

LEGISLATIVE COUNCIL BRIEF

Mandatory Provident Fund Schemes Ordinance (Chapter 485)

MANDATORY PROVIDENT FUND SCHEMES (AMENDMENT) BILL 2001

INTRODUCTION

At the meeting of the Executive Council on 15 May 2001, the Council ADVISED and the Chief Executive ORDERED that the Mandatory Provident Fund Schemes (Amendment) Bill 2001 (the Bill) at Annex should be introduced into the Legislative Council to make a number of technical amendments to the Mandatory Provident Fund Schemes Ordinance (the Ordinance).

Annex

BACKGROUND AND ARGUMENT

2. In the course of preparing for the implementation of the Mandatory Provident Fund (MPF) System, we have identified provisions in the Ordinance and Mandatory Provident Fund Schemes (General) Regulation (the Regulation) which could be improved to better protect the interests of scheme members and enhance the effective operation of the System. Major amendments proposed are as follows :

Enhance Protection for Scheme Members

(A) Conditions for Approval of Trustees

3. The Mandatory Provident Fund Schemes Authority (MPFA) is vested with the statutory function to approve and regulate the activities of trustees of registered MPF schemes. Section 20(8) of the Ordinance provides that in approving an applicant as an approved trustee, the MPFA may impose such conditions with respect to the conduct of the applicant's business as it considers appropriate. The section is silent on whether the MPFA could amend existing conditions or add new ones. To put it beyond doubt, we propose to empower the MPFA to impose additional conditions or to amend existing ones after it has given notice to a trustee and having provided the trustee with an

opportunity to make representations. We also propose to allow the MPFA to waive a condition imposed where it is satisfied that compliance is not reasonably practicable in a particular case. Many of the conditions imposed reflect requirements in the MPF legislation as well as the prevailing best market practice. It is necessary for the MPFA to have the power to modify and update the conditions to reflect the amendments to the MPF legislation and the prevailing best market practice. Any aggrieved party may appeal against the MPFA's decision.

(B) Conditions for Scheme Registration

4. Section 6E of the Ordinance empowers the MPFA to register MPF Schemes. Sections 21 and 21A of the Ordinance specify that an application for the registration of a provident fund scheme as an employer sponsored scheme, or master trust scheme, or industry scheme may be made to the MPFA. Again, the legislation is silent on whether the MPFA can impose additional conditions after such schemes have become registered. To put it beyond doubt, we propose to state clearly in the legislation that the MPFA would have the power to impose additional, or amend or waive existing, registration conditions. An opportunity for the trustee to make representations and an appeal mechanism against the MPFA's decision would also be provided.

(C) Approval of Pooled Investment Funds

5. Section 6 of the Regulation which sets out the procedures for approval of pooled investment funds empowers the MPFA to vary or impose conditions for an approved pooled investment fund as it considers appropriate. Since the MPF legislation and investment guidelines are subject to constant updating, the MPFA may need to impose corresponding additional conditions on such funds. It is arguable that the authority to “vary” will include the authority to “add” new conditions. We therefore propose to amend the Regulation to put it beyond doubt that the MPFA shall have the authority to impose additional conditions for an approved pooled investment fund. Where the MPFA varies or imposes additional conditions, the MPFA should give written notice to the trustee, investment manager or the insurer, where appropriate, of the approved pooled investment fund, and provide them with an opportunity to make representations.

(D) Adequate Reserves for Guarantor of an Approved Pooled Investment Fund

6. It is fundamentally important for trustees of registered schemes to

maintain adequate reserves to cover the investment guarantee offered in their investment arrangements. Hence section 46(1A)(r) of the Ordinance empowers the Chief Executive in Council to make regulations to require the approved trustee of registered schemes to maintain adequate reserves. In practice, many registered schemes structure their investment arrangements by investing in approved pooled investment funds. Such funds are not subject to the same reserve requirements. For prudential regulatory purposes, it is considered necessary to require the guarantor of approved pooled investment funds, i.e. an authorized insurer or an authorized financial institution as the case may be, to maintain adequate reserves to support the investment guarantee. We therefore propose to expand the regulation-making power of the Chief Executive in Council so that the necessary reserving regulations could be made.

(E) Governing Rules

7. At present, the prior approval of the MPFA is required before changes could be made to the governing rules (as defined in section 2 of the Ordinance) of a scheme. This is to ensure that there would not be any changes to the documents of an MPF scheme which would contravene MPF requirements and thus adversely affect scheme members' interests. In practice, there are three major documents of an MPF scheme. The trust deed which is the document governing the establishment of the scheme; the offering document which sets out further details of the scheme, including benefit payment, benefit transfer and investment options, etc.; and the participation agreement which contains the terms and conditions agreed between a participating employer and the scheme trustee, including the rules in relation to voluntary contribution arrangement.

8. It is unclear whether the present definition of 'governing rules' captures the offering document and participation agreement. This is not satisfactory. To enable the MPFA to forestall any changes to scheme features and terms which may adversely affect scheme members' interests, we propose to expand the definition of "governing rules" in section 2 to include offering document and participation agreement.

(F) Failure to Make a Voluntary Contribution

9. In addition to mandatory contributions, employers and employees can make contributions voluntarily. The Regulation provides that a voluntary contribution arrangement should terminate and accrued benefits be paid to the employees when the employer can no longer meet his obligation to make contributions after a period of six months. However, there is ambiguity in the

interpretation of the 'six-month period', in that if the governing rules of a scheme stipulates a due date for the voluntary contribution, the six-month period might then be taken to count from the due date instead of the end of the payroll cycle. We therefore propose to clarify the legislation putting it beyond doubt that where the voluntary contribution amount is determined by reference to the income of the employee concerned, the six-month period would start counting from the end of the payroll cycle. Where the contribution amount is determined by reference to periods of employment, the six-month period would start from the end of each period of employment.

(G) Surcharge on Default Contribution

10. Under section 18(2) of the Ordinance, where the employer fails to make a mandatory contribution, a contribution surcharge of up to 20% per annum on arrears shall be imposed on the employer. The Regulation which sets out the mechanism for levying such surcharge only provides for levying the surcharge up to the end of the second payment period. This effectively puts a cap on the amount of surcharge, even in the event that the mandatory contribution remains outstanding. This is not desirable. To deter any further delay by the defaulter in making good default contributions, we propose to empower the MPFA to issue further notices to the defaulting employer, specifying payment periods after the second payment period, and levying contribution surcharge on any outstanding arrears.

