問次序得到公平處理，秘書稍後記錄委員舉手發問的次序時，這次會由我的右手邊逐一記錄委員姓名。想提問的委員現在請舉手示意。

韋先生，我現在先開始第一條問題。

韋先生，在S58第2.2段，證監會表示已有行政措施，要求非上市零售結構性產品的發行人、擔保人、掉期對手或掉期擔保人遵守《主板上市規則》第15A章的相關資格規定，例如發行人或擔保人的資產淨值必須達到20億港元。請問韋奕禮先生，證監會何時開始採用《主板上市規則》的相關規定，以審批迷你債券此類結構性產品？

**Mr Martin WHEATLEY:**

Thank you, Chairman. In the absence of the specific powers in the Companies Ordinance, we've adopted an approach of mirroring the requirements in the Listing Rules which have been applied to issuers, guarantors and swap guarantors. We've taken that approach since structured

products were first introduced under the Companies Ordinance. So that would have been around 2002, 2003, I think. This is, I think, a system that's worked well; issuers seem to understand that. Such policy has resulted in common standards, whether the structured products were offered to the public either as listed products or under the Companies Ordinance.

**主席：**

Thank you. 當時有甚麼因素促使當局採用《主板上市規則》的相關規定？

**Mr Martin WHEATLEY:**

At the time, because we had no specific requirements, we took the view that this would be an appropriate measure. The key issue is not about whether these eligibility requirements were effective to prevent the failure of an issuer because, obviously, no regulation can achieve that, but we felt that the Listing Rules was a well-understood and a well-accepted structure within the market that provided a degree of protection for buyers of products.

**主席：**

韋先生，不是因為有些外來因素或某些事情發生了，而令你們想起要採用這個《主板上市規則》。是否這樣？

**Mr Martin WHEATLEY:**

I'm not aware that it was in response to any external issue; it was our analysis that the type of products being delivered under the Companies Ordinance were becoming different and more akin to investment products that were listed and that's why we adopted the same structural requirements.

**主席：**

韋先生，證監會採用《主板上市規則》的相關規定是基於甚麼法律依據？

**Mr Martin WHEATLEY:**

It's an administrative basis. Section 342A was amended following public consultation in order to give the SFC power to agree to waive a requirement and to impose conditions, so the requirement that a condition imposed must relate to the requirement waived is a basic principle of statutory interpretation. It was clearly not intended by the legislature that the SFC



should be able to use the power to impose conditions under 342A for purposes unrelated. We've sought an internal legal opinion and we have the view that our approach is justified. I'll have to check whether we had an external opinion as well.

**主席：**

意思就是說，韋奕禮先生，這是你們對該條例的理解，當時的理解，所以做了這樣的決定，但你剛才說，是未曾另外取得獨立的法律意見，這不過是你們自己內部的理解，對法律的理解。對嗎？

**Mr Martin WHEATLEY:**

I would have to check. I'm not aware of external legal advice but I'll have to check and revert on that.

**主席：**

或者請你會後書面回應這一點，好不好？確實這一點的資料，好嗎，韋先生？

**Mr Martin WHEATLEY:**

Yes, Chairman.

**主席：**

接着想問一問，韋奕禮先生，為何只以行政方式來採用《主板上市規則》的相關規定，而不是將這一項安排納入法例中呢？  
Mr WHEATLEY？

**Mr Martin WHEATLEY:**

We have no power to incorporate these measures into the ordinance. This requires legislative change, i.e. primary legislation. There never has been a question that the administrative measures were inadequate or fell short in providing protection. So it would require legislative change in order to bring those under the ordinance and that's clearly something that would require public consultation first.

**主席：**

意思就是說，韋奕禮先生，當時是沒想過——就算要進行一些公眾諮詢也好——提出要修訂該法例，是沒想過的，是嗎？Mr WHEATLEY？

**Mr Martin WHEATLEY:**

Yes, we have a project on reform of the Companies Ordinance and, under that project, there would have been a number of changes. Some of those changes are implemented, some of those changes are still underway.

**主席：**

韋奕禮先生，想再問一問，證監會審閱迷你債券或 Constellation 債券的銷售文件草擬本時，會不會查閱有關發行人或擔保人資產淨值的證明文件？如果沒有，理由是甚麼呢？當局又如何可以確定發行人或擔保人已能符合《主板上市規則》的相關規定呢？Mr WHEATLEY？

**Mr Martin WHEATLEY:**

We would have asked the issuer to satisfy us that they had met those requirements. If we had any doubts that that was the case, we would have sought further information. I don't believe, in any cases, there was any doubt that the eligibility criteria were adequately met.

**主席：**

接着也想問一問，同一份文件 S58 第 3.6 段，當中提到證監會根據《公司條例》第 342A(1) 條，可以向產品發行人發出豁免，並且施加與該豁免有關的條件，但不能夠施加涉及不同事項的條件，例如產品結構性規定。這種講法似乎與小組委員會從另一名證人所得的證供不同。該名證人指出，證監會在《公司條例》的有關條款下，於批出豁免時有充分酌情權施加結構性規定，即是有足夠的酌情權去施加結構性規定。

我想問一問韋先生，證監會有否就《公司條例》第 342A(1) 條的解釋尋求獨立法律意見呢？如果有，詳細情形為何？如果沒有，為甚麼沒有呢？Mr WHEATLEY？

**Mr Martin WHEATLEY:**

The statement appears to be that we have full discretion to impose conditions. What I have set out in my answer is a qualification that, actually, full discretion is not what we have. We have discretion to impose conditions relating to the waiver granted. And, so, I think in this sense that we had, somehow, the ability to impose conditions unilaterally without them being proportionate and related to the waiver, I think, is wrong.

Whether we have sought independent legal advice for that, I think we have our own internal legal advice; I don't know if we have external legal advice and I'd have to revert to the Chairman with that information. But, as I say, the suggestion that, somehow, we had unilateral discretion to impose whatever conditions we wished, I think that's just plainly wrong.

**主席：**

即是當時你們沒有考慮過這點，亦沒有尋求獨立的法律意見。這個你是否需要回去看看有否這樣的紀錄，再告訴我們，會後書面回應我們呢？Mr WHEATLEY。

**Mr Martin WHEATLEY:**

Yes, Chairman. I'll certainly check on whether we sought independent legal advice on that point. It was certainly our internal legal view and remains that today.

**主席：**

Thank you. 想再問一問的是，當局採用《主板上市規則》的相關規定審批迷你債券等結構性產品時，是否顯示當局在《公司條例》第342A(1)條下認可產品銷售文件時，亦可以施加一些結構性規定？

**Mr Martin WHEATLEY:**

Well, we chose to mirror the conditions that were adopted from the Listing Rules through administrative means. We did not have other structural requirements (*The buzzer sounded*) on Minibonds beyond the third<sup>[Note]</sup> schedule of the Companies Ordinance which sets out disclosure

---

[Note] The witness clarified after the hearing that it should be "third schedule" instead of "schedule" as mentioned at the hearing.

requirements. So, the number of structural features would be limited to those that mirrored the Listing Rules.

**主席：**

Thank you. 今天第一輪正在排隊提名的有余若薇議員及甘乃威議員。如果稍後誰想提問，請你舉手。先請余議員。

**Hon Audrey EU Yuet-mee:**

Thank you, Mr Chairman. I'd like to ask Mr WHEATLEY about the term "quick wins". Mr KO used that term in his statement and Mr WHEATLEY replied to it in his statement. I'm trying to find my paragraph number. Yes, paragraph 24 of the witness statement, which is S57, he says, Mr KO "mentions the term 'quick wins' and he seems to regard the use of this term as being inappropriate."

Now, certainly, Mr WHEATLEY, the term "quick wins" is unfortunate because it does imply that the SFC was going to help the market or to help people to make fast bucks or quick money at the expense of investor protection. Now, you say, in your response, that "The term 'quick win' first appeared in the press release issued by the Financial Secretary, Mr Antony Leung in June 2002 to announce the recommendations of The Financial Market Development Task Force." And you say, "It typically refers to proposals which can be implemented by the SFC using our existing powers rather than improvements which require legislative change."

Mr WHEATLEY, where do we find this term "quick win" defined or explained so we can tell what it actually means?

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

I don't think it is defined or explained. It's a term that, as mentioned in my response, was used in a press announcement. I think it's a term which can have a number of different meanings but there's certainly no clearly defined term. But we certainly wouldn't have followed such terminology by not fully applying our regulatory rules and would not have allowed it to be used in a form that allowed a – I think the phrase you used – fast buck to be made. That's not how we operate.

**Hon Audrey EU Yuet-mee:**

Well, if .....

**主席：**

余議員。

**Hon Audrey EU Yuet-mee:**

If there was no clear definition or explanation of what this term means, it certainly can lead to understanding like the one that Mr KO had in his statement, paragraph 12, that the SFC was, in fact, bent or inclined to help people to make fast buck and this was, in fact, at the expense of investor protection.

Mr WHEATLEY, in your paragraph 35, you again responded to Mr KO. Mr KO referred to Mr HARRIS's comments and he said, "Mr Harris says that 'the SFC should not be facilitating market development as this did not appear in its statutory regulatory objective'." And you then say, "Mr Harris was a well respected employee". But then, you say in the next sentence, "However, the statement would appear to reflect a personal opinion [of Mr Harris] but it does not reflect the functions given to the Commission by the SFO that specifically direct the Commission, in section 6, to facilitate innovation".

Now, this, Mr WHEATLEY, is probably the difference between you and Mr KO, I mean, and, of course, in that respect, also, probably Mr HARRIS. I mean, they were worried that the SFC, at the time, was more inclined to facilitate market development and maybe help people to make "quick wins" rather than to protect investors. Do you agree with that?

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

No, I don't agree with that. The need to facilitate market development is one of our statutory objectives. That is built into the SFO and, prior to the SFO, it was our objective albeit the wording would have been slightly different. So that's always been one of our objectives.

Investor protection has always been one of our objectives and always will be and we would never sacrifice investor protection for the benefit of facilitating innovation within the market. Our aim would be to maintain

investor protection at all times whilst still meeting our broader objectives which are about market development.

**主席：**

余議員。

**Hon Audrey EU Yuet-mee:**

Now, how can we be clear about that, Mr WHEATLEY? You see, because, in a way, facilitating market development can conflict with a duty to protect investors. Now, how can we see which comes first? Because, Mr WHEATLEY, in your statement, paragraph 27, you say, in the second sentence, "investor protection has always been and will remain our first priority." You see, I underline the words "first priority". Now, how can we tell that your first priority was investor protection and not facilitating the market .....

**Chairman:**

Mr WHEATLEY?

**Hon Audrey EU Yuet-mee:**

..... to make "quick wins"?

**Mr Martin WHEATLEY:**

It would be very difficult to tell. We are under a requirement to strike a proper balance between the need for investor protection and the promotion of market development. That's what we're required to do. And a proper balance, in my view, means never sacrificing investor protection for the benefit of developing the market.

