

**Responses to the Comments Raised by the Relevant Organizations on the
Mandatory Provident Fund Schemes (Amendment) Bill 2001**

Clause in the Bill	Proposal in the Bill	Comments/Concern	Raised by	The Administration's Response
N.A.	N.A.	<p>It is not the appropriate time to introduce Mandatory Provident Fund (MPF) legislative amendments. MPF schemes have been operating for less than a year. The parties concerned are still adapting to the legislative requirements while rules and regulations governing the schemes are introduced from time to time. It would be more beneficial to all parties to review and streamline the operation and administration of the Scheme to make it less onerous.</p>	<p>Hong Kong Association of Banks (HKAB)¹</p>	<p>The MPF System affects over two million employers, employees, self-employed persons as well as service providers. In view of its importance and complexity, the operation of the System should continuously be improved and enhanced, as necessary, even in its initial stage of operation. Accordingly, the Amendment Bill comprises largely technical amendments which we identified in the course of preparing for the implementation of the System, and aimed at better protecting the interests of scheme members and enhancing the effective operation of the System.</p>

¹ The Hong Kong Association of Restricted Licence Banks and Deposit-taking Companies (DTC) indicated in its submission that it shared HKAB's views and supported its position.

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				<p>We share the association's view of the need to review the operation and administration of the MPF System and legislation. In this regard, the Mandatory Provident Fund Schemes Authority (MPFA) established a MPF Schemes Operation Review Committee in August 2001, which comprises representatives of employees, employers, service providers and professional bodies. The Committee is conducting a comprehensive review of the administrative and operational aspects of the MPF System and its legislation. The amendments agreed will be included in the next legislative exercise.</p>

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<p>Clause 2(a)(iv) & (x) – Definition of “governing rules”, “offering documents” and “participation agreements”</p>	<p>To clarify that “governing rules” include, inter alia, those rules and provisions contained in offering document and participation agreement governing the establishment or administration of the scheme.</p>	<p><u>Offering Documents</u></p> <p>It is unnecessary to explicitly set out that offering documents should be subject to the approval of the MPFA. It is already the existing market practice that trustees would submit amendments to offering documents to both SFC and MPFA for approval.</p> <p>The current definition of “governing rules” should be retained and a specific provision to provide that offering documents and any amendments to such documents require MPFA’s</p>	<p>Retirement Schemes Industry Group (RSIG)</p>	<p>The intention is that the provisions in the offering documents should be consistent with those in the trust document which in turn is vetted by MPFA and complies with the provisions in the MPFSO. In view of the industry’s concern, and to further clarify the provisions, consideration is being given to maintaining the current definition of “governing rules” in the Ordinance, and add a new definition on “offering documents”. The definition will cover documents that</p> <p>(i) invite participation in the scheme by prospective participating employers and prospective members of the scheme; and</p>

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		<p>prior approval should be added.</p> <p>The proposed definition of “offering documents” should be further clarified to ensure that they relate only to what is commonly known as explanatory memorandum or principal brochure.</p> <p>The proposed definition of “offering document” would cover all marketing materials relating to scheme.</p> <p>The definition of “offering document”, seems to cover marketing materials of a registered scheme. Given that the SFC is responsible for</p>	HKAB	<p>(ii) contain information relating to the establishment or administration of the registered scheme.</p> <p>We also propose to set out in the Ordinance that “offering document” and any amendments thereto would require MPFA’s prior approval.</p>

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		<p>vetting marketing materials in accordance with the SFC Code on MPF Products and relevant Ordinances, it would neither be necessary nor desirable to have more than one approving authority for the same set of documents.</p> <p><u>Participation Agreements</u></p> <p>Whilst the scheme provider may have a standard form of participation agreement, employers would usually enter into a slightly different version of agreement with the trustees. Furthermore, the participation agreements would set out the voluntary contributions terms.</p>	<p>RSIG</p>	<p>Our intention is that the contents of the participation agreements should not be inconsistent with the requirements set out in the MPFSO. It should also be consistent with the provisions in the trust instrument establishing the scheme. It is not intended that MPFA should intervene into matters like vesting or voluntary contributions which may vary from employer to</p>

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		<p>e.g. software agreements). The proposed amendments would empower the MPFA to approve such business arrangements which are bilateral agreements between the service providers and their customers.</p>		

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Clause 3 – Functions of Authority	To set out more clearly the function of MPFA, including, inter alia, to consider and proposing reforms of the law relating to occupational retirement schemes or provident fund schemes.	Agreed, but concerned that in respect of ORSO, the requirements on ORSO schemes have been operating well and should be preserved with minimal amendments.	The Hong Kong Retirement Schemes Association (RSA)	We noted the association's views on the issue.

