

**Responses to the
Comments Raised by the Law Society of Hong Kong
in its Letter dated 28 May 2001**

Section in Bill	Comment / Concern	The Administration's Response
<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>The proposed definition clarifies that “offering document” and “participation agreement” form part of the governing rules as they are important scheme documents governing the establishment or the administration of a Mandatory Provident Fund (MPF) scheme. This is to enable the Mandatory Provident Fund Schemes Authority (MPFA) to forestall any changes to scheme features and terms by amending such documents as such changes may adversely affect scheme members’ interests.</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>We recognize that administration agreements, like custodial agreements and investment management contracts, are private arrangements between trustees and other service providers. Scheme administration will have a significant impact on the effective operation of MPF schemes. We consider it necessary to review the administration agreements to ensure that the roles and responsibilities of the trustees and the appointed administrators are clearly defined.</p> <p>At present, in the process of approving trustees and registering MPF schemes, MPFA will review the administration agreements, custodial agreements and investment management contracts, and where necessary, suggest changes to the agreements or contracts.</p>

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		<p>During the on-site inspections of trustees and administrators, MPFA will also review the management and administration of MPF schemes to determine whether the trustees and the administrators have fulfilled their respective roles according to their administration agreements.</p> <p>The trustees have so far been co-operative in accepting MPFA's suggestions. However, there is no explicit provision in the law. Given the importance of such agreements to the operation of MPF schemes, the proposed changes serve to put it beyond doubt that MPFA can vet such agreements when approving the governing rules.</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>Where necessary, MPFA in its approval of offering documents can make clear its intention that further consent from MPFA would not be required in respect of any fee reduction for any particular client below the level specified in the offering document. The trustee may also make explicit in the offering document its discretion to reduce fees for any particular client or class of clients.</p>

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	<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 nature of this new clause.</p>	<p>The revised definition seeks to clarify that governing rules are those governing the establishment or the administration of the scheme. Section 2(b) of the Bill provides a mechanism for MPFA to declare certain types of documents (e.g. advertisements) to be excluded from the definition of governing rules.</p> <p>Our intention is that documents which are relevant to the administration and operation of MPF, and have a bearing on the interest of scheme members would be covered, while others will be excluded.</p> <p>MPFA welcomes views from the industry on the specific types of documents to be excluded. It will also consult the industry where necessary. The gazette notice to exclude such documents will be subject to the scrutiny of the Legislative Council.</p>
	<p>(v) See also concerns with regard to definition of “offering document” in (c) below.</p>	<p>See response to (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>The change from “required to be paid” to “paid or payable” is to address concerns expressed at MPFA's Guidelines Committee (on which the Law Society is represented). The main concern was that under the existing definition, contributions that were prepaid before they were due could not be regarded as mandatory contributions, as they were not “required to be paid” (not due for</p>

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		<p>payment).</p> <p>MPFA considers that mandatory contributions can be prepaid, and contributions prepaid should be treated as mandatory, unless they are later found to be "not required to be made", e.g. member ceases employment before the 60th day of employment.</p> <p>The amendment attempts to put the matter beyond doubt.</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>We consider the insertion of the proposed wording unnecessary, as the present wording already reflects our intention accurately.</p> <p>Agreed. A CSA will be moved to rectify this.</p>
<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>Where necessary, MPFA can use the proposed "exclusion" mechanism in the proposed new section 2(3) to clarify the document to be excluded as "governing rules". (Section 2(b) of the Bill)</p>
	<p>(ii) Coupled with the changes to the definition of "governing rules", this</p>	<p>It is the existing practice of MPFA to vet and comment on offering documents to ensure that the provisions contained therein are in</p>

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	<p>could result in a massive increase in regulation of marketing of MPF schemes.</p>	<p>compliance with MPF requirements encompassed in the MPF legislation and the "Code on MPF Investment Funds" issued by MPFA. In fact, the Securities and Futures Commission (SFC) has been recommending the applicants of MPF schemes and pooled investment funds to liaise with MPFA directly concerning MPF-related matters set out in the offering documents of those products.</p> <p>The proposed amendment, therefore, will not result in a massive increase in regulation of MPF schemes.</p> <p>As some of the detailed rules or provisions relating to the operation of an MPF scheme are described only in the offering document (e.g. statement of investment policies, requirements on fund switching, etc.), it is necessary to put it beyond doubt that the definition of "governing rules" should cover the offering document and be vetted accordingly. The proposed changes will enhance the protection of scheme members' interests.</p>
	<p>(iii) How does this new definition tie in with the Memorandum of Understanding between the MPFSA and the SFC?</p>	<p>It is the existing practice for SFC to seek confirmation from MPFA with regard to compliance with MPF requirements in granting authorization to the offering documents of MPF schemes. MPFA will implement the proposed provision in consultation with the SFC, and upon the enactment of the legislation, the Memorandum of Understanding between the SFC and MPFA will be revised to achieve the effect.</p>

