

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

**MPFA's power to impose additional conditions /amend existing ones
upon approved trustees and MPF schemes, and impose new
conditions on approved pooled investment funds**

I. Purpose

At the meeting held on 13 November 2001, Members discussed the proposal to give the Mandatory Provident Fund Schemes Authority (MPFA) statutory powers to amend conditions imposed / impose new conditions on approved trustees and MPF schemes, and impose new conditions on Approved Pooled Investment Funds (APIFs), after the approval / registration. The Administration was requested to set out the changes contemplated on existing conditions and conditions which MPFA regard as outdated or difficult to be complied with by the service providers. The Administration also undertook to research into the legislative intent when the Mandatory Provident Fund Schemes Ordinance (Ordinance) was enacted in 1995 and amended in 1998.

2. We have consulted MPFA. The information requested by Members is set out in the following paragraphs.

II. Amendments to existing conditions and imposing new conditions

Need for power to amend existing conditions

3. With the passage of time, it is likely that some of the conditions imposed by MPFA would become outdated and require amendment. Two such examples are set out as follows -

- (a) In the context of registering MPF schemes in 2000, MPFA had imposed a condition on trustees that it reserved the right to require the custodial agreement(s), investment management contract(s) and undertakings required under the MPF legislation to be amended to the satisfaction of MPFA before the commencement of contributions on 1 December 2000. This condition is necessary to ensure that the relevant agreements / undertakings meet the concerned requirements such as the independence of investment managers.

In actual practices, it is necessary for MPFA to continue to have such right after 1 December 2000 as the trustee may, for commercial or other reasons, change its appointment of service providers, and entering into new custodian agreement(s) or investment management contract(s). The relevant condition therefore need to be amended so that MPFA could continue to ensure that the new agreements etc. meet the requirements.

- (b) In respect of the **approval of trustees**, MPFA also needs the power to amend existing approval conditions. For example, some trustees rely on continuous financial support from a substantial financial institution (typically a financially strong overseas bank, insurer or trust company). To enable MPFA to monitor the financial soundness of the substantial financial institution, one of the conditions commonly imposed on the trustee is to require them to furnish MPFA with a copy of the audited accounts of the financial institution within 6 months from the end of the institution's financial year-end. If there were a change of legislation in the jurisdiction where the institution is incorporated such that its audited accounts could

only be published after 6 months, then the above-mentioned condition would have to be amended to prescribe another suitable timeframe.

Need for power to impose new conditions

4. MPFA may also need to impose new conditions from time to time in the light of changes in circumstances. Examples of such conditions include -

- (a) One of the qualifications for a person to apply for approval to be a trustee is the availability of appropriate human resources to undertake the relevant duties. While a trustee may initially have the necessary human resources, it is possible for a significant portion of its experienced administration staff to be poached by another company at about the same time. In such circumstances, MPFA would need to liaise with the trustee closely to ensure that it will as soon as practicable deploy sufficient resources to undertake the administration function to avoid disruption of services.

However, in MPFA's experience, the definition of "as soon as practicable" may be subject to different interpretations. To avoid the risk that scheme members' interest would be undermined, MPFA may need to impose a new condition that where there are severe deficiencies in human resources, the trustee shall hire a sufficient number of competent staff for scheme administration or else appoint a third party administrator in accordance with the time frame set by the Authority. This

will ensure that timely action would be carried out by the trustee, and members' interests will be safeguarded.

- (b) MPFA may need to impose a new condition to require a trustee to rectify a deficiency in its administration system within a timetable to be set by MPFA . Such deficiency may arise because of changes in the legislation or other reasons. If the trustee's system is not in compliance with legislative requirements, administration of scheme members' entitlements might be affected, causing concern to scheme members. For example, the definition of "contribution day" was amended in 2000 from the seventh working day after a contribution period to the tenth day after a contribution period. If a trustee failed to modify its administration system in time to reflect the change in legislative requirement, employers who made contribution in accordance with the legislative requirements might be erroneously identified as late in making contributions. This will cause unnecessary confusion to employers and scheme members. To ensure that the trustee would make the necessary changes in accordance with a timetable, it may be necessary for MPFA to impose a condition to the effect that under certain specified circumstances, trustees have to comply with a timetable imposed by MPFA.

- (c) MPFA may need to impose a condition requiring the trustee employing a third party administrator to appoint a new scheme administrator within a timetable to be set by MPFA if the existing one is found to be unsatisfactory or if the agreement with the existing one is going to be terminated. This would ensure that there would be proper scheme administration to keep

track of scheme members' contribution and benefit records as required under the law without undue disruptions due to change in appointed service providers¹.

- (d) If trustees decide to consolidate their MPF business for commercial reasons, the interests of scheme members must be protected. The new or remaining trustee must have the necessary resources to take up the business of the withdrawing trustee. For example, if the two business portfolios are maintained on two different administration systems, the new or remaining trustee may be required to retain a sufficient number of staff familiar with the newly acquired portfolio until the records are consolidated onto one system. Without the necessary experience and expertise to maintain the acquired portfolio, confusion may arise and scheme members' records may not be properly maintained, thereby adversely affecting their interests.

There is no existing provisions or conditions governing the business consolidation of trustees. To protect members' interests, MPFA may find it necessary to impose new condition in setting specific requirements for trustees in case of business consolidation.

¹ While the keeping of scheme accounts is already prescribed in s.78 of General Regulation, there is no provision in the law requiring tracking of scheme member's contributions in a timely manner. If there is a rather long gap between the termination of the appointment of the existing administrator and the appointment of the new administrator, there will be no updating of scheme members' accounts during the interim. While the new administrator can catch up on such work, confusion and errors may easily arise, particularly in respect of the interim period.

5. While a trustee already has a general duty (e.g. fiduciary duty) to, say, deploy reasonable human resources and avoid disruption of its services, MPFA could not rely on such a general requirement to tackle the scenarios set out in paragraphs 3 and 4 above, as it may not be specific enough. To protect the smooth operation of the MPF system and the interests of scheme members, MPFA needs to have the power to add new conditions and amend existing ones to set out the relevant requirements in express and clear terms.

III. Legislative intent

6. We have checked the relevant records. The question of whether MPFA would be (or should be) empowered to amend conditions imposed / impose new conditions on approved trustees and MPF schemes, and impose new conditions on APIFs after the approval / registration was not discussed during the consideration of the Mandatory Provident Fund Schemes Bill in 1995 and the Provident Fund Schemes (Amendment) Bill in 1997 and 1998.

Financial Services Bureau

7 December 2001