**主席：**

余議員。

**Hon Audrey EU Yuet-mee:**

Well, Mr WHEATLEY, isn't that the problem? Because, I mean, you agree with me that making "quick wins" or facilitating the market can conflict with the duty to protect investors and I ask you where can we see which comes first and you say, "Well, actually, it's very difficult to tell." Isn't that the problem or wasn't that the problem, Mr WHEATLEY?

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Well, to deal with the first part, how can you tell which comes first, there's no ranking of our objectives within the SFO. We're required to meet all of our objectives, which include protection and developing the market, and we're required to balance those objectives. In practice, we would never sacrifice investor protection in order to develop the market.

**Hon Audrey EU Yuet-mee:**

Yes, Mr WHEATLEY, .....

**主席 :**

余議員。

**Hon Audrey EU Yuet-mee:**

..... my question was precisely directed to the practice adopted by the SFC. How can we tell that the practice adopted by the SFC was primarily to protect investors and not to help people to make "quick wins"?

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

I think you can see that practice through the decisions that we have made where any innovations that we are asked to pursue, we always will consult publicly, consult the market, consult the Government where appropriate, to ensure that, in pursuing market development, we're not sacrificing protection. And I think you can clearly see that through our record and through the developments that we've implemented over many, many years.

**Hon Audrey EU Yuet-mee:**

Yes, but, .....

**主席 :**

余議員。

***Hon Audrey EU Yuet-mee:***

..... you see, Mr WHEATLEY, that is a very vague and general answer. You say, well, we can see that from your practice and so on and so forth but what Mr KO at least had done is that he's given us chapter and verse in the document which refers to "quick wins" and he said, well, he was very worried that it was one of the reasons that led to the Lehman – or one of the reasons that contributed to the collapse of Lehman and the saga of Lehman because he said here was SFC and the former Chairman of SFC being very intent on "quick wins" and I asked you how can we see that, at that time, actually, your first priority, or SFC's first priority, was investors' protection. And you say, "Well, well, it's very vague, very general, you can find it somewhere." Can you point to some document that we can see which shows that the SFC policy at that time was primarily – and I underline the word "primarily" – to protect investors and not to make "quick wins"?

***Mr Martin WHEATLEY:***

Well, I .....

***Chairman:***

Give us some details, Mr WHEATLEY.

***Mr Martin WHEATLEY:***

Well, .....

***Hon Audrey EU Yuet-mee:***

Give us some documentary proof.

***Mr Martin WHEATLEY:***

Well, the documentary statement – I'm not sure you'll accept it as proof – but our annual report, every year, we report on the activities that we've undertaken, where the balance of our efforts have been put, the importance of investor protection and what innovations that we've supported. So you will see, and I'm very happy to provide chapter and verse from our reports each year as to the activities that we've undertaken.

***Hon Audrey EU Yuet-mee:***

Yes. Mr WHEATLEY, I wasn't .....



**主席：**

余議員。

**Hon Audrey EU Yuet-mee:**

..... asking you for a general statement. That was precisely my question. I understand that you say investors' protection was one of your statutory duties. My question was underlining and emphasising the word "primarily". Where is there any documentary evidence that the primary objective of the SFC was to protect investors and not, for example, to make "quick wins" or facilitate market development? That was the crux or the gist of my question to you.

**Mr Martin WHEATLEY:**

Okay, .....

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Chairman.

**Chairman:**

Can you be more specific?

**Mr Martin WHEATLEY:**

Well, statutorily, which is what drives – what we are required to do, we have a range of objectives. They are not prioritized. There is not a primary objective which is rated over another. We have to balance a number of different objectives. So, in the law, what you're asking for, in the law, we're not subject to a constraint that says .....

**Hon Audrey EU Yuet-mee:**

No, Mr WHEATLEY, .....

**Mr Martin WHEATLEY:**

..... balance this .....

**Hon Audrey EU Yuet-mee:**

..... I wasn't asking .....

**主席：**

等一下，等證人先作答，繼續回答下去。

**Hon Audrey EU Yuet-mee:**

Mr WHEATLEY, don't waste my time .....

**主席：**

等Mr WHEATLEY回答下去吧，余議員。

**Hon Audrey EU Yuet-mee:**

..... because my 10 minutes is up. I wasn't asking you about the law.

**主席：**

不要緊，我多給你1分鐘，我想先讓他回答下去。Mr WHEATLEY。

**Mr Martin WHEATLEY:**

Okay. In the law, if I can, there isn't a ranking of objectives. We have a number of objectives and we are required to balance those in the law. In practice and in our reports, in our publications, we make it very clear that protection of investors is our first priority.

**Hon Audrey EU Yuet-mee:**

Yes, Mr WHEATLEY, .....

**主席：**

余議員。

**Hon Audrey EU Yuet-mee:**

..... you understand English and my English – I don't think was that bad that I didn't make myself clear. I wasn't asking you about the law. I was asking you about the SFC practice and I was asking you where in any of the SFC documents do I find a clear statement, a clear directive to your staff, (*The*

*buzzer sounded*) to the public, that your primary objective, your primary function was to protect investors and yet, in your answer just now, apart from referring to the law, you said, "Well, because we have so many functions, we balance." Now, that wasn't my question because .....

**Mr Martin WHEATLEY:**

I answered .....

**Hon Audrey EU Yuet-mee:**

..... I was asking you about .....

**Mr Martin WHEATLEY:**

Mr Chairman, if I may .....

**Hon Audrey EU Yuet-mee:**

..... paragraph 27 .....

**Mr Martin WHEATLEY:**

..... answer the question, .....

**主席 :**

等.....等.....

**Mr Martin WHEATLEY:**

..... I did answer your question.

**Chairman:**

Will you, please, wait, Mr WHEATLEY?

**Hon Audrey EU Yuet-mee:**

I was asking .....

**Chairman:**

Wait till I ask you .....

**Hon Audrey EU Yuet-mee:**

Yes, I was asking you .....

**Chairman:**

..... to respond.

**Hon Audrey EU Yuet-mee:**

..... about paragraph 27, where you say, "However, investor protection has always been and will remain our first priority" and I underlined the words "first priority". That was my question, Mr WHEATLEY. And I'm asking you where we can find any documentary proof that the SFC practice, that the SFC policy, at that time, was primarily to protect investors, not to balance the number of various functions but primarily to protect investors.

**Chairman:**

Mr WHEATLEY?

**Hon Audrey EU Yuet-mee:**

That was my question.

**Mr Martin WHEATLEY:**

Mr Chairman, I have answered the question – "in our annual report".

**Hon Audrey EU Yuet-mee:**

Yes, please, provide the particular paragraph or the sentence where I can see the word "primarily" or "first priority" or "first job" or "first function", that it comes first. Is that okay?

**Mr Martin WHEATLEY:**

Yes.

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Mr Chairman, we're very happy to provide that.

**主席：**

即是會後會給我們資料，說得清楚一點。其實問題是很清楚的，也是很聚焦的，希望韋奕禮先生在會後書面回應我們，告訴我們那些實際的做法是怎樣符合投資者利益保障，那方面說清楚一點，是怎樣進行你們的工作。可否在會後交這些資料給我們？

**Mr Martin WHEATLEY:**

Yes, Chairman.

**Chairman:**

Thank you. 接着下一位是甘乃威先生，之後是葉劉淑儀議員。甘議員。

**甘乃威議員：**

OK。主席，我想問的文件是S58。我拿着的是中文版，我看見中文版和英文版都是一樣，那個.....

**主席：**

不要緊，中英文都不要緊。

**甘乃威議員：**

就是6.1，可能剛才主席都有問過，那是6.1。因為這裏是韋奕禮先生回應高秉忠先生所提有關企業融資部及投資產品科採取不同的處理方式。我想確認一下，你在6.1那裏說得很清楚，"《公司條例》及《證券及期貨條例》所訂立的是兩個不同的制度，而證監會的責任是同時實施兩個制度。"我想你確認一下，換句話說，你在這兩個條例之下去審批不同的產品，是否都用不同的準則去審批相關的產品？

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

They are two different regimes and, therefore, there are slightly different requirements that are placed on us. You ask "do we adopt different standards or criteria?" The answer to the second is, yes, different criteria are adopted because there are different requirements within the two legal regimes. The answer to the first point – do we adopt different standards – no, we ensure that all products fully comply with the appropriate regime.

**主席：**

甘議員。

**甘乃威議員：**

甚麼叫做符合你們的標準呢？因為我看到6.2，你接下去看6.2，一如剛才余若薇議員說過的保障投資者方面。在6.2那裏，你說過，01年你們在證監會曾有內部的辯論，就如何監管結構性產品，包括上市產品……意思是非上市產品包括在內。辯論的焦點是這樣的，"債權證形式的結構性產品應否繼續按照《公司條例》的監管，還是應該作出若干轉變，以按照《保障投資者條例》監管，因為後者的監管制度有較大的靈活性。"

我想問你剛才提到的標準，究竟你覺得用保障投資者作為一個重要的標準去實施在有關《公司條例》的產品或者在《證券及期貨條例》的產品上面，你究竟是用哪一個標準去進行這個工作呢？因為你這裏提到說，如果用《保障投資者條例》的監管，後者的監管制度有較大的靈活性。你可否解釋一下呢？

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Well, this was the relevant legislation at the time that the products were first introduced and, as I understand it, under the PIO, the SFC would have had the ability to develop codes and guidelines in a more flexible way than under the Companies Ordinance where the requirements for products and the requirements for disclosure were quite clearly and definitively set out.

**主席：**

甘議員。

**甘乃威議員：**

但我想問，為何當時你們的有關討論是……因為6.2最後那段你提到，就是因為要作出法例的檢討，要改變。究竟到了此時此刻，你們是否直到09年才作出一些建議呢？之前是沒有作出任何建議，令致現在……你同不同意你在審批這些產品方面出現兩種不同的標準，特別在保障投資者方面的標準是不一致呢？

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

The first part of the question, yes, we did make proposals before 2009 to amend the Companies Ordinance. Some of those proposals have been implemented, some of those are at draft stages, but it's a complex piece of work covering many, many aspects of the Companies Ordinance, not just structured products within it.

In terms of whether it provided different levels of investor protection, both regimes would have required that information was made properly available to individuals and both regimes would have required that, when the products were sold to individuals, the organization selling those products would have been subject to our Code of Conduct.

So, there are some differences because they're different legal bases but both of those legal bases provide investor protection and both of those legal bases are subject to the same Code of Conduct in the selling of products.

