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**Bills Committee on Mandatory Provident
Fund Schemes (Amendment) Bill 2007**

Meeting on 17 July 2007

**Background Brief on
major proposals of the Mandatory Provident Fund
Schemes (Amendment) Bill 2007**

Purpose

This paper sets out the background of the Mandatory Provident Fund Schemes (Amendment) Bill 2007 (the MPFS Bill) and summarizes Members' major concerns on the legislative proposals.

Background

2. In 1995, the Mandatory Provident Fund Schemes Ordinance (Cap. 485) (MPFSO) was enacted to provide a statutory framework for the establishment of mandatory, privately managed retirement schemes for the retirement protection of the general workforce. The Mandatory Provident Fund (MPF) System was launched in December 2000.

3. In general, apart from certain exempted classes of employers or employees, each employer and employee has to contribute 5% of the employee's relevant income as mandatory contributions to the trustee of a MPF scheme, subject to the minimum and maximum levels of relevant income. An employee who has attained retirement age shall be entitled to be paid by the trustee the entirety of his benefits accrued in the MPF scheme. Given the impact of the MPF System on the community, it is essential that the System be constantly reviewed to ensure that it continues to serve the needs of existing and potential scheme members. For this purpose, the Mandatory Provident Fund Schemes Authority (MPFA) set up the MPF Schemes Operation Review Committee (the Review Committee) in August

2001.¹ Based on the recent advice of the Review Committee, MPFA has made a number of recommendations on amendments to the MPFSO, the Mandatory Provident Fund Schemes (General) Regulation and the Mandatory Provident Fund Schemes (Exemption) Regulation (the Exemption Regulation) to improve the MPF System. The Administration has taken forward the amendment proposals by way of introducing the MPFS Bill into the Legislative Council on 27 June 2007.

Problems identified under the existing arrangements

4. In the light of operational experience, MPFA and the Administration have identified a number of problems under the existing arrangements, including the following:

- (a) Currently, for the purpose of calculating MPF contributions, housing allowance and other housing benefit are excluded from the definition of "relevant income" under MPFSO. However, it has been found that some employers have intentionally designated a portion of the employee's salary as housing allowance so as to reduce the amount of relevant income and evade their responsibilities to pay MPF contributions in respect of that portion of salary.
- (b) Where an employer defaults payment of MPF contributions, the trustee will issue a reminder notice requiring the employer to settle the default contribution within 30 days. Some employers have taken advantage of the 30-day settlement period to delay payment for as long as possible and settle the MPF contributions with the trustee only towards the end of the aforesaid period. At present, MPFA can impose contribution surcharge and institute civil proceedings against the employer to recover the default contribution and contribution surcharge for deferred payment only after all the recovery procedures have been complied with. The cumbersome arrears recovery process has rendered it difficult to recover default payments from employers in a timely manner.
- (c) The time limit for instituting criminal proceedings for an offence under sections 43C and 43E of MPFSO and section 26 of the Exemption Regulation is now governed by section 26 of the Magistrates Ordinance (Cap. 227), which is within six months from the time when the matter of such complaint arose. However, from time to time, an alleged offence was brought to the notice of MPFA more than six months from its occurrence, rendering it impossible for prosecution to be taken out in these cases.
- (d) If a scheme member who is entitled to be paid accrued benefits cannot be located, a trustee is required to publish newspaper notices

¹ The Review Committee comprises representatives of employer and employee bodies, MPF service providers, professional organizations, the HKSAR Government and the MPFA.

to invite the member to lodge a claim. If no claim is made after publication of the notices, the benefits may be treated as unclaimed benefits. However, the legislation is silent on when the trustee should publish such a notice.

- (e) Currently, MPFA is not allowed to disclose to any person information which it has obtained in the exercise and performance of functions except under certain specified circumstances. Such restriction may not be in the interest of the information subject or the public. Besides, MPFSO does not specifically allow MPFA to compile and disclose any comparative information (e.g. fees and charges of the MPF constituent funds) to assist MPF scheme members in making investment decisions.
- (f) In an MPF scheme restructuring, the trustee will have to apply to MPFA for consent. However, the existing legislation is unclear as to whether the consent given by MPFA overrides the requirements to obtain scheme members' consent and is binding on all parties concerned.