Enhance MPFA's Operation and Regulation of the MPF System

(A) Functions of the MPFA

11. The functions of the MPFA, as described in section 6E of the Ordinance, are set out in general terms. We propose to clarify the provisions by stating the specific functions of –

- (a) considering and proposing reforms of the law relating to occupational retirement schemes or provident fund schemes; and
- (b) promoting and encouraging the development of the retirement schemes industry in Hong Kong, including the adoption of a high standard of conduct and sound prudent business practices by trustees and other service providers.

Other financial regulators, for example, the Securities and Futures Commission (SFC), are also provided with similar statutory functions in respect of matters under their purview.

(B) Efficient Financial Management

12. Unlike other statutory bodies, for example the SFC and Hospital Authority, MPFA is not empowered to borrow under the Ordinance. In fact, borrowing is necessary to enable an organization to set up bank overdraft facilities to enhance cashflow management capabilities and to avoid setting aside excessive idle cash to make allowance for unexpected events. Therefore we propose to allow MPFA, with the approval of the Financial Secretary, to borrow money on such security or other conditions as it considers expedient.

(C) De-registration of Scheme

13. Under section 34A of the Ordinance, with the exception of the voluntary winding up of an employer sponsored scheme, a registered scheme can only be wound up by the court. However, there may be a situation in which a registered scheme does not have any scheme members nor scheme assets. In such a situation, it may not be necessary to go through the court to wind up the scheme. A simple de-registration will suffice. We therefore propose to provide MPFA with the power to de-register a registered scheme upon application from the relevant trustee, provided that the scheme has no scheme members and no scheme assets.

Clarifications and Removal of Anomalies

(A) Master Trust Schemes and Employer Sponsored Schemes

14. Under the Ordinance, “master trust scheme” is defined as a registered scheme membership of which is open to relevant employees, self-employed persons and persons who, having accrued benefits in another registered scheme, wish to have their benefits transferred. This definition does not cover a person who has benefits transferred from an occupational retirement scheme to an MPF scheme. Furthermore, employees who are below the age of 18, of or above the age of 65 and whose employers wish to enrol them (and they agree to be so enrolled) in an MPF scheme to make voluntary contributions are not included. The latter problem also exists in the definition of “employer sponsored scheme”. We propose to amend the definitions of “employer sponsored scheme” and “master trust scheme” such that their membership will also be open to all such persons.

(B) Contribution in respect of Casual Employee

15. In respect of casual employees*, the Regulation requires employers to make contributions either on the same day when the relevant income is paid; or on or before the 10th day after the last day of the contribution period. In practice, it is sometimes not feasible for employers to make contributions on the same day, for example, some casual employees are paid very late at night or outside office hours.

16. To overcome the above operational difficulties, we now propose to give some flexibility to employers by amending the definition of the contribution day applicable to a casual employee to the effect that it would mean either the 10th day after the last day of the relevant contribution period, or the next working day (other than a Saturday) immediately subsequent to the payment of the relevant income.

Legislative Review

17. In the course of preparing for and implementing the MPF System, there have been comments on the relevant legislative provisions. Given that the MPF System has just been launched for five months, it is possible that some problems that have been raised are transient and should diminish once the relevant parties are more familiar with the operation of the MPF System on a regular basis, whilst other new problems may emerge with time. We recognize the need to conduct a review on the operational aspects of the MPF legislation, in the light of the experience of the MPFA. We expect the review to commence towards the end of this year, one year after the full implementation of the System.

THE BILL

18. **Clause 2(a)(ii)** expands the definition of “company” to include a “corporation”. This would enable some of the provisions in the Ordinance to apply to all foreign corporations incorporated overseas and regardless of whether they are registered under the Companies Ordinance.

* Note

Casual employees are defined in the Ordinance to mean those relevant employees who are –

(a) engaged in an industry for which a provident fund scheme is registered as an industry scheme (i.e. the construction and catering industries); and
(b) employed in that industry by an employer on a day-to-day basis or for a fixed period of less than 60 days.

19. **Clause 2(a)(iii), (iv) and (vi)** expand the definitions of “employer sponsored scheme”, “governing rules” and “master trust scheme” (paragraphs 7, 8 and 14 above).

20. **Clause 3** seeks to set out more clearly the functions of the MPFA and **clause 4** confers the MPFA the power to borrow money.

21. **Clauses 5 and 7(b)** seek to remove the ambiguity in sections 7 and 7C of the Ordinance by specifying that the relevant time for the purpose of determining when an employer/self-employed person should register his employee/himself as a member of a registered scheme should count from the beginning of the date on which the employment (or self-employment) begins.

22. **Clause 7(c)** puts it beyond doubt that self-employed persons who are less than 18 years of age or who have reached retirement age are not required to join MPF schemes or make mandatory contributions.

23. **Clauses 9, 10 and 11** empower the MPFA to impose, amend or waive conditions imposed on an approved trustee, registered master trust schemes, employer sponsored schemes and industry schemes. Any aggrieved party may appeal against the MPFA's decision by lodging an appeal with the MPF Schemes Appeal Board (**clause 20**).

24. **Clause 13** empowers the MPFA to cancel the registration of a scheme upon application from the relevant trustee, provided that the scheme has no scheme members and no scheme assets.

25. **Clause 14** seeks to provide immunity from civil liability for MPFA and its directors and employees acting in good faith in the performance or purported performance of any function under the Ordinance. Similar immunity provisions are provided in the Banking Ordinance and Securities and Futures Commission Ordinance.

26. **Clause 18** expands the regulation-making power of the Chief Executive in Council to make regulations to require the guarantor of an approved pooled investment fund to maintain adequate reserves so as to provide investment guarantees.

27. **Clause 21 and the Schedule** make consequential and other technical amendments to the Regulation. These include clarifying when the six-month period in respect of failure to make voluntary contributions would start (section 4); empowering the MPFA to impose additional conditions on approved pooled investment funds (section 2); rectifying an omission and

imposing an obligation on the approved trustees to ensure that the contract of appointment appointing a custodian would prohibit a person who is not eligible to be a delegate of the custodian to assume such a position (section 7); clarifying the contribution day applicable to casual employees so that employers of such employees may make contributions on the day following the payment of income (section 10).

