

Bills Committee to Study the Mandatory Provident Fund Schemes (Amendment) Bill 2001

Response of the Administration to matters discussed at the meeting on 13 November 2001¹

Clause in the Bill	Proposal in the Bill	Comments/Concern	The Administration's Response
N.A.	N.A.	<p>The Amendment Bill would provide the Mandatory Provident Fund Schemes Authority (MPFA) with excessive power. Moreover, as the Mandatory Provident Fund (MPF) System has been launched for a short period of time, it is too early for legislative amendments. It would be preferable to wait for 2 to 3 years and see how the system works before pursuing legislative amendments.</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. The Amendment Bill comprises largely technical amendments which were identified in the course of preparing for or during the first few months of the implementation of the MPF System. It aims at better protecting the interests of scheme members and enhancing the effective operation of the System.</p>

¹ A separate paper will be submitted on MPFA's power to impose additional conditions (or amend existing ones) upon approved trustees, MPF schemes and approved pooled investment funds.

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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 the offering document and participation agreement governing the establishment or administration of the scheme.</p>	<p>Governing rules should not include offering documents. In accordance with the Memorandum of Understanding entered into between the Securities and Futures Commission (“SFC”) and the MPFA, the SFC is responsible for approving offering documents. The proposed amendment of including offering document in the definition of “governing rules” and making those documents subject to the MPFA’s approval would result in a duplication of function of MPFA and SFC.</p>	<p>The intention is that the provisions in the offering documents should be consistent with those in the trust document, which in turn shall be vetted by MPFA and shall comply with the provisions of the MPFSO. In view of the industry’s concern, and to further clarify the provisions, we propose to maintain the current definition of “governing rules” in the Ordinance, and add a new definition for “offering documents”, say, documents that</p> <ul style="list-style-type: none"> (i) invite participation in the scheme by prospective participating employers and/or perspective members of the scheme; and (i) contain information relating to the establishment or administration of the registered scheme. <p>We also propose to set out in the MPF legislation that “offering document” and any amendments thereto would require MPFA’s prior approval. <i>The above</i></p>

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		<p>“Participation agreements” are agreements between trustees and participating employers primarily relating to voluntary contributions. The proposed definition of “governing rules” would be too broad if such agreements would also be covered.</p>	<p><i>proposals have been agreed with the industry and the relevant draft Committee Stage Amendments have been prepared.</i></p> <p>The 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. MPFA would not intervene into matters like vesting or voluntary contributions which may vary from employer to employer. Our intention is to empower MPFA to approve a standard form of participation agreement. The standard form would allow trustees and employers to have tailor-made clauses on vesting and voluntary contributions within the confinement of the MPF legislation, whilst ensuring that the other standard clauses are in compliance with legislative requirements. Amendments to those other clauses in the participation agreement would require MPFA's</p>

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			prior approval. <i>The above have been agreed with the industry. Draft Committee Stage Amendments have been prepared to clarify our intention.</i>
Clause 2(a)(v) – definition of “mandatory contributions”	To amend the definition of “mandatory contributions” to clarify that mandatory contributions can be prepaid.	The proposed amendment cannot achieve the purpose of allowing prepayment of mandatory contributions before they are due. In respect of a new employee, it was suggested to introduce some form of contingency such that contributions made before the end of the permitted period was contingent upon the employee remaining in the same employment at the end of the permitted period.	This is a drafting matter. <i>We have prepared draft Committee Stage Amendments to clarify the provision.</i>

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<p>Clause 8(a) – voluntary contributions</p>	<p>To clarify that the employer of a person less than age 18 or is of or more than retirement age may arrange for the person to join and pay voluntary contributions to an MPF scheme. A self-employed person less than age 18 or is of or more than retirement age may also join and pay voluntary contributions to an MPF scheme.</p>	<p>The expansion of the scope of making voluntary contributions is not wide enough. It does not allow exempt persons to make voluntary contributions, in particular, non-permanent HKID card holders and members with an overseas retirement scheme who are exempted from the Mandatory Provident Fund Schemes Ordinance (MPFSO) by virtue of section 4(3) of the Ordinance. Such persons should be allowed to make voluntary contributions.</p> <p>Any voluntary contributions arrangement must be subject to the governing rules of the MPF scheme concerned.</p>	<p><i>Draft Committee Stage Amendments have been prepared to clarify that exempt persons can be enrolled in MPF Schemes and make voluntary contributions.</i></p> <p>Section 11(7) of the MPFSO already provides that any contributions paid to an MPF scheme as provided by that section are voluntary, but are subject to the governing rules of the scheme.</p>