**主席：**

甘議員。

**甘乃威議員：**

其實，換句話說，在01年，你已發現在《公司條例》上出現了漏洞，在保障投資者的……有關監管上怎樣保障投資者出現了漏洞，當時為何你不提出這些建議，去提醒投資者《公司條例》

對投資者的保障是有問題的？為何當時你們不提出這些警告，提醒市場(特別是投資者)這方面有這樣的風險呢？

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Well, I don't accept the premise of the question, which was that, in 2001, we spotted a loophole. There wasn't a loophole. There were different regulatory structures that we had to enforce. The debate, at the time, was whether the CFD division had sufficient approval authority in terms of approving products but there was no loophole as such. This was discussed fully within the organization and at the SFC's Board and decisions were taken that the two structures could continue without a need, at that stage, to change them. So, there was no loophole.

**主席：**

甘議員。

**甘乃威議員：**

主席。如果你覺得.....韋奕禮先生說沒有漏洞，我想問，為何你們會在2009年10月提出"有關對《公司條例》的招股章程制度及《證券及期貨條例》的投資要約制度的可行性改革諮詢文件"？這份文件就是CB(1)220/09號文件，我不知道韋奕禮先生你記不記得，裏面提到包括.....我簡單讀出其中一兩點，因為有很多建議。這兩點說到"提高".....在第50段裏面有"提高"，你要求加強訊息的披露，包括發行人、保證人、安排人、抵押品、參考資產，這些建議正正就是.....第50段的主要建議有加強訊息的披露，提高產品的透明度。這些都是有關在《公司條例》及證監條例的投資者要約制度方面的一些改善建議。

我想問，這些討論，其實是否在2001年，你們的有關討論其實已經開始了？即是說這些討論，是否已經在證監會的期貨條例中使用這些標準，而在《公司條例》則不是使用這些標準呢？

**Chairman:**

Mr WHEATLEY?



**Mr Martin WHEATLEY:**

Sorry, forgive me, Chairman, I've just found the relevant paragraph, so, if I don't answer the question correctly, maybe honourable member could restate it.

The proposals that are now being considered under the Code of Unlisted Structured Products are very much reflecting how the industry has evolved and developed over the last eight years. They are, today, what we think is appropriate and, indeed, is a debate that is being held in many regimes around the world. So the enhancements to disclosure, including the introduction of key fact statements, standards for disclosure, exactly the same debate is being held within Europe, within Australia and a number of different regimes and it's to reflect the fact that the markets have evolved over the last eight years. Those weren't particularly issues at the time of 2001 when structured products first started to be created but I think we've recognized that the market's moved on and it's time to rethink the regime under which they're offered.

**主席：**

甘議員。

**甘乃威議員：**

我的問題就是有關這些，譬如你在第50段提到的發行人及保證人的資格規定、抵押品的資格的規定、參考資產的資格準則，這些建議，我想問，是否《證券及期貨條例》(計時器響起)裏面的相關產品就是使用這些準則及標準呢？

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

As I've said earlier, the structures of the SFO and the Companies Ordinance have a different legal basis and, therefore, have different requirements and different criteria that we are required to adopt. What we're now describing, in terms of product transparency and the structural features, very much reflect what, I think, all of us have discovered over the last two years, that simply the credit rating agencies' work in rating products didn't give enough information about the underlying liquidity of products. So we're suggesting the introduction of changes today which reflect the fact that

the market has moved on and the market has developed hugely. They weren't issues at the time in 2001.

**主席：**

接着是葉劉淑儀議員。

**葉劉淑儀議員：**

多謝主席。我提的問題都是基於有關文件SC Reference No. SC(1)-S57。

有幾點想問一下韋總裁。第一就是，文件中經常提到，譬如 Executive Summary 第2段，韋先生說證監會監察那些中介公司是較好的。他說收到的投訴中，少於1%是有關證監會監察的中介公司，而99%則是有關銀行的錯誤銷售。這個比例是否有點誤導呢？因為其實售賣的銀行遠多於證監會監察的中介公司，對不對？這個事實是不是真的？

第二，證監會監察的中介公司包括新鴻基及凱基，正好兩間都賠了，這是否就是說，其實證監會監察的公司是百分之一百都有問題的？

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

No, I think this was replying specifically to the allegation that it was lax supervision of intermediaries by the SFC that contributed to the Minibond losses and it was putting in perspective that the majority of Minibond losses were not due to selling by SFC-supervised intermediaries. It was simply dealing with that narrow point.

**主席：**

葉劉淑儀議員。

**葉劉淑儀議員：**

但事實就是，證監會監察的中介公司中，有售賣雷曼票據的遠少於銀行，對不對？這個是事實，所以是1%。那個比例其實是不是1%與99%的差距？

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Well, in terms of the total numbers of people affected by Lehman's failure, I think the ratio is correct. We're not saying that there were no SFC-licensed intermediaries that were at fault because, clearly, we've found, in a number of cases, there were. This was simply trying to put in perspective the statement made by the witness that it was lax supervision of intermediaries by the SFC that led to Minibond losses and we're just trying to put that into context. It's not a significant point that's trying to say that there wasn't failure by intermediaries under SFC supervision, as well.

**主席：**

葉劉淑儀議員。

**葉劉淑儀議員：**

主席，韋總裁已不止一次告訴我們，其實他在一些監察過程中已看到銀行銷售的問題，亦已通知了金管局。我可不可以問問韋總裁，你覺得是你們的監察比較有效，還是金管局的？

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Can I clarify the first point? You say that we identified the mis-selling of banks. What we identified was, in our licensed population, mis-selling and we did that through our inspections. We did not inspect the banks. So we were not able to make that conclusion but we shared our conclusions relating to our own inspections with the HKMA and invited them to carry out their own inspection of banks, which is their responsibility and duty.

**主席：**

葉劉淑儀議員。

**葉劉淑儀議員：**

我想問一問韋總裁，你覺得金管局有沒有……即你們監察這些中介公司賣證券的經驗是豐富的，你覺得金管局有沒有甚麼地方是特別可以向你們多點借鏡的？譬如說要多些權力還是怎樣？

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

I'm certain that we can both learn from each other's experience and the objective of having an MOU in place is that we do share experience. The HKMA does not have the same powers and I think one of the points that's already been made by the HKMA is whether they should have additional powers in terms of their own ability to supervise bank staff and banks in general.

**主席：**

葉劉淑儀議員。

**葉劉淑儀議員：**

主席，在這份文件裏，韋總裁也有提到政府正在研究甚麼監管制度是最好，應否採用澳洲那種twin peak——雙峰的方法，即是兩個監管機構，即證監會與金管局都繼續監察。其實真正的原因是否因為你們兩大機構都不想放棄自己的監管權力呢？

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

No, I think that you'll find that both regulators want to have the best possible market structure for Hong Kong. Now, clearly, we both supervise a part of that market today and there is some overlap in terms of the regulatory

responsibilities. What we've suggested to the Government is that they should review whether there is a better model.

Now, that's not a simple question and every major jurisdiction in the world is going through a similar question at the moment but it's a discussion that I think only the Administration can have. It's very difficult for either one of us who have, clearly, a part of the regulatory structure, it's difficult for either one of us to prescribe an entire regime that covers all financial products, some of which are under our control, some of which are under the MA's control and some of which are under neither of our control.

**主席：**

葉劉淑儀議員。

**葉劉淑儀議員：**

主席，因為時間關係，我要換一個問題。我想問文件第17段，這裏……

**主席：**

還是S……S甚麼？還是那份文件，是嗎？

**葉劉淑儀議員：**

剛才我一直談的S57。

**主席：**

還是同一份文件，是S57，OK。

**葉劉淑儀議員：**

S57的第17段。這裏證監會反駁高秉忠先生的一些講法，就是說這些雷曼票據在其他地方也有在零售市場賣給小投資者，所舉的例子就是新加坡、台灣、印尼都有賣，其他一些信貸掛鈎票據亦有在澳洲、愛爾蘭、日本、德國、丹麥、挪威、瑞士、荷蘭等地方售賣。但是，這裏的資料不足夠讓我們判斷不同地方在零售層面的銷售對保護小投資者的程度有沒有分別。譬如說，可能有些地方有賣，我不知道，或者可能有些地方例如日本，它要求零售投資者達到某個財富水平或某個專業投資者水平，很詳細地評估過才賣。所以，如果就此便告訴我們，說這

些票據在其他地方都可以隨便在街上售賣，這樣的撮要是否很準確呢？

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Well, again, the point specifically being made was that the witness has said that Minibonds and, probably, all structured products, were not authorized for sale to retail public in any major jurisdiction overseas. That's not true; they were.

The level of protection would have been different and every single jurisdiction will have a slightly different type of protection. In some cases, they would have been sold only under advice; in some cases, they would have been sold through IFAs; in some cases, they were sold only to professional or semi-institutional investors. So there is a very complex picture globally and the standards are very different in every market. This was dealing with the assertion that structured products were not available in any major jurisdiction overseas, and that's simply wrong.

**主席：**

葉劉淑儀議員。

**葉劉淑儀議員：**

主席，也是因為時間關係，證監會可否就第17段所舉的例子提供多些詳細資料給我們，看看其他司法管轄區對這些結構性金融產品在零售市場售賣是有甚麼規定，對小投資者有甚麼保障，可否給我們多一些資料？

**主席：**

韋先生，可否於會後書面提供？

**Mr Martin WHEATLEY:**

Chairman, that's a very complex question and would take considerable resources and time to provide.

**葉劉淑儀議員：**

或者可否提供幾個？

**主席：**

葉劉淑儀議員，你可否稍為簡化那個要求？

**葉劉淑儀議員：**

也許這樣吧，第17段那裏有很多例子，或者可否找幾個例子，亞洲找一些，澳洲找一些，歐洲找一兩個，讓我們看看這些結構性金融產品賣給零售投資者、在零售層面售賣時對投資者有甚麼要求呢？因為我聽過有些人說，美國雖然可以賣，但可能要求購買的零售投資者一定要是 high net-worth individual，有很高財產的，或者已經有 options account 的，這就表示他已經過(計時器響起)某個程度的評估——風險評估。

**主席：**

韋先生，或者可以選一些有代表性的例子來提供資料就行了。Mr WHEATLEY, is that okay?

**Mr Martin WHEATLEY:**

Yes, certainly, Chairman. Yes, we can provide examples. I just would say that, to be fully comprehensive, that would be an extremely complex piece of work. But we're very happy to provide some illustrations.

**主席：**

Thank you. 下一位是劉慧卿議員。

**Hon Emily LAU Wai-hing:**

Thank you, Chairman. Chairman, I think it would be very useful if the SFC can provide the illustrations because I'm sure Mr WHEATLEY understands, this subject has come up again and again on the fact that why is it that Hong Kong's doing it and other jurisdictions don't, but you are saying to us that they do as well. So, the fact that you can name these places shows you must have the information; otherwise, you wouldn't have named them. But you have to tell us the circumstances under which, you know, similar products were sold in other countries. So I hope that you have some

background for paragraph 17 without just – you know, I'm sure you wouldn't have just mentioned that to us without any backing.