PUBLIC CONSULTATION

28. We have consulted the MPF Schemes Advisory Committee in respect of the proposed amendments. It has not raised any objection to the proposals. The Legislative Council Panel on Financial Affairs has also been briefed on the proposals. The MPFA has also sought the views of employer associations and the relevant professional bodies in the retirement schemes industry. In preparing the Bill, we have taken into account the views expressed by these bodies.

BASIC LAW IMPLICATIONS

29. The Department of Justice advises that the Bill does not conflict with those provisions of the Basic Law carrying no human rights implications.

HUMAN RIGHTS IMPLICATIONS

30. The Department of Justice advises that the Bill is consistent with the human rights provisions of the Basic Law.

BINDING EFFECT OF THE LEGISLATION

31. The amendments made by the Bill will not affect the current binding effect of the Ordinance and the Regulation.

FINANCIAL AND STAFFING IMPLICATIONS

32. The proposal of empowering the MPFA to borrow money will enhance the financial management capability of the MPFA and allows it to generate better investment returns to fund its operations. Other proposals only seek to improve the operational effectiveness of the MPF System and are mainly technical in nature. They will neither require Government, as an

employer, to incur additional MPF contributions nor generate additional workload for Government. The Bill will have no additional financial or staffing implications for Government.

ECONOMIC IMPLICATIONS

33. The Bill will facilitate the operation of the MPF System, and enhance the effectiveness of the regulation of MPF schemes by the MFPA. Thus it will better protect the interest of MPF scheme members, and have beneficial effects on the retirement schemes industry generally.

LEGISLATIVE TIMETABLE

34. The legislative timetable is as follows –

Publication in the Gazette	18 May 2001
First Reading and commencement of Second Reading debate	23 May 2001
Resumption of Second Reading debate, committee stage and Third Reading	To be notified

PUBLICITY

35. A press release will be issued shortly. A spokesman will be available for answering media enquiries.

ENQUIRIES

36. For any enquiries, please contact Miss Maureen To, Principal Assistant Secretary for Financial Services (Retirement Schemes and Insurance), at 2528 9016.

Financial Services Bureau

16 May 2001

MANDATORY PROVIDENT FUND SCHEMES (AMENDMENT) BILL 2001

CONTENTS

Clause		Page
1.	Short title	1
2.	Interpretation	1
3.	Functions of Authority	9
4.	Section added	
	6QA. Authority may borrow money	9
5.	Employer to arrange for employees to become scheme members	9
6.	Employer and relevant employees required to contribute to registered scheme	9
7.	Duty of self-employed person to become scheme member	10
8.	Voluntary contributions	10
9.	Approval of trustees	12
10.	Application for registration as employer sponsored scheme or master trust scheme	14
11.	Applications for registration of schemes as industry schemes	17
12.	Winding up of registered schemes otherwise than in accordance with section 34 or 34D	20
13.	Section added	
	34D. Cancellation of registration of registered scheme which has no scheme members, etc.	20
14.	Section added	
	42B. Immunity	21

Clause		Page
15.	Offences by approved trustees	21
16.	Offences by self-employed persons	21
17.	Application and interpretation of sections 45B and 45C	22
18.	Regulations	22
19.	Exempt persons	22
20.	Decisions which may be the subject of an appeal	23
21.	Consequential and other amendments to Mandatory Provident Fund Schemes (General) Regulation	23
Schedule	Consequential and other amendments to Mandatory Provident Fund Schemes (General) Regulation	24

A BILL

To

Amend the Mandatory Provident Fund Schemes Ordinance.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Mandatory Provident Fund Schemes (Amendment) Ordinance 2001.

2. Interpretation

Section 2 of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) is amended -

(a) in subsection (1) -

- (i) in the definition of "accrued benefits", by adding "including sums" after "time,";
- (ii) by repealing the definition of "company" and substituting -

"company" (公司) -

(a) means -

- (i) a company within the meaning of the Companies Ordinance (Cap. 32); or
- (ii) an oversea

company;

(b) includes a corporation
in the case of -

(i) the
definitions
of
"associated
company",
"chief
executive
officer",
"controller",
"officer",
"oversea
company",
"share" and
"voting
share"; and

(ii) the
provisions of
section 44(1),
section 7(2)
of Part 2 of
Schedule 1A
and Schedule
8;"

(iii) in the definition of "employer sponsored

scheme", in paragraphs (a) and (b), by
repealing "relevant";

(iv) by repealing the definition of "governing
rules" and substituting -

"governing rules" (管限規則), in relation to
a registered scheme -

(a) subject to paragraph (b),
means those rules and
provisions -

(i) contained in -

(A) a trust
instrument
or other
document,
including
any offering
document or
participation
agreement,
relating
thereto; or

(B) that
instrument
and that
document
taken

together;

and

(ii) governing -

(A) the

establishment

of the

scheme; or

(B) the

administra-

tion of the

scheme;

(b) does not include rules or provisions declared in a notice under subsection (3) to be rules or provisions to which this definition does not apply;"

(v) by repealing the definition of "mandatory contribution" and substituting -

"mandatory contribution" (強制性供款)

means -

(a) an amount that is paid or payable as a contribution to a registered scheme under section 7A or 7C; or

(b) minimum MPF benefits,
to which section 5(1)(b)
of Schedule 2 to the
Mandatory Provident
Fund Schemes (Exemption)
Regulation (Cap. 485
sub. leg.) applies,
that have been
transferred to a
registered scheme;" ;

(vi) in the definition of "master trust
scheme" -

(A) in paragraph (a), by repealing
"relevant" ;

(B) in paragraph (c), by repealing "first-
mentioned scheme," and substituting
"first-mentioned scheme; and" ;

(C) by adding -

"(d) persons who, having benefits
in an ORSO exempted scheme,
or an ORSO registered scheme,
within the meaning of
section 2(1) of the
Mandatory Provident Fund
Schemes (Exemption)
Regulation (Cap. 485 sub.
leg.), wish to have those

benefits transferred to the
first-mentioned scheme,";

- (vii) in the definition of "oversea company", by repealing "company" where it secondly appears and substituting "body corporate";
- (viii) in the definition of "participating employer", by repealing "relevant";
- (ix) in the definition of "retirement age", by repealing "a relevant" and substituting "an";
- (x) by adding -