Proposed changes

5. To improve protection for MPF scheme members, enhance scheme administration and enforcement of the MPF System, the MPFS Bill contains various proposals which seek, inter alia, to -

- (a) remove the exclusion of housing allowance and benefit from the definition of "relevant income" so that all remuneration items including housing allowance/other housing benefit will be taken into account in determining the relevant income for the purpose of computing mandatory contribution;
- (b) remove the 30-day settlement period and the requirement on MPFA to issue surcharge notices to employers in specified circumstances, and clarify the uncertainty in the law to facilitate the recovery of default contribution by MPFA even if some recovery steps could not be complied with;
- (c) amend the relevant provisions to the effect that criminal proceedings may be instituted for an offence under sections 43C and 43E of MPFSO and section 26 of the Exemption Regulation within six months after the offence is discovered by, or comes to the notice of MPFA;
- (d) streamline the process by which benefits will become "unclaimed benefits" and set out clearly the timeframe of six months for a trustee to locate the scheme member who is entitled to be paid accrued benefits;

- (e) enable MPFA to disclose information in specified circumstances, including the compilation and disclosure of comparative information to assist members in making investment decisions, releasing information upon request to certain parties (e.g. the Labour Tribunal) to facilitate the processing of their cases for different purposes; and
- (f) put beyond doubt that the consent given by MPFA for scheme restructuring overrides the requirements to obtain members' consent and is binding on all parties concerned.

6. As advised by the Administration, it was intended that the Bill should also provide for criminal and civil liability on employers who have failed to enrol employees in a MPF scheme and make MPF contributions for them. In other words, an employer may be prosecuted for both offences of non-enrolment and non-payment of MPF contributions at the same time. However, as more time is needed to draft the relevant legislative provisions for implementing the proposal, the Administration has taken out this proposal from the Bill in order not to hold up the current legislative exercise. According to the Administration, the legislative proposals under the Bill have been thoroughly deliberated by the Review Committee and the MPF Schemes Advisory Committee² and are supported by them. It has also informed the Labour Advisory Board of the proposed amendments.

Major views and concerns expressed at the Panel on Financial Affairs (FA Panel)

7. At the FA Panel meeting on 12 April 2007, members were briefed by the Administration and MPFA on the proposed amendments to MPFSO. While members had no objection to the introduction of the Bill, the Administration and MPFA were asked to take into consideration members' views and concerns in refining the legislative proposals. Members' major views and concerns are summarized in the following paragraphs.

Treatment of housing allowance and other housing benefit

8. On the proposal to include housing allowance and benefit in the definition of "relevant income" under MPFSO, some members queried the rationale for the proposed amendment and whether there was any objective data or evidence showing a rising trend that employers were trying to evade MPF contributions by designating a sizable portion of their employees' income as housing allowance. They were concerned that the revised definition might have serious implications on the calculation of entitlements under other labour legislation such as the

² The MPF Schemes Advisory Committee was established under MPFSO to make recommendations to the MPFA as to the operation of the MPFSO and the effectiveness and efficiency of the MPFA. The Advisory Committee consists of an executive director designated by the MPFA and 10 other members appointed by the Chief Executive of HKSAR.

Employment Ordinance (Cap. 57) (EO) which was also based on the employee's wages. The proposal however had the strong support of some other members, in particular Members from labour unions, who considered that it could prevent abuse in cases where the employer had intentionally designated a sizable portion of the employee's income as housing allowance, thereby reducing the amount of relevant income for calculating MPF contributions.