Chairman, I want to ask some questions relating to the same document, S57. Page 16, paragraph 60. Mr WHEATLEY is talking about Mr KO's resignation from the SFC. He resigned on 26 September 2008 stating that this was due to a conflict with his supervisor. However, he was subsequently offered a position in another Department which he accepted. And then, in the following year, on 19 February 2009, he resigned again and only finally left the SFC on 31 August 2009. And then he said that our Subcommittee, Chairman, was established at a meeting of the House Committee on 17 October 2008 and the witness' first resignation predated the establishment of the Subcommittee and his second resignation was four months after the Subcommittee was formed. And Mr WHEATLEY said, "His resignation period was extended beyond what was usual or required and the Statement was only made 11 months after he resigned from the SFC." So you said you "do not find the facts entirely consistent with the assertion in his statement that he resigned from the SFC in order to assist the Subcommittee."

So, Chairman, so what is Mr WHEATLEY trying to tell the Subcommittee?

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

There was a statement made by the witness that he resigned for the purpose of assisting the Subcommittee; I'm saying that that doesn't appear to be consistent with the dates and the records that we have.

**主席：**

劉議員。

**Hon Emily LAU Wai-hing:**

So, Chairman, is Mr WHEATLEY saying the witness was lying?

**Mr Martin WHEATLEY:**

No, .....



**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

..... in a number of statements – I think, overall, what I'm saying, and the fact is that we employed Harold for a considerable period after his first resignation because we recognized that he has valuable experience which was useful to us and so it was very useful that we could continue to have Harold helping us with our handling of complaints. But, in terms of the statement made to this committee, I'm saying that, in a number of areas, notwithstanding Harold's intention and purpose in supporting this investigation, there are a number of statements that appear to be unreliable and this is one of those statements but there are many, many statements where we would question the facts on which the statement is based.

**主席：**

劉議員。

**Hon Emily LAU Wai-hing:**

Well, Chairman, we look at the dates of the first and the second resignation and the final departure but why should Mr WHEATLEY ask the Subcommittee to question his assertion that he resigned in order to assist this Subcommittee?

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Well, because he resigned before the Subcommittee existed.

**Hon Emily LAU Wai-hing:**

Well, .....

**主席：**

劉議員。

***Hon Emily LAU Wai-hing:***

..... I think the Subcommittee, of course, was formed in October of 2008 but, prior to that, there was quite a bit of discussion that the Legislative Council should investigate this whole fiasco, so, if he, if Mr KO's first resignation, Chairman, was in September of 2008, which is just one month before the Subcommittee was formed in the House Committee, so, at that time, he would have known about all the discussion, isn't it? So why do you want to question what he asserted to this Subcommittee?

***Mr Martin WHEATLEY:***

Well, my final .....

***Chairman:***

Mr WHEATLEY?

***Mr Martin WHEATLEY:***

..... point is that there is no need to resign from our organization in order to assist the Subcommittee and, in fact, had he not resigned from the organization, there would be less questions about the legality of the documents that have been produced as evidence.

***Hon Emily LAU Wai-hing:***

Yes, Chairman, .....

***主席 :***

劉議員。

***Hon Emily LAU Wai-hing:***

..... this is my second question relating to paragraph 61, on page 16. As Mr WHEATLEY said, he said it's unclear why he needed to resign. He said, "If the Witness had remained an employee of the SFC he could still have given evidence to the Subcommittee and would then have had legitimate access to documentation which under current circumstances may have been illegally retained." So the SFC, Mr Chairman, I want to ask Mr WHEATLEY, does have a policy, what people would call the "whistle-blower" policy, of allowing their employees, if they see something that's happening that they don't agree with, something that may be contrary to public interests, they can bring the documents that they have access to and

come to the Legislative Council, disclose it to us? Are you saying that all your employees can do that?

**Mr Martin WHEATLEY:**

We have .....

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

..... proper grievance procedures internally for dealing with anybody who feels that they need to blow a whistle or have problems with the way we carry out certain activities. There are nonetheless constraints in terms of taking away information which has been used for the purpose of carrying out our regulatory duties. Now, as an employee, he would have had access to such documents; as an ex-employee, he should not have such documents.

**主席 :**

劉議員。

**Hon Emily LAU Wai-hing:**

First of all, Chairman, I think we would like to have a copy of the so-called grievance procedure. Mr WHEATLEY does not describe it as a whistle-blower policy. So you haven't got a whistle-blower policy but you have a grievance procedure. So can you let us have a copy of that to show us what sort of procedure that your employees can follow to express their grievance? But then you tell me that there are constraints and, so, if Mr KO were still employed by the SFC and you've seen some of the things that he referred to, do you think he would have been able to come to this Subcommittee with those documents and then the SFC would have given him authorization to come and speak to us?

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Well, we would not have needed to give him authorization to come and speak to you because that would be a requirement that you would impose.

The access to documents would have meant that, were you able to properly subpoena documents, he would have been able to provide those documents legally to you.

In the absence of being an employee, there is a serious question over why the range of documents that the Subcommittee appeared to have – and I said "appeared" to have because, despite my repeated requests to understand which documents you have, I've been told that I'm not allowed to know that – but I believe that you have a number of documents which possibly may have been obtained illegally.

In terms of the grievance procedures, I'm very happy to provide you with our grievance procedures; they are publicly available on our website but I'm happy to provide you with copies of those documents.

**主席：**

還是請你會後提供這些申訴的程序，韋奕禮先生。

**Hon Emily LAU Wai-hing:**

Chairman, I still don't understand .....

**主席：**

劉議員。

**Hon Emily LAU Wai-hing:**

..... this business about if this – Mr KO or any other SFC employee can come to this – okay, we can summon the employee – that the employee can come, armed with various documents to show us why he had the grievances?

**Mr Martin WHEATLEY:**

If .....

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Chairman, if you summon an employee who has legitimately access to documents and you ask that employee for such documents as part of your inquiry, the employee would provide those documents to you. An

ex-employee does not have access to our documents unless he has taken measures to obtain copies which are against our rules and potentially against the SFO.

**主席：**

劉議員。

**Hon Emily LAU Wai-hing:**

So, Chairman, what Mr WHEATLEY is telling us is, if we summon the employee and we also summon the documents, then the employee will come with all the documents to assist this Subcommittee.

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Well, Chairman, that's exactly what I have done. I have been summoned and I have produced whatever documents this committee has asked for that we are legitimately and legally able to provide.

**Hon Emily LAU Wai-hing:**

That's the last point: "legitimately and legally". I hope you .....

**主席：**

劉議員。

**Hon Emily LAU Wai-hing:**

..... would not reserve those things to the last sentence. I don't think we are here to debate that point today, Mr WHEATLEY. And, if you look at the number of correspondence we've had with you, I think that you should – I hope you would be more candid with this Subcommittee and not mislead us and the public into thinking that it's so easy, if we ask a question, all the documents and evidence would be available. Mr WHEATLEY, that is not the point. (*The buzzer sounded*) Thank you, Chairman.

**主席：**

接着是涂謹申議員。

**涂謹申議員：**

是，主席。2月18日，韋奕禮先生……我希望他應該記得，那時我跟他有些問題對答，裏面談到究竟根據公司法和根據證監條例是否有不同的標準。後來，即現在韋奕禮先生很詳細地再去回應高先生在這一方面的問題，我也看過。但問題是，最後，我撇開零售層面的銷售的監管，我希望韋先生不要再說在零售層面那些人應該如何如何，要小心去解釋，怎樣去評估風險，我先不說那些，因為那是另一個題目。我只是說在證監會裏面的審批標準，似乎韋奕禮先生現在是說，就算有不同的……他用的字眼是"regime"或者不同的"approach"，但提供資料及保障的標準，或者對投資者的標準是一樣的。

好了，我現在的問題是希望問韋奕禮先生，你是否仍然說，在從前，無論是根據公司法及證監條例的兩個所謂"approach"或"regime"，提供資料及對小投資者的保障是絕對一模一樣的？我的說法是：是否絕對一模一樣？無論你內部怎樣審批，根據不同的法例，原來譬如說可以加諸的條件或者要求的保障，或者在那個所謂結構性產品方面的審批標準是一模一樣？是否這樣呢？

**主席：**

我相信問題已清楚了。Mr WHEATLEY？

**Mr Martin WHEATLEY:**

Chairman, Mr TO has referred to the 18 February exchange and I can't remember the exact words but I don't think I would have said that the standards are exactly the same because they're clearly not; they're two different legal regimes. They're broadly equivalent in the level of protection provided but I did at no stage say that they're exactly the same.

**涂謹申議員：**

是了。

**主席：**

涂議員。

**涂謹申議員：**

因為我看你回答甘乃威議員或在其他書面文件裏面，你似乎想告訴我是一模一樣，幸好現在我給你多一次機會，你說不是一模一樣，OK。因為在2月18日，你用的字眼是"in broad sense"，我現在.....

**主席：**

哪份文件，涂議員？

**涂謹申議員：**

主席，2月18日的逐字紀錄第20頁。

**主席：**

OK，好。1月18日嗎？

**涂謹申議員：**

我quote吧，我引述出來吧，其實我問了一輪問題，然後最後.....2月18日。

**主席：**

是2月9日吧？

**涂謹申議員：**

Sorry，對不起。是2月9日，對不起。第一稿是2月18日，說的是2月9日，對不起。2月9日，韋先生。我現在引述。

**主席：**

可否告訴我們第幾頁？

**涂謹申議員：**

第20頁。

**主席：**

第20頁，OK，行，謝謝。請繼續。

**涂謹申議員：**

我來引述，因為這樣公道一些，"One standard is set out in the Companies Ordinance and, therefore, there's a very prescriptive schedule of requirements in terms of disclosure. One standard is set out under the SFO which allows us to write and impose codes of disclosure on the products. But, in broad sense, they both operate to broadly the same standard in providing information and protection." 你用的字眼就是"in broad sense"。

你剛才都說不是一模一樣，我想問有甚麼分別呢？要記住，那個分別是否令到.....假設那些迷你債券在不同部門都是這樣審批的，或者是不是也會這樣爆，這個稍後我會再問你。但是，最重要是那個標準，因為高先生是說標準不同，你就老是說："高先生從沒做過那邊那個部門，另外一邊，你都不懂，每樣事情這裏誤解、那裏誤解，不過你誤解也是有理由的，我也明白的。"但高先生指出就是不同，你現在也回答說是不同，那麼你不可以回答是怎樣不同？

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Well, the key differences are that, under the Companies Ordinance, the disclosure requirements are set out in a schedule to the Ordinance which prescriptively sets out what information should be made available and the role of approving the document is to ensure that it is compliant with that schedule and that all of the information is made available and that, in addition, the structural elements are compliant or match the requirements in Chapter 15A<sup>[Note]</sup> of the Listing Rules. Under the SFO, we have developed a code for the issuance of collective investment schemes which sets out what the requirements are in terms of disclosure. And, so, there are different legal structures that we're operating to.