""corporation" (法團) means a body
corporate which is incorporated
in a place outside Hong Kong and
is not an oversea company;

"minimum MPF benefits" (最低強制性公積金
利益) has the same meaning as in
section 1(1) of Schedule 2 to the
Mandatory Provident Fund Schemes
(Exemption) Regulation (Cap. 485
sub. leg.);

"offering document" (要約文件), in
relation to a registered scheme,
means a document -

- (a) containing information
on the scheme; and

- (b) inviting participation in the scheme by prospective participating employers and prospective members of the scheme;

"participation agreement" (參與協議), in relation to a registered scheme, means an agreement -

- (a) between a participating employer and the approved trustee of the scheme for the employer and his employees to participate in the scheme;
- (b) between a self-employed person and the approved trustee of the scheme for the self-employed person to participate in the scheme;
- (c) between a person intending to maintain a preserved account in the scheme and the

approved trustee of the
scheme;

"preserved account" (保留帳戶) has the
same meaning as in section 2 of
the Mandatory Provident Fund
Schemes (General) Regulation (Cap.
485 sub. leg.);

"working day" (工作日) means any day
other than -

- (a) a public holiday;
- (b) a gale warning day or
black rainstorm warning
day within the meaning
of section 71(2) of the
Interpretation and
General Clauses
Ordinance (Cap. 1).";

(b) by adding -

"(3) The Authority may, by notice published
in the Gazette, and subject to such conditions,
if any, as are specified in the notice, declare
rules or provisions specified in the notice to
be rules or provisions to which the definition
of "governing rules" does not apply.

(4) For the avoidance of doubt, it is
hereby declared that a notice published under

subsection (3) is subsidiary legislation.".

3. Functions of Authority

Section 6E(1) is amended by adding -

- "(ea) to consider and propose reforms of the law relating to occupational retirement schemes or provident fund schemes;
- (eb) to promote and encourage the development of the retirement scheme industry in Hong Kong, including the adoption of a high standard of conduct and sound prudent business practices by trustees and other service providers;".

4. Section added

The following is added after section 6Q -

"6QA. Authority may borrow money

The Authority may, with the approval of the Financial Secretary, borrow money on such security or other conditions as it considers expedient.".

5. Employer to arrange for employees to become scheme members

Section 7(3)(b)(ii) is amended by adding "the beginning of" before "the date".

6. Employer and relevant employees required to contribute to registered scheme

Section 7A is amended -

- (a) in subsection (7), by repealing "income" and

substituting "relevant income earned";

- (b) in subsection (10), in the definition of "contribution period", in paragraphs (a), (b) and (c), by adding "or should pay" after "pays".

7. Duty of self-employed person to become scheme member

Section 7C is amended -

- (a) in subsection (1)(b), by adding "subject to the provisions of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg.)," after "must,";
- (b) in subsection (2), in the definition of "the relevant time", in paragraph (b), by repealing "the date on which the person becomes self-employed" and substituting "the beginning of the date on which the person becomes self-employed";
- (c) by adding -
 - "(6) This section does not apply to a self-employed person who is -
 - (a) less than 18 years of age; or
 - (b) of or more than retirement age."

8. Voluntary contributions

Section 11 is amended -

- (a) by repealing subsections (1) and (2) and substituting -

"(1) The employer of a person may arrange for the person to join and pay contributions to a registered scheme notwithstanding that the person is less than 18 years of age or is of or more than retirement age. The employer may pay contributions to the scheme in respect of the person, but is not obliged to do so, whether or not the person pays contributions to the scheme whilst being of that age.

(2) A self-employed person may join and pay contributions to a registered scheme notwithstanding that the person is less than 18 years of age or is of or more than retirement age." ;

(b) by repealing subsection (7) and substituting -

"(7) Any contributions -

(a) paid to a registered scheme as provided by this section; or

(b) consisting of any benefits, other than minimum MPF benefits to which section 5(1)(b) of Schedule 2 to the Mandatory Provident Fund Schemes (Exemption) Regulation (Cap. 485 sub. leg.) applies, of a member of an ORSO exempted scheme, or an ORSO registered scheme, within the meaning of

section 2(1) of the Mandatory Provident Fund Schemes (Exemption) Regulation (Cap. 485 sub. leg.), transferred to a registered scheme,
are voluntary, but are subject to the governing rules of the scheme.".

9. Approval of trustees

Section 20 is amended by adding -

"(12) Where the Authority -

(a) has decided that it is appropriate to -

(i) amend any conditions imposed under subsection (8) or this subsection with respect to the conduct of an approved trustee's business; or

(ii) impose conditions with respect to the conduct of an approved trustee's business; and

(b) has given to the approved trustee -

(i) not less than 7 working days' advance notice of its decision, specifying its grounds; and

(ii) an opportunity to make written representations as to why the conditions should not be amended or imposed,

then the Authority may -

- (i) by written notice served on the approved trustee -
 - (A) amend any conditions imposed under subsection (8) or this subsection with respect to the conduct of the approved trustee's business; or
 - (B) impose conditions with respect to the conduct of the approved trustee's business;and
- (ii) if the notice is accompanied by a certificate of approval issued by the Authority specifying the conditions imposed under this section with respect to the conduct of the approved trustee's business as those conditions are in force after the service of the notice, require the approved trustee to surrender to the Authority the last certificate of approval issued under this section to the approved trustee not later than 7 working days after the service of the notice.

(13) The Authority may waive a person's compliance with a condition imposed under subsection (8) or (12) -

- (a) in a particular case; and
- (b) where the person satisfies the Authority that such compliance is not, or has not been, reasonably practicable in all the circumstances of that case."