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<p>Clause 18 - Regulations</p>	<p>To empower the MPFA to make regulations requiring the guarantor of an APIF to maintain adequate reserves so as to provide investment guarantees.</p>	<p>Since MPF scheme members can choose among different investment options within an MPF scheme, the guaranteed fund option is actually voluntary in nature. As a result, the regulation of guaranteed funds in MPF schemes should not be in any way different from other guaranteed funds in the market.</p>	<p>The MPF System is a mandatory one, which was designed to help the working population to save for their retirement needs. We consider that the reserving of guaranteed funds should be regulated to ensure that the guarantees are properly backed up by assets specifically set aside for the purpose. The existing section 46(1A)(r) of the MPFSO already provides for the making of regulation by the Chief Executive in Council on the reserving requirements for investment guarantees of MPF schemes. 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, we propose 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>

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		<p>There is a concern that different regulators may impose different standards in regulating guaranteed funds.</p>	<p>In consultation with the Hong Kong Monetary Authority (HKMA) and the Insurance Authority (IA), the MPFA has already issued a set of guidelines prescribing the reserving requirements on guaranteed funds (whether it is at the constituent fund level or approved pooled investment fund level). The proposed legislative amendment will merely enable such existing guidelines to be prescribed into regulation, if necessary. Furthermore, any regulation made under the proposed provisions will be subject to vetting by the Legislative Council.</p> <p>MPFA will continue to work together with HKMA, IA and the Securities and Futures Commission to ensure consistency in regulatory standards in regulating MPF guaranteed funds taking into account the differences in product design and regulatory regimes. This point will be reflected in the speech of the Secretary for Financial Services during the resumption of the second reading of the Bill.</p>

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<p>Schedule - section 1(b) – definition of preserved account</p>	<p>To amend the definition of “preserved account” to make it clear that it can receive benefits transferred from an Occupational Retirement Schemes Ordinance (ORSO) exempted scheme or ORSO registered scheme.</p>	<p>The definition should be further amended so that only minimum MPF benefits could be received by a preserved account, and minimum MPF benefits could only come from an ORSO registered scheme.</p> <p>If an employee joins an employer who does not have a voluntary contribution arrangement but he wants to make voluntary contributions himself, he should be allowed to use his preserved account for the purpose.</p>	<p>While 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, it can also hold voluntary contributions from former employment. This is set out in section 78(8)(b) of the MPFS General Regulation. The intention of the proposed amendment is to allow benefits accumulated in the ORSO registered or ORSO exempted schemes of an employee to be transferred to MPF schemes.</p> <p>The MPF System is an employment based system. The primary aim of voluntary contributions in MPF is to facilitate voluntary contribution arrangements between employers and employees. MPFA will review the current provisions to see if any amendment is needed to facilitate the making of voluntary contributions by employees themselves in preserved account when reviewing the overall</p>

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			regulation of voluntary contributions in future.
Schedule – section 6, Eligibility of delegate of custodian	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 function to a non-	In certain overseas markets, the trustee and the investment manager may not be able to obtain service of subcustodians meeting the MPFA's eligibility criteria. However, since the trustee (acting as the custodian) is ultimately responsible and provides indemnity should there be any losses arising, there should be no need to impose an offence provision for failure to appoint eligible persons to be subcustodians.	<p>The legislative intent is that a trustee, when also acting as a custodian, should have the obligation to ensure that its appointed subcustodians comply with such eligibility requirements.</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 approved trustees acting as custodians which, without reasonable excuse, appointed persons not eligible to act as subcustodians. Whether or not an approved trustee has a duty to indemnify any losses arising is a separate matter.</p> <p>The imposition of fine is not an automatic process. Before the MPFA may trigger 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 comply with the</p>

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	<p>eligible person.</p> <p>An offence provision is added for trustees who fail to comply with the said requirements.</p>		<p>legislation.</p> <p>Under the existing legislation, the only way for the MPFA to enforce the relevant requirements is to revoke the approval of trustees. This enforcement option is not appropriate in all cases, as it may disrupt the operation of an MPF scheme and may not be in the interest of scheme members. We therefore consider the proposed penalty provision necessary.</p>