Now, the question is, would Minibonds have been approved under the different regimes. It's impossible to say because they are debentures and were structured as debentures. Were they structured as collective investment

---

[Note] The witness clarified after the hearing that it should be "15A" instead of "15" as mentioned at the hearing.



schemes, there may have been some differences, I don't know. They would have, therefore, been subject to our code and I'm sure the issuer of those products would have made sure that the product fully complied with our requirements. So, had they fully complied with our requirements, then they would have been approved under the SFO regime. But it's very difficult to speculate because they weren't structured as that and, therefore, they weren't brought to that regime.

**主席：**

涂議員。

**涂謹申議員：**

主席。你在S57，即3月8日你交給我們以詳細反駁高先生的那個文件裏面，你很詳細地解釋，說迷你債券現在怎樣"爆煲"的情況，原本審批採用那個標準的時候，全部那些標準都是業內認為可以接受的，甚至你在該文件第82段提到，美國法院現在突然間說，原來它用下面的一些雷曼附屬或子公司或相關公司去做那些所謂"對盤"(swap counterparty)，現在突然間有這樣的判決，是不可預見的。

我想問的就是 —— 當然，我不知道你可否這樣回答，不過我盡量都應該是這樣問 —— 我們得到的印象，起碼是我吧，就是覺得高先生是說，因為是兩套不同的法律標準或者法律基礎，所以在高先生所接觸的那堆產品裏面不可能有一個這樣的安排是能夠被接受的。應該這麼說，當時雷曼本身是很有"料"的，是AAA甚麼的，然後它下面的子公司又兼做counterparty，即對盤那些。但這樣一串又一串全部由它做 —— 當然我知道，不是全部迷你債券都用它下面那個來做counterparty swap，但起碼部分是 —— 這樣的狀態，如果是在高先生工作的那個部門有一個類似的產品，是不可能容許有這種結構性風險一連串地往下蔓延，這就是我得到的印象。不知道你覺得是不是會這樣發生呢？即如果換了用Companies Ordinance.....不，sorry，用SFO，會不會是完全不同的看法？無論是理論上及實質上。

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

*(The buzzer sounded)* Chairman, the department that Harold worked in was authorizing a very limited range of products. They were investment-linked insurance products and equity-linked deposits, both of which were authorized under the SFO and are structurally very different from Minibonds. Minibonds were structured in a particular way – they were structured as debentures – and, therefore, there's no question, the question just doesn't arise, as could they have been authorized under the SFO because they're debentures and debentures are authorized under the Companies Ordinance.

**主席：**

好了，各位，現在我要宣布小組委員會休息十多分鐘。請各位在11時05分返回會議廳，以便委員會有足夠法定人數繼續進行我們的研訊。在休息期間，請證人不要與其他人士討論他的證供。

**(研訊於上午10時47分暫停)**

**(研訊於上午11時06分恢復進行)**

**主席：**

現在我宣布研訊繼續。韋先生，你現在仍是繼續在宣誓下作供。下一位是第一輪排隊的梁美芬議員。梁議員。

**梁美芬議員：**

主席，我都想問韋奕信先生……

**主席：**

韋奕禮先生。

**梁美芬議員：**

是的，Mr WHEATLEY吧，關於答覆Mr Harold KO的那份文件，是section 58第10點。

**主席：**

即文件S58，是嗎？

**梁美芬議員：**

是了，第10點。在第10點那裏，其實有部分是跟進葉劉淑儀剛才的問題。其實你們在這個答覆中比較詳細地列舉了其他國家銷售雷曼產品的情況，你亦提供了不少附件。我希望Mr WHEATLEY跟我一起看其中一些附件——附件6。附件6其實是提到……

**主席：**

S58附件6。

**梁美芬議員：**

S58附件6的……

**Chairman:**

Annex 6.

**梁美芬議員：**

…… page 0001一直到0004。在0002，即這附件中，那個作者或者專家提到海外的情況，他們都列出兩大重要的要點，在第2頁第2段及第3段，特別指出那些銷售代理會不會在sales practice方面錯誤地將一些他們認為有高風險的產品列作相對保守的產品。然後在另外一頁，0003最後那段，他亦總結了大部分此類雷曼苦主的投訴都有一個中心點。而該中心點，在我們處理的時候，大家都歸納說，究竟這些銷售代理是否有充分的disclosure——披露。但到了最後，他都提到說，如果在現時這些情況下，其實這是more than一個securities fraud，是產品的欺詐，rather than failure to disclose risks。我覺得這是其中一個observation，比較清楚地說出，如果那個表達方式在各方面出了問題，這根本可能是一個securities fraud。

第二，在同一個討論中，他們多次提到仲裁。最後0004頁提到，他們有很多仲裁的申訴。這裏和其他幾個附件也提到以不

同的方式去解決這些紛爭，就是在附件5及附件4。在附件5，你看到英國亦是很詳細地討論，他們有一個現存的scheme，就是Financial Services Compensation Scheme。這個scheme，很明顯，我想我們香港應該是沒有的，而我們在一開始當雷曼事件出現時，我自己也一直希望看看可否成立類似這種大規模式，可能在一些很特別的情況下，我們是否應該成立一些所謂金融賠償基金。由香港的金融機構共同銷售一些產品，當中可能會出現一些問題，這個會不會將來我們香港真的可以考慮呢？

附件4第1頁最後那裏亦然。你看到，其實在外國，人家有一個Financial Ombudsman，這個都是我們有提過的。那就是說，我的幾個問題其實都是針對一點：究竟現在我們怎樣去解決現時仍未得到解決的一些個案？因為香港去年以大規模的形式，政府及你們都facilitate了一個和解方案。但你都看到，和解跟仲裁及這類賠償基金的解決方式其實是不同的，亦包括是否有一個財務專員(Financial Ombudsman)。我們是否就此採用這個和解方案，其他我們提過的，似乎又好像沒有再去想了。你看到外國其實仍不斷採用這些方案去解決現時的問題。當然，它有提到一點，就是如果在銷售時講明是一些capital security，是很安全的產品，他們才可得到賠償，其他的就不可以了，所以那些亦有機會進行訴訟或交去仲裁。我看到你們在section 58第10點歸納了很多在外國都有的買賣。

追問兩個問題：第一個問題是，除了剛才葉議員提到說究竟外國的法例是怎樣，我希望你們可以再跟進他們的解決方式，現時譬如新加坡、美國、英國，部分是引用賠償基金，到了甚麼階段，我們香港與他們的比較究竟如何？而且，因為在香港除了雷曼那些Minibond-related，還有很多ELN，很多其他的，他們都仍在爭取，我們怎樣處理這些餘下的一些投資者的問題？

第二，香港提出了一個新的方向，早前說過的調解機制，50萬元以上的金融紛爭可以進行調解，50萬似乎太少了，現在我們餘下的個案在投資數額上很多都超出.....

**主席：**

盡量不要提出自己的意見好嗎，梁議員？

**梁美芬議員：**

我想.....

**主席：**

你已經兩次提出自己的意見及建議，這是不可以的，是不可以的。

**梁美芬議員：**

我希望Mr WHEATLEY提供現時究竟證監會考慮如何解決這些問題。外國方面，你們給我的附件都有這麼多種不同的方式，我們現在站在甚麼位置呢？

**主席：**

你的問題相當長，梁議員，你只有.....

**梁美芬議員：**

兩個問題說完了.....

**主席：**

.....你只有10分鐘而已。

**梁美芬議員：**

.....他可以回答了。

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Okay, Chairman, thank you. In terms of dispute resolution, every regime has something slightly different and we recommended in our report, in 2008, to the Financial Secretary that Hong Kong investigate whether we introduce some form of arbitration dispute resolution system. The Government have worked through to come up with a proposal and that proposal is now in the public domain for consultation. So any questions about the proposal are more properly focused towards the Administration.

The question which relates to compensation for other products where there are losses, as the committee is aware and as I've been at pains to explain, we don't have any powers to force compensation. We have a compensation scheme for listed products in the event of a broker default but there's no compensation structure in place for mis-selling products or for contractual disputes between two parties. Our approach has been, and was with the 16 banks, that, if we could achieve a positive regulatory outcome which included a buy-back for investors as resolution of our investigations, then that would be a good result and we believed that we achieved that with the Minibond investors where investors received an initial payment of 60% with more to follow once the collateral is valued.

We continue to investigate the other areas where there have been significant numbers of complaints – ELNs, equity-linked deposits – and we would hope to be able to reach a positive regulatory outcome in those instances as well but those investigations are very much still underway. They've not been stopped, they've not been given lower priority, they're very much a high priority to us to resolve and complete those cases.

**主席：**

梁議員。

**梁美芬議員：**

Mr WHEATLEY，其實你都可能應該知道，調解到了最後，可以是一方不同意，而且沒有強制性，所以你看到其他地方都是用仲裁。仲裁起碼還有一個決斷性是約束雙方的，否則就要去打官司，那些小型投資者就最不想打官司。現在我想問，其實你剛才提到，這些賠償基金屬於行政的責任，你們可否真的認真去考慮，建議各大銀行如要在香港銷售這麼多不同樣版的投資產品時，他們有責任共同成立這個賠償基金，去解決那些剩餘的一些比較強的個案呢？

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Chairman, thank you. We have asked the banks under the section 201 agreement to review their processes in terms of how they monitor, do product due diligence and sell products and we've also asked them to review

their complaint handling procedures. Both of those are (*The buzzer sounded*) underway and we will work with the MA to see that a positive outcome comes forward on those.

In terms of mediation and/or arbitration, as I said, that's very much part of, I think, the Government's consultation and they are properly the people who should answer questions on that.

**主席：**

陳健波議員。

**陳健波議員：**

主席，我想回頭說S57，請看看第81、82及83段。為了簡單一點，我不讀出文件的內容，這裏主要是說抵押品應該由受託人持有，所以並不是特別目的投資公司。但這裏最重點是說，英國法院最近就一宗在澳洲出售的文件，即雷曼的文件，裁定轉換條款是有法律效力的。但到了文件第82段卻說，這個案是最新的，就是在Lehman Brothers Special Financing Inc. v BNY Corporate Trustee Services Limited中，美國破產法庭作出相反的裁決。該法庭在2010年裁定，這轉換條款是不能強制執行的。這決定令票據持有人的受託人在這些清盤過程中不再享有抵押品方面的優先權。這裁決推翻了過去10年來眾多結構產品所採用的法律依據，而且是無法預知的。

這裏更重要，第83段說："這亦意味著簽訂了和解協議的16家銀行，可能無法收回他們向投資者回購迷你債券所付出的款項。" 這個如此大的變動，你可否解釋一下為何美國法庭會有這樣的裁定？這對將來這類結構性產品的影響其實是很深遠的，因為如果它一旦清盤，就會有很多後果出現，這些風險很多人都不知道。可不可以詳細地談談這3段的資料呢？

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Yes, Chairman. This is a very, very significant global issue extending way beyond Minibonds. Over the last 10 years, all structured products have effectively been structured under something called an ISDA agreement and

that ISDA agreement is an agreement which was structured under English law and defined terms that affect structured products, how they're structured and who has priority in certain events. Under that agreement, the priority should be for the noteholders and so it should be possible to enforce the recovery of the collateral value in settlement of the noteholders' – or to the advantage of the noteholders.