10. Application for registration as employer sponsored scheme or master trust scheme

Section 21 is amended -

- (a) in subsection (8)(b), by repealing "on behalf of any relevant employee or self-employed person." and substituting -

"on behalf of -

(i) any relevant employee; or

(ii) any self-employed person who is 18 years of age or over and below retirement age.";

- (b) by adding -

"(8A) Without prejudice to the operation of subsection (8), on registering a provident fund scheme, the Authority may impose such conditions with respect to the administration or marketing of the scheme as it considers appropriate.";

- (c) in subsection (11), by adding "and, if the Authority has imposed conditions under subsection (8A) with respect to the administration or marketing of the scheme, must specify those conditions in the certificate or in a document accompanying the certificate" after "registration";

- (d) by adding -

"(12) Where the Authority -

(a) has decided that it is appropriate to -

(i) amend any conditions imposed under subsection (8A) or this subsection with respect to the administration or marketing of a registered scheme; or

(ii) impose conditions with respect to the administration or marketing of a registered scheme; and

(b) has given to the approved trustee -

(i) not less than 7 working days' advance notice of its decision, specifying its grounds; and

(ii) an opportunity to make written representations as to why the conditions should not be amended or imposed,

then the Authority may -

(i) by written notice served on the approved trustee -

- (A) amend any conditions imposed under subsection (8A) or this subsection with respect to the administration or marketing of the scheme; or
 - (B) impose conditions with respect to the administration or marketing of the scheme; and
- (ii) if the notice is accompanied by a certificate of registration issued by the Authority specifying the conditions imposed under this section with respect to the administration or marketing of the scheme as those conditions are in force after the service of the notice, require the approved trustee to surrender to the Authority the last certificate of registration issued under this section to the approved trustee not later than 7 working days after the service of the notice.

(13) The Authority may waive a person's compliance with a condition imposed under

subsection (8A) or (12) -

- (a) in a particular case; and
- (b) where the person satisfies the Authority that such compliance is not, or has not been, reasonably practicable in all the circumstances of that case."

11. Applications for registration of schemes as industry schemes

Section 21A is amended -

- (a) in subsection (8), by repealing "or self-employed person who is employed or engaged" and substituting "who is employed, or any self-employed person who is 18 years of age or over and below retirement age and engaged,";
- (b) by adding -
 - "(8A) Without prejudice to the operation of subsection (8), on registering a provident fund scheme as an industry scheme, the Authority may impose such conditions with respect to the administration or marketing of the scheme as it considers appropriate.";
- (c) in subsection (11)(b), by adding "and, if the Authority has imposed conditions under subsection (8A) with respect to the administration or marketing of the scheme, must specify those conditions in the

certificate or in a document accompanying the certificate" after "registration";

(d) by adding -

"(12) Where the Authority -

(a) has decided that it is appropriate to -

(i) amend any conditions imposed under subsection (8A) or this subsection with respect to the administration or marketing of a registered scheme; or

(ii) impose conditions with respect to the administration or marketing of a registered scheme; and

(b) has given to the approved trustee -

(i) not less than 7 working days' advance notice of its decision, specifying its grounds; and

(ii) an opportunity to make written representations

as to why the
conditions should not
be amended or imposed,

then the Authority may -

- (i) by written notice served on the approved trustee -
 - (A) amend any conditions imposed under subsection (8A) or this subsection with respect to the administration or marketing of the scheme; or
 - (B) impose conditions with respect to the administration or marketing of the scheme; and
- (ii) if the notice is accompanied by a certificate of registration issued by the Authority specifying the conditions imposed under this section with respect to the administration or marketing of the scheme as those conditions are in force after the service of the notice, require the approved trustee to surrender to the Authority the last certificate of registration

issued under this section to the approved trustee not later than 7 working days after the service of the notice.

(13) The Authority may waive a person's compliance with a condition imposed under subsection (8A) or (12) -

- (a) in a particular case; and
- (b) where the person satisfies the Authority that such compliance is not, or has not been, reasonably practicable in all the circumstances of that case."

12. Winding up of registered schemes otherwise than in accordance with section 34 or 34D

Section 34A(1) is amended by adding "or 34D" after "section 34".

13. Section added

The following is added after section 34C -

"34D. Cancellation of registration of registered scheme which has no scheme members, etc.

(1) On being satisfied on the application of the approved trustee of a registered scheme that the scheme has no scheme members, no scheme assets and no liabilities (including obligations to participating employers and scheme members), the Authority must cancel the registration of the scheme.

(2) An application must -

- (a) be in a form approved by the Authority; and
- (b) contain such information, and be accompanied by such documents, as are specified in the form.

(3) The Authority may, by written notice, require an applicant to provide such additional information and documents as are reasonably necessary to enable it to determine the application. If such a requirement is not complied with within a reasonable time specified in the notice, the Authority may reject the application."

14. Section added

The following is added -

"42B. Immunity

No civil liability shall be incurred by the Authority, a director of the Authority or an employee of the Authority in respect of anything done, or omitted to be done, by the Authority, director or employee, as the case may be, in good faith in the performance or purported performance of any function under this Ordinance."

15. Offences by approved trustees

Section 43A(3) is amended by adding ", 20(12)(ii), 21(12)(ii) or 21A(12)(ii)" after "section 14(3)".

16. Offences by self-employed persons

Section 43C(1) is amended by adding "who is 18 years of age or

over and below retirement age" after "self-employed person".

17. Application and interpretation of sections 45B and 45C

Section 45(1) is repealed and the following substituted -

"(1) Sections 45B and 45C apply to -

- (a) approved trustees;
- (b) participating employers; and
- (c) self-employed persons who are 18 years of age or over and below retirement age."

18. Regulations

Section 46(1A) is amended -

- (a) in paragraph (r), by repealing "擔保" and substituting "保證";

(b) by adding -

"(wa) requiring the guarantor of an approved pooled investment fund, within the meaning of section 2 of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg.), to maintain adequate reserves so as to provide investment guarantees;"

19. Exempt persons

Schedule 1 is amended, in Part I, in item 7(2), in the definition of "relevant time", in paragraph (b), by adding "the

beginning of" before "the date".

20. Decisions which may be the subject of an appeal

Schedule 6 is amended -

(a) by adding after section 2 -

"2A. A decision of the Authority amending conditions imposed on an approved trustee.

2B. A decision of the Authority imposing conditions on an approved trustee subsequent to the trustee's approval.";

(b) by adding after section 6 -

"6A. A decision of the Authority amending conditions imposed on the administration or marketing of a registered scheme.

6B. A decision of the Authority imposing conditions on the administration or marketing of a registered scheme subsequent to the scheme's registration.".

21. Consequential and other amendments to Mandatory Provident Fund Schemes (General) Regulation

The provisions of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg.) are amended as specified in the Schedule.