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<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>Section 2(b)(4) of the Bill sets out clearly that the proposed Gazette notice is subsidiary legislation. As subsidiary legislation, such notices will be subject to vetting by the Legislative Council. MPFA will not be a quasi lawmaking body.</p> <p>In any event, MPFA is already empowered to declare notices published in the Gazette, e.g. such as the declaration of the permitted period after the relevant time (sections 7 and 7C of the Ordinance), and the scales of amounts of contributions for casual employees under the industry schemes (section 7A(6) of the Ordinance). The proposal is in line with the current practice.</p>
	<p>(ii) Precisely what documents need approval by the MPFSA before amendment is a fundamental aspect of MPF scheme regulation. With these sections (3) and (4) the position immediately becomes totally unclear to the industry.</p>	<p>The new definition of “governing rules” helps to clarify that “offering document” and “participation agreement”, which are well known terms to the industry, form part of governing rules. The new sections 2(3) and (4) further provide a mechanism for MPFA to clarify certain types of documents as excluded from the definition when necessary (section 2(b) of the Bill).</p> <p>Our intention is that documents which are relevant to the administration and operation of MPF, and have a bearing on the interest of scheme members would be covered, while others will be excluded.</p> <p>MPFA welcomes views from the industry on the specific types of documents to be excluded. It will</p>

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		also consult the industry where necessary. The gazette notice to exclude such documents will be subject to the scrutiny of the Legislative Council.
(f) Section 7 – Self-employed person	We suggest that the words “subject to the” be replaced by “in accordance with the”.	It is not necessary to replace the words “subject to the” with “in accordance with the” because in the context of the amended section 7C, they mean the same thing.
(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?	Under the existing section 11(1), only a member of a registered scheme can continue to make voluntary contributions after reaching the retirement age. This has excluded employees who are less than 18, or is of or more than retirement age, as they are not existing members. Our intention is that all employees (as defined in the Mandatory Provident Fund Schemes Ordinance and Employment Ordinance) can be enrolled in MPF schemes and make voluntary contributions. The revised section 11(1) clarifies the above intention.
(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?	This is a law drafting matter. It is not necessary to put the definitions of “ORSO exempted scheme” and “ORSO registered scheme” into the Ordinance because they do not occur frequently enough in the Ordinance to warrant that.
(i) Section 10 – Application for registration (s.21)?	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	At present, SFC will vet and authorize MPF products and related marketing materials in accordance with the Securities Ordinance and the Protection of Investors Ordinance, to ensure proper disclosure to and fair treatment of

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	<p>may result in a duplication of monitoring by regulators. Why is this change necessary?</p>	<p>members of the public who participate or invest in MPF schemes.</p> <p>To protect the interests of scheme members and the general public, MPFA has issued a Code of Conduct for MPF Intermediaries to promote good and ethical practices in the marketing of MPF business by MPF trustees and promoters of MPF business. MPFA, in approving the registration of MPF schemes, has imposed various conditions, including those relating to the promotion of MPF schemes, e.g. only registered MPF intermediaries could be used to sell/advice on the MPF scheme.</p> <p>It is also the existing practice of MPFA to vet and comment on the offering documents to ensure that the provisions contained therein are in compliance with MPF requirements encompassed in the MPF legislation and the "Code on MPF Investment Funds" issued by MPFA.</p> <p>Therefore, the inclusion of the word "or marketing" in the new section 8A only serves to clarify the existing practice. Where deemed necessary, the Memorandum of Understanding will be reviewed in consultation with SFC.</p>
(j) Section 18 – Regulations	<p>The new section 46(1A)(wa) appears to duplicate the role of the Monetary Authority, Insurance Authority (or other appropriate regulation). Why is this</p>	<p>In respect of MPF guaranteed funds, the Monetary Authority ("MA") and the Insurance Authority ("IA") are responsible for monitoring the financial soundness of banks and insurance companies respectively on a company basis. MPFA, however,</p>

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	dual monitoring necessary?	<p>has the role of monitoring the adequacy of reserving for guaranteed funds at individual product level.</p> <p>Also, different reserving standards may be required for MPF investment products with regard to MPF's mandatory nature. In fact, the existing section 46(1A)(r) already provides for the making of regulation on the reserving requirements for investment guarantees of MPF schemes.</p> <p>However, most MPF schemes in practice have chosen to offer investment guarantees not underwritten directly by the scheme itself but indirectly by investing into approved pooled investment funds that provide investment guarantees. Therefore, it is necessary to include a new section 46(1A)(wa) to provide for the making of regulation on the reserving requirements for investment guarantees of approved pooled investment funds.</p> <p>MPFA will continue to co-ordinate with the MA and the IA in the regulation of reserves maintained by guarantors to support investment guarantees given by MPF investment products.</p>
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	The primary purpose of “preserved account” is to hold or receive the transfer of accrued benefits derived from mandatory contributions (and minimum MPF benefits) for preservation until the retirement age of 65. This has no relevance to

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	scheme, schemes of foreign governments). Suggest simply use "any occupational retirement scheme"?	schemes which are not registered or exempted under the Occupational Retirement Schemes Ordinance (ORSO) such as offshore schemes operating outside Hong Kong (i.e. the examples mentioned by the Law Society will not fall under this definition).