The Lehman's liquidators challenged that in the US court and the US court upheld that decision. It's also been challenged in the UK court and the UK court upheld the decision that it should be in favour of the noteholders, i.e. the investors. So we've got two national courts taking decisions which are completely opposite – coming at opposite ends. Those decisions will be appealed, it will go through an appeal process, it will have to go to the highest possible level of those courts and the outcome remains uncertain. And the reality is that that outcome remains uncertain which means that the banks who've paid out over \$5 billion in buying back the notes may not recover their funds and the underlying investors may not recover further value from the collateral.

But the structure we set up under the agreement was that the banks would contribute their commission earned to a fighting fund which would employ lawyers that would fight for the collateral<sup>[Note]</sup>. So Hong Kong has a huge advantage over any other jurisdiction in the world in that we've now got a properly-funded action to fight for the collateral<sup>[Note]</sup> but it still remains uncertain as to what the actual, the final outcome will be.

**主席：**

陳議員。

**陳健波議員：**

你在它上訴之前，其實你現正審批很多fund，好像你剛才所說，都是受最近的法庭判案所影響，那你會做些甚麼令將來新批的產品會有這個警告，對於現有的、已批出的，你會作出甚麼警告呢？

---

<sup>[Note]</sup> The witness clarified after the hearing that it should be "for the collateral" instead of "this agreement" as mentioned at the hearing



**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

I'm not sure I quite understand. I think, because of the uncertainty of this outcome, any new funds are adopting slightly different structures in terms of how they're put together. I think it's made the whole situation of these sorts of products very, very unclear globally and the product structurers have to take that uncertainty into account in any new products coming forward.

**主席：**

陳議員。

**陳健波議員：**

我想問另一部分，其實是跟剛才的有關，不過我之後再說吧。我現在想問的是產品認可方面，即product authorization方面。證人的陳述第5點，仍是文件S57.....

**劉慧卿議員：**

第幾頁？第幾段？

**陳健波議員：**

57.....

**主席：**

第5段。

**陳健波議員：**

第4點應該在15頁，即中文那份是15頁。15頁那裏大家看到.....

**主席：**

即是哪一段呀？

**陳健波議員：**

.....高秉忠就.....

**主席：**

15頁第幾段，陳議員？

**陳健波議員：**

15頁的第5段，"就投資產品而言"那裏。15頁第5個point，即證人陳述的第5個point，"就投資產品而言"那裏。那裏主要是說，我不讀出來了，但主要的重點是說，產品的結構是需要符合規定的，例如擔保人。擔保人必須是認可財務機構或獲證監會接納為具規模的財務機構。而你的回覆則說，其實只有很少產品是有擔保的，例如截至2010年2月23日，在投資產品科認可的2 395項產品之中，只有66項(即其實是2.76%)為零售保證基金。你又說這種保證其實是最好的，因為保證是指到期一定可以將保證金額，即可能是全部或可能是按一個比例交回投資者。但據你所說，迷你債券的擔保人的角色卻不同，例如以迷你債券五、六、七、九為例，其發行收益是投資於Lehman Brothers Treasury Company發行的票據，而雷曼控股則作出擔保。如果Lehman Brothers Treasury發生違約事件，雷曼控股會根據這些票據支付款項，即其擔保只是向發行人發出，而不是向票據持有人作出擔保。但很多時候，在售賣這些產品的宣傳文件裏面，當那些購買人見到"擔保"兩個字就很開心，因為擔保一般來說，意思都是希望能擔保如果它到時發生甚麼事，我放了這麼多錢進去，到期能把錢取回。但你這裏很明顯是想告訴大家，其實擔保有不同角色，好像這個角色在雷曼裏面多數是擔保發行人，而擔保發行人，以我的瞭解則不是這麼有用，為甚麼呢？它一發行了那些東西，責任就已完結，所以便沒有甚麼可以擔保。

我想你說說情況是否真的如此呢？其實消費者一定要很清楚區分保證基金的擔保人，即保證他到期一定可以取回，這些是最穩當的，以及相對這些所謂有"擔保"這兩個字出現但其實只擔保發行人，那個責任其實是少很多的。你可否說說這些擔保的分別？

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Okay. Chairman, this was responding to a witness statement that product structures should have ensured that there were suitably qualified institutions to guarantee a product and that the substantial financial institutions should be acceptable to the SFC. Relatively few products are fully guaranteed where the underlying capital is guaranteed. Some are, but even where those products are guaranteed, the guarantee is only as good as the effective credit rating of the guarantor. So, if you buy Greek government bonds, you are effectively buying bonds that are good as long as the Greek government can pay that bond.

In these products, the underlying capital, most of the time, was not guaranteed; you were exposed to the quality of the collateral and the collateral itself could vary in value. So, effectively, the exposure you had was to the value of the collateral. The guarantee that did exist was of the swap payments but that guarantee was a guarantee that Lehman would ensure the swap payments and, clearly, the failure of Lehman meant the failure of those swap payments.

So, the notes were very clearly stated that they were not guaranteed notes, although some features of the note were guaranteed. But even where a feature is guaranteed, the guarantee is only as good as the credit standing of that institution and, in this case, the institution Lehman Brothers has collapsed.

**主席：**

陳議員。

**陳健波議員：**

其實我都是想說一件事而已，就是我剛才說的那個例子，英國法庭與美國法庭的判決都可以不同，因而影響了受託人的權利。我們一向都以為東西放在受託人那裏很安全，如果現在影響到權利，這個風險就沒甚麼人……現在才發現它出現了。

重點就是，其實在雷曼的產品方面，我們做了這麼多研究，或者這麼多聆訊，其實在風險披露上，真是有很多千奇百怪的風險……

**主席：**

你不要說自己的言論了……

**陳健波議員：**

不，我這個是引子，我先說出來(計時器響起)……

**主席：**

OK，好。

**陳健波議員：**

……我想總裁回答的是，我們留意到有千奇百怪的風險，其實在不同的層次都會出現。我想問Martin WHEATLEY先生，究竟你是否認為，無論是發行人、中介人、SFC，在審批雷曼時，做夢也想不到原來是有這麼多風險的，是不是呢？

**Chairman:**

Mr WHEATLEY, we have to be very short, very brief.

**Mr Martin WHEATLEY:**

The risk that was not envisaged was the risk that the collateral could not be enforced in favour of the noteholders because the legal structure under which they were formed was that that would be exactly the case that the Minibond noteholders, in an ultimate situation as we have seen, would still receive the value of the collateral naturally as part of the feature of the notes. And the risk that nobody had foreseen was that the US Bankruptcy Courts would hold in favour of Lehman Brothers to have priority over the collateral. That's the risk that hasn't been seen. All of the other risks, albeit that they're complex risks – and I accept that there are layers of complex risk – all of those other risks are included but that risk was not foreseen.

**主席：**

OK。各位，第一輪問完了。第二輪還有5位：余若薇議員、葉劉淑儀議員、劉慧卿議員、甘乃威議員及涂謹申議員。因為今早我已宣布，今天的公開研訊到12時一定要結束，現在我在此劃一條線，即5位每人有6分鐘，請大家一定要確保答和問都在6分鐘之內完成。

余若薇議員。

**Hon Audrey EU Yuet-mee:**

Mr Chairman, I want to follow up on the question that you asked in the beginning and that relates to the document S58, paragraph 2.2, where the witness says that "the SFC applies eligibility requirements applicable to listed structured products mirroring those in Chapter 15A of the Main Board Listing Rules" and the witness said that that started in 2002 and 2003. And he also said that it was not a specific requirement and he said "we took a view that it would be appropriate". Can Mr WHEATLEY explain to us who you mean or who you meant by "we"?

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Chairman, that would have been a view taken by the department responsible with internal legal advice and, as I explained earlier, I'll have to check as to the extent to which we also took external advice.

**Hon Audrey EU Yuet-mee:**

What, so it's the .....

**主席：**

余議員。

**Hon Audrey EU Yuet-mee:**

..... SFC legal department who advised that this Main Board Listing Rules should apply to the approval of documents relating to Minibonds; is that right?

**Mr Martin WHEATLEY:**

No, no. No, the .....

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

..... Corporate Finance Division would have taken that decision and the legal department would have given a view that that was an appropriate legal form that we could impose as an administrative measure.

**主席 :**

余議員。

**Hon Audrey EU Yuet-mee:**

So it was an exercise of discretion on the part of the Corporate Finance Division of the SFC.

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

I think the answer would be, yes. It was a decision we took, yes.

**主席 :**

余議員。

**Hon Audrey EU Yuet-mee:**

Now, if you look at the last sentence of paragraph 2.2, you say, "These are akin to structural requirements which are imposed through administrative means." You see that sentence?

**Chairman:**

Mr WHEATLEY, 2.2.

余議員。

**Hon Audrey EU Yuet-mee:**

Yes? You see that?

**Mr Martin WHEATLEY:**

Yes.

**Hon Audrey EU Yuet-mee:**

Now, can you now look at paragraph 3.6 of the same statement? And you see this was responding to Mr KO's statement where he said that the SFC could have imposed a condition relating to the approval of the Minibonds and you say, in response to Mr KO, you said, "However, the SFC cannot agree to waive a requirement relating to the contents of the prospectus and then impose a condition relating to a completely different matter such as the structure of the product. To do so would be ultra vires." You see that?

**Mr Martin WHEATLEY:**

Yes.

**Chairman:**

Mr WHEATLEY?

**Hon Audrey EU Yuet-mee:**

Now, I find it inconsistent with your paragraph 2.2 because, I mean, here, in paragraph 2.2, you were saying the SFC Corporate Finance Division exercised a discretion and imposed, through administrative means, some requirements which were akin to structural requirements and yet, when Mr KO said, "Well, actually, you could have done more to protect investors", then you challenged his suggestion as being ultra vires because you say, "Well, here we could not impose a condition relating to a completely different matter such as the structure of the product." Isn't that talking about the same thing as paragraph 2.2 which you imposed through administrative means?

**Mr Martin WHEATLEY:**

No, I .....

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

..... I think they're quite different issues. In paragraph 2.2, we're talking about how the totality of debentures or structured products that come through the route of debentures should be structured. Paragraph 3.6 or, rather, the statement in 3, appears to be saying that, for any particular note, we could have imposed a condition unique to that particular note which related or did not – in fact, which bore no relation to any waiver that we had given. So I think the assertion appears to be – and I don't know what the condition would have been – but the assertion appears to have been we could have, on each issue, have imposed unilaterally conditions that we thought were appropriate for that particular issue. And .....

**Hon Audrey EU Yuet-mee:**

Well, Mr .....

**主席：**

余議員。

**Mr Martin WHEATLEY:**

..... I just don't see .....