SCHEDULE

[s. 21]

CONSEQUENTIAL AND OTHER AMENDMENTS TO MANDATORY
PROVIDENT FUND SCHEMES (GENERAL) REGULATION1. **Interpretation**

Section 2 of the Mandatory Provident Fund Schemes (General)

Regulation (Cap. 485 sub. leg.) is amended -

- (a) by repealing the definition of "corporation";
- (b) in the definition of "preserved account", by repealing everything after and including "includes" and substituting -

"includes -

- (a) a former contribution account of the member retained in the scheme under section 147(6);
- (b) the member's benefits, if any, transferred to the scheme from an ORSO exempted scheme or an ORSO registered scheme;"
- (c) by repealing the definition of "working day";
- (d) by adding -

" "ORSO exempted scheme" (職業退休豁免計劃) has the same meaning as in section 2(1) of the Mandatory Provident Fund Schemes (Exemption) Regulation (Cap. 485 sub. leg.);

"ORSO registered scheme" (職業退休註冊計劃) has the same meaning as in section 2(1) of the

Mandatory Provident Fund Schemes (Exemption)
Regulation (Cap. 485 sub. leg.);".

2. **What is an approved pooled investment fund for the purposes of this Regulation?**

Section 6 is amended -

(a) in subsection (2), by repealing the second sentence;

(b) by adding -

"(3) Where the Authority -

(a) has decided that it is

appropriate to -

(i) amend any conditions

imposed under

subsection (2) or this

subsection on an

approved pooled

investment fund; or

(ii) impose conditions on an

approved pooled

investment fund; and

(b) has given to the investment

manager, insurer or trustee

concerned -

(i) not less than 7 working

days' advance notice of

its decision,

specifying its grounds;

and

- (ii) an opportunity to make written representations as to why the conditions should not be amended or imposed,

then the Authority may, by written notice served on the investment manager, insurer or trustee -

- (i) amend any conditions imposed under subsection (2) or this subsection on the investment fund;
- or

- (ii) impose conditions on the investment fund.

(4) The Authority may waive a person's compliance with a condition imposed under subsection (2) or (3) -

- (a) in a particular case; and
- (b) where the person satisfies the Authority that such compliance is not, or has not been, reasonably practicable in all the circumstances of that case."

3. **Non-refusal of scheme applicants**

Section 31 is amended -

- (a) in subsection (1), by repealing "or by a self-

employed person" and substituting ", or by a self-employed person who is 18 years of age or over and below retirement age,";

- (b) in subsection (5)(b), by adding "and who is 18 years of age or over and below retirement age," after "former self-employed person,".

4. **Requirements with respect to voluntary contributions**

Section 33(3) is repealed and the following substituted -

"(3) If a member of the scheme so requests, accrued benefits derived from voluntary contributions made by or in respect of the member must be paid to the member as provided by the governing rules of the scheme. Where any of those voluntary contributions are required to be made by the scheme member's employer, then the governing rules of the scheme must, not later than 6 months after the commencement of this subsection, provide for the payment of any accrued benefits derived from voluntary contributions if the employer has failed to make such a required voluntary contribution to the scheme within 6 months after -

- (a) if the amount of the voluntary contributions required to be made by the employer is determined by reference to the income derived from the employee's employment with the employer, the end of the period covered by the payment of such income;

- (b) if the amount of the relevant contributions required to be made by the employer is determined by reference to a period of employment of the employee with the employer, the end of such period."

5. **Amendments to governing rules of registered scheme not to take effect without Authority's approval**

Section 63 is amended -

- (a) in subsections (1) and (2), by repealing "An" and substituting "Subject to subsection (2A), an";
- (b) by adding -

"(2A) Subsections (1) and (2) shall not apply to an amendment proposed to be made or made to the governing rules in respect of or by a participation agreement of a registered scheme if the amendment is in a form approved by the Authority for the purposes of this section."

6. **Eligibility of delegate of custodian**

Section 71 is amended -

- (a) by renumbering it as section 71(1);
- (b) by adding -

"(2) The approved trustee of a registered scheme must ensure that -

- (a) if the custodian of scheme assets

is appointed under section 50(1), the contract for the appointment prohibits the custodian from delegating the custodian's function as a custodian to a person who is not eligible under subsection (1) to be a delegate of the custodian;

(b) if the trustee is the custodian of the scheme assets in accordance with section 50(2), the trustee does not delegate the trustee's function as a custodian to a person who is not eligible under subsection (1) to be a delegate of the custodian.

(3) The approved trustee of a registered scheme who, without reasonable excuse, fails to comply with a requirement imposed on the trustee by subsection (2) commits an offence and is liable on conviction to a fine at level 5."

7. **Subcustodial agreement**

Section 72 is amended -

(a) by renumbering it as section 72(1);

(b) by adding -

"(2) The approved trustee of a registered

scheme must ensure that -

(a) if the custodian of scheme assets is appointed under section 50(1), the contract for the appointment prohibits the custodian from entering into an agreement with a person providing for any of the custodian's functions to be delegated to that person unless the agreement complies with subsection (1);

(b) if the trustee is the custodian of the scheme assets in accordance with section 50(2), the trustee does not enter into an agreement with a person providing for any of the custodian's functions to be delegated to that person unless the agreement complies with subsection (1).

(3) The approved trustee of a registered scheme who, without reasonable excuse, fails to comply with a requirement imposed on the trustee by subsection (2) commits an offence and is liable on conviction to a fine at level 5."

8. **Separate account for each scheme member**

Section 78 is amended -

- (a) by repealing subsection (6)(a), (b), (c), (d), (e) and (f) and substituting -

"(a) a sub-account specifying -

- (i) the contributions paid under section 7A(1)(a) or (2)(a) of the Ordinance in respect of the member by the member's current employer as mandatory contributions;
- (ii) any contribution surcharges paid by the member's employer on arrears if the relevant income of the employee is less than the minimum level of relevant income per month and there is not a sub-account as referred to in paragraph (b);
- (iii) the member's minimum MPF benefits (if any), to which section 5(1)(b) of Schedule 2 to the Mandatory Provident Fund Schemes (Exemption) Regulation (Cap. 485 sub. leg.) applies, transferred to the scheme which are attributable to the current employer's

contributions;

- (iv) the income or profits arising from any investments of the contributions, surcharges and benefits mentioned in any of subparagraphs (i), (ii) and (iii), but taking into account any losses in respect thereof;

