

LETTERHEAD OF THE LAW SOCIETY OF HONG KONG

Practitioners Affairs

Our Ref : CWP-144/01/49482
Your :
Direct Line :

28 May, 2001

Mrs. Florence Lam
Clerk
Legislative Council
3/F, Citibank Tower
3 Garden Road, Central
Hong Kong

Dear Mrs. Lam,

Re: Mandatory Provident Fund Schemes (Amendment) Bill 2001

I refer to the Bill gazetted on 18 May 2001 and attach comments from the Law Society of Hong Kong. Please arrange to circulate the comments to the members of the Bills Committee.

Yours sincerely,

Joyce Wong
Director of Practitioners Affairs
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Encl.

cc Rafael Hui
Members of the Retirement Schemes Committee

**MANDATORY PROVIDENT FUND SCHEMES
(AMENDMENT) BILL 2001**

**Comments from the Law Society of Hong Kong
28 May 2001**

Section in Draft Bill	Comment/concern
<p>(a) Section 2(a)(iv) - Definition of "governing rules"</p>	<p>(i) This definition is exceptionally broad. In our opinion the new definition does not reflect the true intention and is unworkable.</p> <p>(ii) The insertion of the word "or" between (A) and (B) of para (ii) (in the current legislation the word "and" is used) will result in pure administration agreements between trustee and administrator falling within the definition "governing rules". Such agreements are private arrangements which have no impact on the public. Why should they be regulated by the MPFSA?</p> <p>(iii) The inclusion of "offering document" in this definition, taken together with the mandatory covenant in para (a) of Schedule 5 to the Ordinance ("approved trustee will comply with the terms of the governing rules"), will mean, for example, that it will not be permissible to reduce fees for any particular client below the level specified in the Offering Document without the consent of the MPFSA. Is this the intention?</p> <p>(iv) The manner in which this definition is drafted (an exceptionally broad section (a), with an exclusion for those "rules or provisions declared by notice ..." under section (b) and subsection (3)) is confusing and currently unclear. The MPFSA has not currently given any indication as to what "rules or provisions" will be excluded under subsection (3). As such we are in the dark as to the true</p>

Section in Draft Bill	Comment/concern
	<p>nature of this new clause.</p> <p>(v) See also concerns with regard to definition of "offering document" in (c) below.</p>
<p>(b) Section 2(a)(v) - Definition of "mandatory contribution"</p>	<p>(i) We are concerned as to the reason for the change in paragraph (a) from "required to be paid" (in the current definition) to "payable". Perhaps the MPFSA could explain the reason for the change.</p> <p>(ii) Section (b) should be amended by:-</p> <ul style="list-style-type: none"> - the insertion of "an amount equal to the" at the beginning, and - a replacement of "section 5(1)(b)" with "section 5(1)" (the current cross reference is incorrect - note this appears throughout the Bill).
<p>(c) Section 2(a)(x) - Definition of "offering document"</p>	<p>(i) This will, in effect, include any advert for an MPF scheme. As such all adverts will need approval of both the SFC <u>and</u> the MPFSA.</p> <p>(ii) Coupled with the changes to the definition of "governing rules", this could result in a massive increase in regulation of marketing of MPF schemes.</p> <p>(iii) How does this new definition tie in with the Memorandum of Understanding between the MPFSA and the SFC?</p>
<p>(e) Section 2(b) - MPFSA - notices in Gazette</p>	<p>(i) These new sections turn the MPFSA into a quasi lawmaking body.</p> <p>(ii) Precisely what documents need approval by the MPFSA before amendment is a fundamental aspect of MPF scheme regulation. With</p>

Section in Draft Bill	Comment/concern
	these sections (3) and (4) the position immediately becomes totally unclear to the industry.
(f) Section 7 - Self-employed person	We suggest that the words "subject to the" be replaced by "in accordance with the"
(g) Section 8(a) - Voluntary contributions	The second half of the first sentence of section (1) implies that there are other categories of employee in Hong Kong in respect of whom the employer cannot pay voluntary contributions. Correct?
(h) Section 8(b) - Voluntary Contributions	The terms "ORSO exempted scheme" and "ORSO registered scheme" are defined in the Gen. Reg. Would it not make sense to define them in the Ordinance instead?
(i) Section 10 - Application for registration (s21)?	The inclusion of the words "or marketing" in the new section 8A appear to conflict with the Memorandum of Understanding between the MPFSA and SFC. This may result in a duplication of monitoring by regulators. Why is this change necessary?
(j) Section 18 - Regulations	The new section 46(1A)(wa) appears to duplicate the role of the Monetary Authority, Insurance Authority (or other appropriate regulation). Why is this dual monitoring necessary?
SCHEDULE	
(k) Section 1(b) - "preserved account"	Paragraph (b) refers to certain transferred benefits. It does not (and should) include transfers from schemes which are <u>not</u> registered or exempted under ORSO (e.g. offshore schemes, schemes of foreign governments). Suggest simply use "any occupational retirement scheme"?