**Hon Audrey EU Yuet-mee:**

Mr .....

**Mr Martin WHEATLEY:**

..... that as being appropriate.

**Hon Audrey EU Yuet-mee:**

Yes, Mr KO's point was very simple. All he said was the SFC could have imposed a requirement that whoever issued these Minibonds should provide a guarantee for the bonds, the same point that Mr CHAN, my colleague, was making. This would protect investors. You .....

**Mr Martin WHEATLEY:**

It wouldn't have protected .....



**Hon Audrey EU Yuet-mee:**

You require .....

**Mr Martin WHEATLEY:**

..... investors.

**Chairman:**

Uh, uh .....

**Mr Martin WHEATLEY:**

Who would have provided the guarantee?

**Chairman:**

Wait till I ask you, Mr WHEATLEY, .....

**Hon Audrey EU Yuet-mee:**

Yes, .....

**Chairman:**

..... and not to rush, you know.

**Hon Audrey EU Yuet-mee:**

..... I mean, Mr KO's point was that the SFC could have imposed a requirement for guarantor and you say, in paragraph 2.2, "Yes, we did impose something which was akin to structural requirement, that was to require some form of a guarantee although it was not for the noteholder but for the issuer", and yet, when Mr KO raised the same point, you say, "Well, actually, we couldn't do that because that would be ultra vires." I mean, that was the contradiction that I find difficult to follow.

**Mr Martin WHEATLEY:**

No, but, .....

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

..... Chairman, if I may, one is for the use of debentures and the issue of debentures overall; the second point you seem to be making is that we could have required that a guarantee be a condition of certain notes. I find it an extraordinary statement because it implies that investors would be much worse off. Had Lehman been the guarantor of the note, investors would have nothing. Today, they at least have, subject to the enforcement of the collateral, they at least have the recovery of collateral.

**Hon Audrey EU Yuet-mee:**

Well, .....

**Mr Martin WHEATLEY:**

So I find that the basis of it wrong and the suggestion completely false that it would have provided greater protection for investors.

**Hon Audrey EU Yuet-mee:**

Well, it's very little comfort, .....

**主席 :**

余議員。

**Hon Audrey EU Yuet-mee:**

..... Mr WHEATLEY, when you just told us in reply to Mr CHAN that we really don't know the fate and the outcome of the collaterals and yet here you're telling us that, well, they are much better off. But my question still relates to the SFC's power or discretion to impose additional requirements relating to structure. And what I can't understand is that, in paragraph 2.2, you were telling us that the SFC, in fact, did, through administrative means (*The buzzer sounded*), impose conditions and, if that was right, why was it that SFC could not have imposed better protection through imposing conditions for the .....

**Chairman:**

Um, okay.

**Hon Audrey EU Yuet-mee:**

..... protection of investors?

**Chairman:**

Mr WHEATLEY, you have to be very brief.

**Mr Martin WHEATLEY:**

Well, again, if I may, the paragraph 2.2 is for all the class of debentures that would be brought forward and the issuer for a full class of debentures. Your statement appears to be about an individual product and the guarantee that you're proposing would have provided significantly worse protection for investors.

**主席：**

下一位應該是葉劉淑儀議員，不過她走開了，現在先請劉慧卿議員。

**Hon Emily LAU Wai-hing:**

Chairman, I want to refer to the paper S57, page 34, also about this "quick wins" because Mr KO told us that he had an encounter with the former Chairman, Andrew SHENG, when he came knocking on their doors and asking for "quick wins" to report to Government as he had a meeting with the government officials the following week. Of course, at the time, Mr WHEATLEY was not Chairman but, as far as you are aware, is this the way the SFC operates? So the Government wants to have a meeting with you, wants some "quick wins", so you, as Chairman, you would go down, as Mr KO said, "three tiers" to go and knock on doors, "Hey, have you got some answers? I have to give to the Government next week." Does that look a bit funny to you? And this is understandable if it has made a very strong impression on the staff.

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Mr Chairman, no, that is not the way the SFC operates. We have a very structured decision-making process that is not to do things lightly or quickly in response to requests wherever. We are, as you know, operationally independent from the Government. The Government will set overall policy but I'd be surprised if that policy could be implemented in a matter of days or weeks if it's a change of policy. That's not how the SFC operates.

**Hon Emily LAU Wai-hing:**

Mr Chairman, .....

**主席：**

劉議員。

**Hon Emily LAU Wai-hing:**

..... I want to ask Mr WHEATLEY whether he has checked the sequence of events, whether they did happen as presented here.

**Mr Martin WHEATLEY:**

Well, .....

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

..... the fact that the Government asked for "quick wins" is a matter of public record because that was in a press release. I take it as a statement of fact that Mr SHENG, our previous Chairman, would have spoken to staff. I don't believe that any "quick wins" could have been taken which would have violated our core regulatory principles but I don't have a record of what those "quick wins" that were sought, in specific detail, were.

**主席：**

劉議員。

**Hon Emily LAU Wai-hing:**

Chairman, in paragraph 138, Mr WHEATLEY said that the Financial Secretary, Antony LEUNG, issued a press release in June 2002 and used the term "quick wins". Has the SFC, in your own documents, ever used this expression and are you aware of any other government policy papers which contain this term?

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

I'm not aware of other government policy papers. There may be, I don't know .....

**Hon Emily LAU Wai-hing:**

What about the SFC?

**Mr Martin WHEATLEY:**

Well, it's possible .....

**Hon Emily LAU Wai-hing:**

Have you ever used it in a serious way? Because this term gives people all kinds of very strange impression.

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

In most businesses, I wouldn't see it as an unusual term. I think, in lots of businesses, .....

**Hon Emily LAU Wai-hing:**

I'm asking the SFC, Chairman, I'm not asking other businesses. I have very limited time.

**Mr Martin WHEATLEY:**

Okay.

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

I'm not aware .....

**Chairman:**

Be specific, yes.

**Mr Martin WHEATLEY:**

..... of any pursuit of or use of the term "quick wins" to describe our strategies but I would check and revert to the Chairman with more information if I can find it.

**Hon Emily LAU Wai-hing:**

Yes.

**Mr Martin WHEATLEY:**

But I'm not aware of that.

**Hon Emily LAU Wai-hing:**

Chairman, and also .....

**主席：**

在會後提供。

**Mr Martin WHEATLEY:**

Yes.

**Hon Emily LAU Wai-hing:**

..... if you can check and revert to us on the "quick wins" that you have come up with or whether even the Financial Secretary .....

**主席：**

他已答應在會後提供，劉議員。

**Hon Emily LAU Wai-hing:**

..... would describe certain things and, in fact, the SFC has not been able to deliver such "quick wins". I hope you will come back to us.

I want to go to page 37, Chairman, about the comment by Mr Geoff HARRIS, Senior Director of Enforcement Division, saying "Mis-selling applies across the board; we need to impose better sales practice on all intermediaries" and "Facilitation has allowed mis-selling. We need to regain the lost ground by proposing and implementing sale practices" and so on. And then, of course, the following page, Mr WHEATLEY said it was just his

view. But can you tell us, in what context did Mr HARRIS make these comments and what has happened then, subsequently, whether the SFC has done something to address his concerns?

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Mr Chairman, we had, as I've stated before to this committee, significant concerns about mis-selling and, in response to those concerns, we carried out a number of surveys of the market which confirmed that, amongst those surveyed, there were problems of mis-selling. In response to that, we published our findings from those surveys, we published additional information to firms as to how they should operate and we shared those findings with the Monetary Authority and we conducted a second survey to follow on to .....

**Hon Emily LAU Wai-hing:**

Chairman, Chairman, .....

**主席 :**

劉議員。

**Hon Emily LAU Wai-hing:**

..... my question is, on what occasion did Mr HARRIS make these comments? What was the context? Were there people talking to him and they agreed with him? And what subsequent action was taken as a result of these criticisms?

**Chairman:**

Mr WHEATLEY?

**Hon Emily LAU Wai-hing:**

I ask a specific question; I want a specific answer.

**Mr Martin WHEATLEY:**

You, I believe, have the email from which this is extracted. That wasn't provided to us. I think we've subsequently been asked for that email and we

provided that to you. So you will have the email in which this is taken and, therefore, can see the context from that.

**Hon Emily LAU Wai-hing:**

So you are saying .....

**主席：**

劉議員。

**Hon Emily LAU Wai-hing:**

..... that your colleagues agreed with Mr HARRIS (*The buzzer sounded*) because he was expressing concern?

**Mr Martin WHEATLEY:**

I'm saying that .....

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

..... in an organization of 500 people, you'll have a diverse range of views and I think it's healthy that people can express those diverse range of views.

**主席：**

下一位是甘乃威議員。

**甘乃威議員：**

主席，我問的文件是S61。S61裏面的Attachment I，有一個from Gary HO發出的電郵，電郵裏面有一份attach的annex的文件，名為"Comparison of vetting approach for Offer Documents"，這就是S61-Attachment I的Annex 2。

其實因為這份文件是關於2006年6月這個所謂harmonization，即所謂協調project的項目裏面提出了有關部門之間不同的審批標準。這個Annex 2裏面我只提出兩點，因為有很多，我提出兩點可能比較容易理解，就是這個表中第10項——



"Product Provider"。這個表的第一個表內有關ELD的要求，關於"Product Provider"，就是"Product provider must be an authorised financial institution regulated by HKMA"，簡單地說。但如果是ELN，則沒有這個要求，即ELD有這個要求，ELN則沒有這個要求，這是第10項。

到第14項的"Approved person"，同樣地，ELD要求"Approved person must be resident in HK"，但ELN則沒有這樣的要求，所以現在你看見有些好像ELN的產品，原來要到荷蘭去追討，那些發行人根本不需要在香港也行。

所以我想問，其實在06年你們內部已經看到兩者比較的不同之處，我想問為何會出現這個標準？光看這些，我不覺得需要修改法例從而令這些產品有同一標準。大家都說，如何保障投資者，標準是很簡單，現在說approved person，如果他在香港的話，你就在香港追討，容易去追討。現在卻不然，那些ELN的苦主要到荷蘭去追討，根本不知那人在何處。為何你們在審批方面有兩個不同標準？我現在說的並非事後孔明，說的是2006年6月，你們所謂的harmonization project都已經有這個所謂比較表，已經知道有那個情況存在。為何當時你們不作出這個糾正，而繼續容許這些事件發生？你可否回應一下，如何保障投資者是你最重要、首要的任務，在這裏我看不到，你可否解釋一下呢？

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Mr Chairman, the two products – equity-linked deposits, equity-linked notes – have similar economic behaviour, similar features, which is why we were looking at whether the regimes for them both could be harmonized but one operates under SFO and one operates under the Companies Ordinance. So, an issuer of an ELD would be a domestic bank and, therefore, subject to the oversight of the HKMA but there wouldn't be any collateral protection. So, in the event of a default of a domestic bank, there would be no additional protection for the noteholders.