(b) a sub-account specifying -

- (i) the member's contributions paid under section 7A(1)(b) or (2)(b) of the Ordinance by the member's current employer on behalf of the member as mandatory contributions;
- (ii) any contribution surcharges paid by the member's employer on arrears if -
 - (A) the relevant income of the employee is not less than the minimum level of relevant income per month;
 - (B) the contributions have been made under subparagraph (i) in respect of the member; or
 - (C) the minimum MPF benefits have been transferred under subparagraph (iii) in

respect of the member;

(iii) the member's minimum MPF benefits (if any), to which section 5(1)(b) of Schedule 2 to the Mandatory Provident Fund Schemes (Exemption) Regulation (Cap. 485 sub. leg.) applies, transferred to the scheme which are attributable to the employee's contributions of the current employment;

(iv) the income or profits arising from any investments of the contributions, surcharges and benefits mentioned in any of subparagraphs (i), (ii) and (iii), but taking into account any losses in respect thereof;

(c) a sub-account specifying -

(i) all mandatory contributions paid by or in respect of the member while employed by a former employer or while self-employed and transferred to the member's contribution account in accordance with Part XII, any contribution surcharges in respect of mandatory

contributions paid by the member's employer while the member is employed by a former employer, and any contribution surcharges paid in respect of mandatory contributions paid by the member while self-employed;

(ii) the member's minimum MPF benefits (if any), to which section 5(1)(b) of Schedule 2 to the Mandatory Provident Fund Schemes (Exemption) Regulation (Cap. 485 sub. leg.) applies, transferred to the scheme which are attributable to his former employments;

(iii) the income or profits arising from any investments of the contributions, surcharges and benefits mentioned in any of subparagraphs (i) and (ii), but taking into account any losses in respect thereof;

(d) a sub-account specifying -

(i) the voluntary contributions (if any) paid in respect of the member by the member's current employer;

(ii) the amount (other than minimum MPF benefits to which section 5(1)(b) of Schedule 2 to the Mandatory Provident Fund Schemes (Exemption) Regulation (Cap. 485 sub. leg.) applies), if any, transferred to the scheme in respect of the member from an ORSO exempted scheme or an ORSO registered scheme which are attributable to the current employer's contributions;

(iii) the income or profits arising from any investments of the contributions and amount mentioned in any of subparagraphs (i) and (ii), but taking into account any losses in respect thereof;

(e) a sub-account specifying -

(i) the voluntary contributions (if any) paid by the member while employed by the member's current employer;

(ii) the amount (other than minimum MPF benefits to which section 5(1)(b) of Schedule 2 to the

Mandatory Provident Fund Schemes (Exemption) Regulation (Cap. 485 sub. leg.) applies), if any, transferred to the scheme in respect of the member from an ORSO exempted scheme or an ORSO registered scheme which are attributable to the employee's contributions of the current employment;

(iii) the income or profits arising from any investments of the contributions and amount mentioned in any of subparagraphs (i) and (ii), but taking into account any losses in respect thereof;

(f) a sub-account specifying -

(i) all voluntary contributions paid by or in respect of the member while employed by a former employer or while self-employed and transferred to the member's contribution account;

(ii) the amount (other than minimum MPF benefits to which section 5(1)(b) of Schedule 2 to the

Mandatory Provident Fund Schemes
(Exemption) Regulation (Cap. 485
sub. leg.) applies), if any,
transferred to the scheme in
respect of the member from an
ORSO exempted scheme or an ORSO
registered scheme which are
attributable to the member's
former employments;

(iii) the income or profits arising
from any investments of the
contributions and amount
mentioned in any of subparagraphs
(i) and (ii), but taking into
account any losses in respect
thereof.”;

(b) by repealing subsection (7)(a), (b), (c) and (d) and
substituting -

“(a) a sub-account specifying the member's
mandatory contributions paid by the member
while self-employed, any contribution
surcharges paid by the member on arrears,
and the income or profits arising from any
investments of those contributions and
surcharges, but taking into account any
losses in respect thereof;

(b) a sub-account specifying -

- (i) all mandatory contributions paid by or in respect of the member and transferred to the member's contribution account in accordance with Part XII, any contribution surcharges in respect of mandatory contributions paid by the member's employer while the member is employed by a former employer, and any contribution surcharges paid in respect of mandatory contributions paid by the member while self-employed;
- (ii) the member's minimum MPF benefits (if any), to which section 5(1)(b) of Schedule 2 to the Mandatory Provident Fund Schemes (Exemption) Regulation (Cap. 485 sub. leg.) applies, transferred to the scheme;
- (iii) the income or profits arising from any investments of the contributions, surcharges and benefits mentioned in any of subparagraphs (i) and (ii), but taking into account any losses in

respect thereof;

(c) a sub-account specifying the voluntary contributions (if any) paid by the member while self-employed and the income or profits arising from any investments of those contributions, but taking into account any losses in respect thereof;

(d) a sub-account specifying -

(i) all voluntary contributions paid by or in respect of the member and transferred to the member's contribution account;

(ii) the amount (other than minimum MPF benefits to which section 5(1)(b) of Schedule 2 to the Mandatory Provident Fund Schemes (Exemption) Regulation (Cap. 485 sub. leg.) applies), if any, transferred to the scheme in respect of the member from an ORSO exempted scheme or an ORSO registered scheme;

(iii) the member's income or profits arising from any investments of the contributions and amount mentioned in any of subparagraphs (i) and (ii), but taking into

account any losses in respect
thereof.”;

(c) by repealing subsection (8)(a) and (b) and
substituting -

“(a) a sub-account specifying -

- (i) all mandatory contributions paid by or in respect of the member and transferred to the member’s preserved account in accordance with Part XII, any contribution surcharges in respect of mandatory contributions paid by the member’s employer while the member is employed by a former employer, and any contribution surcharges paid in respect of mandatory contributions paid by the member while self-employed;
- (ii) the member’s minimum MPF benefits (if any), to which section 5(1)(b) of Schedule 2 to the Mandatory Provident Fund Schemes (Exemption) Regulation (Cap. 485 sub. leg.) applies, transferred to the scheme;
- (iii) the income or profits arising from any investments of the

contributions, surcharges and benefits mentioned in any of subparagraphs (i) and (ii), but taking into account any losses in respect thereof;

(b) a sub-account specifying -

- (i) all voluntary contributions paid by or in respect of the member and transferred to the member's preserved account;
- (ii) the amount (other than minimum MPF benefits to which section 5(1)(b) of Schedule 2 to the Mandatory Provident Fund Schemes (Exemption) Regulation (Cap. 485 sub. leg.) applies), if any, transferred to the scheme in respect of the member from an ORSO exempted scheme or an ORSO registered scheme;
- (iii) the member's income or profits arising from any investments of the contributions and amount mentioned in any of subparagraphs (i) and (ii), but taking into account any losses in respect thereof."