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	MPF scheme.	<p>Exempt persons should be allowed to make voluntary contributions.</p> <p>HKAB presumes that the proposed new clarification relating to employee only applies where the employee agrees to be so enrolled. If this is the case, the relevant provision should be made clear.</p>	<p>HKAB</p> <p>HKAB</p>	<p>Employers of exempt persons who are relevant employees can enrol such employees into MPF schemes and make contributions. Self-employed persons who are exempt can also join MPF schemes and make voluntary contributions.</p> <p>Since the making of voluntary contributions is a voluntary arrangement, the employer can enrol the employee only if the employee agrees to be so enrolled.</p> <p>We believe that the proposed provision is clear on this aspect and further clarification is not necessary.</p>

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<p>Clause 9, 10, 11, section 2 of Schedule – MPFA to impose, amend or wave conditions imposed on approved trustee, MPF registered schemes, and Approved Pooled Investment Funds (APIF)</p>	<p>To put it beyond doubt that the MPFA has power to impose additional conditions or amend the existing ones on approved trustees, MPF schemes and APIFs.</p>	<p><u>Power to impose additional conditions or amend the existing ones</u></p> <p>This is significant power that could easily and unintentionally be misused.</p> <p>It is misleading for scheme members and trustees if conditions are changed subsequent to employers joining the scheme and members being signed up. There will inevitably be uncertainty and cost involved which may be to the detriment of scheme members.</p>	<p>RSA</p>	<p>Under the MPFSO, MPFA has the power to impose conditions upon registration/ approval of the trustees, MPF schemes and APIFs, and to vary the conditions imposed for the APIFs. However, the legislation is silent on whether new or additional conditions can be imposed after the registration/approval.</p> <p>The proposed amendments, by setting out clearly in the MPFSO the above power, intend to remove any doubt. The amendments also introduce additional safeguards to ensure that affected persons will be given the chance to make representations, and appeal against MPFA's decision.</p>

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		<p>There has been insufficient time in which the MPFA could build up a track record of using such powers in a sensitive and reasonable manner. Until such time as it has established its record, the power should not be given at this time.</p> <p>The ability to impose and vary conditions in respect of the specific approval of a scheme or a service provider gives the MPFA power to legislate by imposing additional requirements which have not been reviewed by the legislature or made known to market participants.</p>	<p>RSIG</p>	<p>MPF system is an on-going programme designed to cater for the retirement needs of the community in the long run. It is reasonable that the MPFA should have the power to impose new conditions or vary existing conditions in the context of technological, monetary or inflationary or legislative changes.</p> <p>We also would like to point out that the powers to impose and amend conditions after the granting of approval/licenses are common in other legislation, e.g. under the Banking Ordinance, Hong Kong Monetary Authority (HKMA) may impose, amend or cancel any conditions at any time in respect of approval granted for authorized institutions to establish or maintain any local branch and local representative office.</p>

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		<p>Prospective service providers should be in a position where they know what requirements will be applicable to them before they apply for approval and these requirements should form part of the published law. The ability to impose additional requirements or vary the law by the imposition of conditions when granting approvals creates uncertainty in the market and gives scope for the arbitrary imposition of different requirements on different service providers/schemes.</p>		<p>Under the Securities Ordinance, Securities and Futures Commission (SFC) may at any time impose, amend or cancel any conditions in respect of certificates of registration granted.</p> <p>We consider that the proposed amendments as reasonable and necessary to enhance the effectiveness of MPFA in monitoring the operation of the approved trustees, MPF Schemes and APIFs, thereby better protecting the scheme members' interests.</p>

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		<p><u>Timeframe for notification of MPFA's decision</u></p> <p>To extend the 7 days timeframe to 30 days so as to allow more time for trustees to modifies their operations or computer systems to reflect new requirements.</p>		<p>Taking into account the industry's view and in view of MPFA's operational experience, we agree that that it is reasonable to extend the 7 working days timeframe to 30 calendar days.</p>

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Clause 15 – offence by approved trustees	An offence is imposed on trustees who, upon issue of a new certificate by MPFA stating the new approval conditions, do not surrender the original certificate to MPFA.	The offence provision under clause 15 of the Bill is a severe punishment on trustees and should be removed.	HKAB	Our intention is to ensure that trustees would surrender the original certificate to MPFA upon issue of a new one. Having regard to the fact that creating an offence is only an “after the event intervention”, we now decided to adopt an administrative measure. MPFA would withhold the issue of the new certificate until the original certificate has been surrendered by the trustee. The proposed offence clause may therefore be not necessary, and we are prepared to remove it, subject to members' views.