In the case of ELNs, we imposed structural requirements which meant that they had to have a significant credit rating and significant capital and they

would, therefore, be subject to the oversight of another regulator, in the case of Lehmans, the SEC. But there are additional features in the case of ELNs such as the existence of collateral which provides a different type of protection. So we administer two different regimes and, as I've said previously, they have broadly similar degrees of protection but it's not exactly the same.

Now, we were looking at harmonizing these areas because the products were similar in terms of how they operated. That would be a major rewrite of the Companies Ordinance. Some aspects of that project have been delivered; some aspects of that project are still underway.

**主席：**

甘議員。

**甘乃威議員：**

主席，我只說這兩個例子出來，我想韋奕禮先生你可否談談，為何在《公司條例》中，你不可以加入這個條款？一如你一直都說你不容許，譬如舉個例子，**approved person must be resident in Hong Kong**，這點為何你不可以.....即兩者同樣地放進去而已。你可以要求，這樣沒有違反《公司條例》內的要求，你可以做這件事情，為何你不做呢？我很奇怪，這件事情為何你不做呢？這是否一個雙重標準呢？你只是以"公司法例裏面沒有"來作一個擋箭牌而逃避你的責任呢？

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

No, it would require a change to the law. Issuers of debentures are not necessarily Hong Kong residents or Hong Kong banks. It's a very broad range of issuer that uses this particular route. To require it to be only a Hong Kong resident or a Hong Kong bank would actually narrow down the funding arrangements available to a very broad range of corporates that use Hong Kong as a fund-raising centre. So, it would not be appropriate to impose those structures on all debentures.

What we have been (*The buzzer sounded*) looking at is whether certain types of debentures, specifically structured products such as ELNs, could be

covered under the SFO and that's a project that's underway but it's a complex project, it's not something that can be done as a "quick win", as the phrase that's been used.

**主席：**

涂謹申議員。

**涂謹申議員：**

主席，那個應該是S57，第82段那裏。主席，我想問，這個決定似乎意思就是說，韋奕禮先生說他也覺得是預計不到的。我是說美國法院的決定"was not foreseeable"，我想他的意思應該是.....因為這份是韋奕禮先生的書面回應，所以應該是指你預計不到，抑或這是你所得的美國律師的法律意見，抑或是銀行在和解協議作出時的法律意見？

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

I'm sorry, I didn't hear – Chairman, I didn't hear the question properly.

**主席：**

涂議員，請你再問一次。

**涂謹申議員：**

好的，行。或者我引述吧，OK。

82段最後一句是："This decision overturns the legal basis on which many structured products have been written for at least 10 years and was not foreseeable."。

So, "foreseeable" by whom? .....

**Mr Martin WHEATLEY:**

Well, .....

**Hon James TO Kun-sun:**

You or your American attorney or the banks, the 16 banks' joint legal adviser, US legal adviser?

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Well, I think it wasn't foreseen by anybody who was involved in this industry for the last 10 years.

**主席 :**

涂議員。

**Hon James TO Kun-sun:**

It's a legal decision, .....

**Mr Martin WHEATLEY:**

Well, the .....

**Hon James TO Kun-sun:**

..... SO .....

**Mr Martin WHEATLEY:**

Sorry.

**Hon James TO Kun-sun:**

So is it you received legal advice that this decision is unforeseeable?

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

No.

**Hon James TO Kun-sun:**

"No" means you .....

**主席 :**

涂議員。

**Hon James TO Kun-sun:**

..... you did not receive any legal advice to say that this decision is not foreseeable – unforeseeable?

**Mr Martin WHEATLEY:**

No, the .....

**Chairman:**

Is that correct, Mr WHEATLEY?

**Mr Martin WHEATLEY:**

We haven't sought legal advice as to whether the decision was foreseeable or not, no.

**Hon James TO Kun-sun:**

So, .....

**主席 :**

涂議員。

**Hon James TO Kun-sun:**

So, this statement that this decision was not foreseeable is not foreseeable by you; is that right?

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

I think by us or anybody else who's been involved in this industry for the last 10 years.

**主席：**

涂議員。

**涂謹申議員：**

主席，我想問的就是，那16間銀行，在第83段中，他現在似乎好像說，它們連付給投資者的六、七成都無法收回，可能會這樣吧，OK。有幾個問題，第一就是，第82段所說的決定，以你所知，那些銀行會不會上訴呢？即透過信託人。

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

I can't speak for the specific actions that the banks will take through the trustee. I know that there are many, many attempts to fight and overturn this decision but I can't comment specifically on what the trustee, the Minibonds trustee, actions are. But I can be sure that there are lots of interested parties that are challenging this decision.

**主席：**

涂議員。

**涂謹申議員：**

主席，因為證監會都有份而金管局亦同意，當時有一個協議，在7月的時候，當然是指去年，其中當時亦有一些分析，說可能那些抵押品，若以當時的價值計算，可能會超過六成、七成，於是有一些.....以我印象記得，有大約10個系列的苦主都基於似乎市價高於六、七成，而協議裏面說如果高於六、七成，多出的會還給苦主而不是歸銀行所有。

在這個時候，譬如現在證監會覺得自己有沒有責任要跟進一下，例如那些銀行，即不單是它們損失，如果它們能夠就這個決定上訴成功的話，其實對銀行或者對苦主都是有利的。不知道證監會覺得自己在這個問題上，在監察協議的執行方面有沒有一些角色？抑或你覺得這純粹是銀行自己的商業決定呢？

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

No, we do play a role in overseeing the implementation of the agreement and there are a number of different factors to that agreement but including the pursuit of the collateral. So we remain in contact with the legal team pursuing that collateral. It is in favour, as you say, of both the investors and the banks to resolve this properly.

**主席：**

涂議員。

**涂謹申議員：**

那麼，你覺得你有沒有責任去跟進銀行合理地保障它自己或尤其是苦主的利益，盡量在這個個案中，以及尤其是籌集了一筆錢作為法律費用，對吧，你會不會跟進，或者你有沒有跟進過呢？自從1月到現在。

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Yes. Yes, Chairman.

**涂謹申議員：**

可不可以講一講你跟進了些甚麼呢？(計時器響起)

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Well, we've been in regular contact with the legal team, with the administrators; we've been making sure that the terms of the agreement have been adequately followed. It's not possible for me to talk to you about the legal status of that challenge.

**涂謹申議員：**

但似乎……

**主席：**

OK。

**涂謹申議員：**

……你們證監會連取一些法律意見，或者起碼的一些都好像沒有啊。因為你剛才說，似乎你說這一句出來，說"**This decision was not foreseeable**"，好像你已經是……即某程度對我來說，可能你如果是這樣說法，可能第一，那些銀行事先收到的法律指導有沒有疏忽？不知道了。你接着有一個判斷，或許他們都能夠取得那些抵押品，尤其很多系列是超過六、七成的，是在這個基礎之下同意那個協議的，但似乎你之前……我不知道你有沒有任何法律意見認為抵押品是可以取到的，或者你到現在都沒有取過法律意見是關於這個決定的。而你又已說了"**This decision was not foreseeable**"，你又不是美國的律師，我不明白為何你要這樣寫出來？你這樣寫出來會不會給人一個感覺就好像是為那些銀行沒有盡力去爭取，或者這樣子令投資者全部接受六、七成那個意見去開脫呢？

**主席：**

Mr WHEATLEY，請你把這條問題答完。

**Mr Martin WHEATLEY:**

No, Chairman, I believe the banks are fighting very hard to try to enforce the proper collateral. We meet regularly with the receivers, PwC. We required that the banks create a fund of \$290 million in order to pursue this. We are very close to those banks in ensuring that they do pursue this properly. So it's not true to say that we are shirking our responsibility; we're working very hard to try to make sure that the collateral is properly enforced, which is what we would all like to see.



**主席：**

各位，本來已劃了線，因為葉劉淑儀議員走開了，所以沒有機會問。現在有少許時間可以給第三輪的甘乃威議員，你有3分鐘。

**甘乃威議員：**

主席，我追問剛才我那個問題。剛才韋奕禮先生提到有關對 product provider、發行人及 approved person 的規管，我想韋奕禮先生確認一下，是《公司條例》不容許，抑或是在於證監會的政策？如果在政策上純粹只是要求譬如 approved person 須是 resident in Hong Kong，或者 product provider 須是 financial institution regulated by HKMA，如果有這兩者的規管的話，便會窒礙其他香港以外的公司或金融機構來香港進行所謂的融資。是因為這樣，抑或是法例不容許呢？因為你一直都說《公司條例》不容許你規管這些所謂發行人。

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

The Companies Ordinance does not require that issuers of debentures have to be Hong Kong persons or banks supervised by the HKMA because a debenture is used for a number of different purposes but, very often, fund-raising purposes by a broad range of institutions. It's quite different from an equity-linked deposit which is a deposit instrument sold by banks to investors within Hong Kong, so they're quite different structures. The requirement that we have imposed in terms of credit rating and capital is an administrative requirement that we've imposed by requiring compliance with the Listing Rules.

**主席：**

甘議員。

**甘乃威議員：**

我剛才是說，如果換句話說，其實證監會是可以規定這些所謂發行人，因為現在就算是你的2009年10月的諮詢文件，都有訂

明發行人的資格規定。發行人的資格規定，換句話說，你可以加上這些條款，就算現在《公司條例》不改變，都可以加上這些條款，就是那些發行人須要受香港金管局的規管或者是香港居民？

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

Mr Chairman, we cannot make those conditions without changing the Companies Ordinance. That requires a law change which would require broad consultation and would require approval by the Legislative Council, so it's not something that we can simply add in as additional requirements.

**主席：**

甘議員。

**甘乃威議員：**

那麼，我想問為何ELD可以呢？

**Chairman:**

Mr WHEATLEY?

**甘乃威議員：**

你可否解釋一下ELD為何可以呢？

**Chairman:**

Mr WHEATLEY?

**甘乃威議員：**

為何ELD在vetting的時間可以加入一些這樣的要求呢？

**Mr Martin WHEATLEY:**

An ELD is effectively a banking product but that's structured as a regulated investment agreement under the SFO. So it's a different legal structure under which the products are authorized.

**主席：**

甘議員。

**甘乃威議員：**

那為何ELN不可以呢？

**Chairman:**

Mr WHEATLEY?

**Mr Martin WHEATLEY:**

No, ELNs are debentures (*The buzzer sounded*) under the Companies Ordinance.

**主席：**

好了，韋奕禮先生，謝謝你今早出席。小組委員會就有關範疇向你取證的工作已經完畢。如有需要，小組委員會會再傳召你出席研訊。如果是這樣的話，2009年5月20日向你發出的傳票依然有效。現在我宣布此部分的公開研訊結束。

請工作人員盡快安排公眾人士包括傳媒人士離開本會議廳。各位傳媒人士亦請帶走所有攝錄及電子儀器及器材，以便小組委員會繼續內部商議。

**(研訊於正午12時結束)**