9. **Definitions**

Section 119 is amended -

(a) by repealing the definition of "second payment-period";

(b) by adding -

"subsequent payment-period" (其後付款期) means the period specified in a notice under section 136(6)."

10. **Participating employer to calculate relevant income and pay mandatory contributions**

Section 122(1) is amended, in the definition of "contribution day", by repealing paragraph (b)(i) and (ii) and substituting -

(i) the 10th day after the last day of the relevant contribution period; or

(ii) the next working day (other than a Saturday) immediately subsequent to the payment of relevant income for the relevant contribution period;".

11. **Participating employer to provide remittance statement to approved trustee**

Section 123(3) is amended by repealing "day on which the relevant income for the relevant contribution period is paid to the employee" and substituting "working day mentioned in paragraph (b)(ii) of the definition of "contribution day" in section 122(1)".

**12. Approved trustee to notify defaulters
of failure to pay contributions**

Section 133(2) is amended by repealing "day on which the relevant income for the relevant contribution period is paid to the employee" and substituting "working day mentioned in paragraph (b)(ii) of the definition of "contribution day" in section 122(1)".

**13. Contribution surcharge for, and report
on, failure to pay contributions**

Section 134 is amended -

- (a) in subsection (3), by repealing "day on which the relevant income for the relevant contribution period is paid to the employee" and substituting "working day mentioned in paragraph (b)(ii) of the definition of "contribution day" in section 122(1)";
- (b) in subsection (4)(b), by repealing "second" and substituting "relevant subsequent".

**14. Authority to give notice to defaulter
and approved trustee to inform
Authority of non-payment**

Section 136 is amended -

- (a) in subsection (5), by adding "or any subsequent payment-period" after "payment-period";
- (b) in subsection (6), by repealing "must serve a second" and substituting "may serve another";
- (c) by repealing subsection (8).

15. **Approved trustee to check calculations of arrears and contribution surcharge**

Section 137(2) is amended by repealing "second" and substituting "relevant subsequent".

16. **Participating employer to give monthly pay-records to scheme members**

Section 139(4) is amended by repealing "day on which the relevant income for the relevant contribution period is paid to the employee" and substituting "working day mentioned in paragraph (b)(ii) of the definition of "contribution day" in section 122(1)".

17. **Circumstances in which persons are exempted from operation of the Ordinance**

Section 203(1)(b) is amended by repealing "12" and substituting "13".

18. **Financial Penalties**

Schedule 4 is amended, in Part II -

(a) in item 53, in column 2, by repealing "and (8)";

(b) by adding after item 70 -

"70A 167 Approved 10,000 20,000 50,000".

trustee not

to pay

accrued

benefits if

scheme

accounts are
being
audited or
if scheme is
being
investigated

Explanatory Memorandum

The principal object of this Bill is to amend the Mandatory Provident Fund Schemes Ordinance (Cap. 485) ("the Ordinance") in order to make a number of technical amendments to its provisions which practical experience of the operation of the Ordinance has revealed are necessary or desirable.

2. Clause 2(a)(ii) repeals and replaces the definition of "company". The new definition of "company" is expanded to include a corporation in the case of the provisions of the Ordinance mentioned in paragraph (b) of the new definition. The definition of "corporation" is added by clause 2(x).

3. Clause 2(a)(iv) repeals and replaces the definition of "governing rules". The new definition of "governing rules", as read with new section 2(3) at clause 2(b), provides a means to exclude certain rules and provisions from the definition.

4. Clause 2(a)(v) repeals and replaces the definition of "mandatory contribution". The new definition of "mandatory contribution" is expanded to cover certain minimum MPF benefits that have been transferred to a registered scheme. The definition of "minimum MPF benefits" is added by clause 2(x).

5. Clause 2(a)(vi) amends the definition of "master trust scheme" by requiring a master trust scheme to also be open to membership by persons having benefits in an ORSO exempted scheme, or an ORSO registered scheme, within the meaning of section 2(1) of the Mandatory Provident Fund Schemes (Exemption) Regulation (Cap. 485 sub. leg.), and who wish to have those benefits transferred to the master trust scheme.

6. Clause 3 amends section 6E to more clearly set out the full range of the functions of the Mandatory Provident Fund Schemes Authority ("the Authority").

7. Clause 4 adds a new section 6QA to empower the Authority to borrow money with the approval of the Financial Secretary.

8. Clause 7(c) amends section 7C in order to disapply the section to self-employed persons who are less than 18 years of age or who have reached retirement age. Similar amendments are made by clauses 16 and 17 to sections 43C and 45 respectively.

9. Clause 8(a) amends section 11 to, inter alia, provide that a person's employer may arrange for the person to join and pay voluntary contributions to a registered scheme notwithstanding that the person is less than 18 years of age or is of or more than retirement age. The employer may also pay contributions to the scheme, but is not required to do so.

10. Clause 9 amends section 20 to empower the Authority to impose conditions from time to time on an approved trustee, including empowering the Authority to amend those conditions from time to time or to waive compliance with such conditions in particular cases. Similar amendments are made by clauses 10 and 11 to sections 21 and

21A. Consequential amendments are made by clause 15 to section 43A (offences by approved trustees) and by clause 20 to Schedule 6 (decisions which may be the subject of an appeal).

11. Clause 13 adds a new section 34D to require the Authority to cancel the registration of a scheme on being satisfied that the scheme has no scheme members and no scheme assets.

12. Clause 14 adds a new section 42B to provide immunity from civil liability for the Authority and its director and employees acting in good faith in the performance or purported performance of any function under the Ordinance.

13. Clause 18 amends section 46 to expand the regulation-making power of the Chief Executive in Council.

14. Clause 21 and the Schedule make consequential and other technical amendments to the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg.). In particular, sections 6 and 7 of the Schedule amend sections 71 and 72 respectively of the Regulation to require approved trustees to ensure that sections 71(1) and 72(1) are complied with.