Enforcement against non-compliance

9. The Panel was in support of proposed amendments to step up enforcement action under the MPF System. Some members had all along been very concerned that in non-enrolment cases, while criminal proceedings could be brought against the employer for non-enrolment, no legal action could be taken against the employer for its non-payment of mandatory contributions under the existing MPF legislation. They urged that criminal proceedings should be brought against the employer for both non-enrolment and non-payment of MPF contributions at the same time. There was a view that criminal liability, if imposed, should have retrospective application so as to achieve greater deterrent effect and provide better protection for employees. Members noted the Administration's/MPFA's advice that the question of retroactivity would require careful study.

10. Some members considered that the penalties under MPFSO for non-enrolment and non-payment of MPF contributions were relatively lenient when compared with the offence provisions under EO for defaulting wage payment. There was also a suggestion that a higher penalty should be imposed on employers who had not only defaulted their own payment of MPF contributions but also the contributions deducted from their employees' income.

11. Concern was raised on the effectiveness of the legislation in safeguarding against employers' evasion of payment of MPF contributions, in particular when employers arranged to transfer the assets of their companies prior to winding up. There was also concern about the protection of the benefits of scheme members when their employers went into bankruptcy or liquidation.

Unclaimed benefits

12. On the Administration's proposal to streamline the existing process by removing the requirement on the trustee to remind MPF scheme members annually but to continue to retain the benefits for the member until the latter applied for withdrawal, some members expressed concern that retired scheme members might still need to rely on some regular reminders about their "unclaimed benefits" kept in the scheme. They therefore suggested that instead of abolishing the requirement altogether, the process could be simplified by requiring trustees to remind scheme members at longer intervals, say every three to five years.

Disclosure of information by MPFA and consent to scheme restructuring

13. In general, the Panel supported greater transparency in the disclosure of information on MPF schemes. There was also a suggestion that the "public interest" element should be included in the criteria for information disclosure so that MPFA would be allowed to disclose information in response to widespread public concern. The Panel noted that this point would be taken on board by the Administration when drafting the proposed amendment.

14. Regarding the proposal to put beyond doubt that consent given by MPFA would override the requirements to obtain scheme members' consent for MPF scheme restructuring, some members considered it prudent to provide for an oversight mechanism to ensure protection of the rights of scheme members, such as the matter being brought to the attention or consideration by the Court or by high-level officials such as Financial Secretary.

Other concerns

15. The Panel noted that at present, employers who had made severance payment (SP) or long service payment (LSP) to their employees in accordance with EO could offset the corresponding amounts from the employees' vested benefits which were attributable to employers' contributions. Some members reiterated their call on the Administration to give serious consideration to making appropriate amendments to MPFSO to discontinue the offsetting arrangements. However, some members held a different view that as SP and LSP provided certain protection to employees on account of their service with the same employer, the offsetting arrangement was reasonable, lest employees would be provided with "double benefit" in respect of the same period of service. They further opined that employees should also be encouraged to make other arrangements to cater for their retirement needs instead of relying solely on the accrued benefits from the MPF schemes.

Relevant papers

16. A list of relevant papers is in **Appendix I**.

List of relevant papers

Committee	Paper	LC Paper No.
Meeting of Panel on Financial Affairs on 12 April 2007	✧ Paper on Proposed amendments to Mandatory Provident Fund Schemes Ordinance http://www.legco.gov.hk/yr06-07/english/papers/fa/papers/fa0412cb1-1266-1-e.pdf	CB(1)1266/06-07(01)
	✧ Power-point presentation on Proposed amendments to Mandatory Provident Fund Schemes Ordinance http://www.legco.gov.hk/yr06-07/chinese/papers/fa/papers/fa0412cb1-1350-3-ec.pdf	CB(1)1350/06-07(03)
	✧ Information on the coverage of the Protection of Wages on Insolvency Fund http://www.legco.gov.hk/yr06-07/english/papers/fa/papers/fa0412cb1-1541-1-e.pdf	CB(1)1541/06-07(01)
	✧ Minutes of meeting http://www.legco.gov.hk/yr06-07/english/papers/fa/minutes/fa070412.pdf	CB(1)2009/06-07