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Clause 18 - Regulations	To empower MPFA to make regulations requiring the guarantor of an APIF to maintain adequate reserves so as to provide investment guarantees.	Guaranteed APIFs are either offered by banks or insurers, and their financial affairs are already sufficiently regulated by the HKMA, Insurance Authority (IA) and SFC respectively. Enabling the MPFA to regulate also in this area would cause confusion and the regulations may conflict with the other regulations mentioned above. The proposed regulation making power should be withdrawn.	RSA	<p>HKMA and IA are responsible for monitoring the financial soundness of banks and insurance companies respectively on a company-wide basis but individual voluntary investment and savings products as well as MPF guaranteed funds are not subject to the prior approval of HKMA and the IA. SFC, on the other hand, is responsible for vetting the marketing materials of MPF guaranteed funds. MPFA has the role of monitoring the adequacy of reserving for guaranteed funds at individual product level.</p> <p>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</p>

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				<p>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 other regulators in the regulation of reserves maintained by guarantors to support investment guarantees given by MPF investment products.</p>

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Section 6 and 7 of Schedule Eligibility of delegate of custodian and Subcustodial agreement	To require the approved trustee to ensure that any custodial agreement it enters into with the custodian prohibits the custodian from delegating the custodian's function to a non-eligible person. If the trustee acts as the custodian itself, he should not delegate the custodian's	<p>It would be more appropriate to require the custodian to indemnify the scheme against all losses arising from its use of subcustodians who do not comply with the MPF requirements for a subcustodian.</p> <p>There is further obligation placed on trustees who act as custodian as well. It is inappropriate to impose</p>	<p>RSA</p> <p>RSIG, HKAB</p>	<p>It is the policy intent that trustees are the key party responsible for administering an MPF scheme and ensure that the operation of the scheme is in compliance with the MPF legislation. The trustee should make proper arrangements with the custodian to ensure that the eligible requirements of subcustodians and requirements on contents of subcustodial agreements are properly observed. In the case where the trustee acts as the custodian as well, it is appropriate that the trustee itself should appoint only eligible persons to act as subcustodians.</p> <p>It is the original intent that the trustees, when acting as custodians, have the obligation to ensure that any of its appointed subcustodians comply with</p>

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	<p>function to a non-eligible person. An offence provision is added for trustees who fail to comply with the said requirements.</p>	<p>penalties on trustees where they have used best efforts to comply with the existing provisions of the Regulation. As trustees are responsible for the acts and omissions of subcustodians, the penalty should not be imposed.</p>		<p>such eligibility requirements. They should also ensure that any subcustodial agreement entered into with the subcustodians comply with Schedule 3 of the MPFS (General) Regulation.</p> <p>Given the important bearing of custodians and subcustodians on the security of scheme assets, it is reasonable to have penalty provision imposed on trustees acting as custodians who have appointed persons not eligible to act as subcustodians.</p> <p>The imposition of financial penalty is not an automatic process. Before the MPFA triggers off any penalty provision, it will look into the specific circumstances of each case in detail, including whether the trustees have used their best endeavour to</p>

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				<p>comply with the legislation.</p> <p>Under the existing legislation, the only way for the MPFA to enforce the relevant requirements is to withdraw the licence of approved trustees' administering the MPF scheme. This should be used as a last resort as it may disrupt the smooth operation of an MPF scheme and not be in the interest of scheme members. The proposed amendment can serve as a prohibitive measure to ensure that the relevant requirements are complied.</p>

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Clause 8 of Schedule – Separate account for each scheme member	To amend section 78 of the Regulation to clarify the sub-accounts of each scheme in which the different types of contributions and benefits are placed.	As the Bill is presently worded, it may mean that within each sub-account of a scheme member, the trustee has to segregate further sub-accounts within each sub-account. Such segregation serves no purpose and is not necessary.	RSIG	The proposed amendment seeks to clarify what sorts of contributions/benefits should be included in each sub-account of a scheme member by listing those contributions/benefits item-by-item. The RSIG may have mis-interpreted our proposal as requiring further segregation of each contribution/benefit within a sub-account. This is not our intent. We will clarify the matter with RSIG.