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**Bills Committee on Mandatory Provident
Fund Schemes (Amendment) (No.2) Bill 2007**

**Background Brief on
Major Proposals of the Mandatory Provident Fund
Schemes (Amendment) (No.2) Bill 2007**

Purpose

This paper sets out the background of the Mandatory Provident Fund Schemes (Amendment) (No.2) Bill 2007 (the MPFS (No.2) 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. It is supplemented by subsidiary legislation passed in 1998, 1999 and 2000. The Mandatory Provident Fund (MPF) System was launched in December 2000. As at end September 2007, over 2.3 million employees and self-employed persons were enrolled in MPF schemes and the total scheme assets amounted to over \$257 billion.

3. Given the importance of the MPF System in 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 recommendations of the Review Committee, the Administration introduced the Mandatory Provident Fund Schemes (Amendment) Bill 2007 (the MPFS Bill) into the Legislative Council (LegCo) on 27 June 2007. The MPFS Bill was scrutinized by a

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

Bills Committee and passed on 9 January 2008. With a view to introducing further improvements to the MPF System and taking forward some proposals which have not been dealt with under the MPFS Bill, the Administration introduced the MPFS (No. 2) Bill into LegCo on 9 January 2008.

The MPFS (No.2) Bill

4. The MPFS (No.2) Bill seeks to amend the MPFSO and the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A) to improve the operation and enforcement of the MPF System. The MPFS (No.2) Bill contains various proposals which seek, inter alia, to –

- (a) increase the maximum penalty for non-enrolment or non-payment of MPF contributions, and to impose a higher penalty on employers who have not remitted to the trustee the mandatory contributions deducted from employees' wages;
- (b) where a relevant employee has not been enrolled in a registered scheme, impose an obligation on his employer to pay mandatory contributions to MPFA and to provide for the relevant procedures;
- (c) provide that a person must not become a controller of a corporate approved trustee without prior consent from MPFA and to empower MPFA to object to existing controllers and to give directions in relation to substantial shareholders; and
- (d) create a new offence for employers participating in MPF schemes to provide false or misleading information in pay-records given to employees.

5. According to the Administration, the proposals under the Bill have been thoroughly deliberated by the Review Committee and the MPF Schemes Advisory Committee² and are supported by them. The Administration has also informed the Labour Advisory Board of the proposed amendments.

Major views and concerns expressed by Members

6. At the FA Panel special meeting on 8 November 2007, members were briefed by the Administration and MPFA on major proposals under the MPFS (No.2) Bill. In general, members were in support of the proposed amendments as a further step to strengthen the enforcement and operation of the MPF System. In the course of scrutinizing the MPFS Bill, members of the Bills Committee have also given views on

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.

how the existing System can be improved. Their major views and concerns are summarized in the following paragraphs.

Non-payment of MPF contributions in non-enrolment cases

7. Members noted that under the existing MPFSO, where an employer had failed to enrol an employee in an MPF scheme and thus had not been making mandatory contributions for the employee, criminal prosecution could be brought against the employer for non-enrolment. However, no legal action could be taken against the employer for non-payment of mandatory contributions. To plug this loophole and ensure that employees in non-enrolment cases would not be deprived of their entitlement to mandatory contributions, the Administration had proposed to amend the MPF legislation to make it clear that an employer who had failed to enrol his relevant employee in an MPF scheme would still be liable to pay mandatory contributions for the employee. As more time was needed to draft the legislative amendments, the proposal had not been included under the MPFS Bill and would be dealt with under the MPFS (No.2) Bill.

8. In principle, members supported the proposal. Nevertheless, some members pointed out that where an employer had failed to enrol an employee in an MPF scheme, it necessarily followed that he would also fail to make MPF contributions for the employee. As such, instead of separately imposing a penalty on default contributions in respect of the non-enrolled employee, consideration might be given to imposing a substantially higher penalty for the offence of non-enrolment, the quantum of which should be sufficiently high to also deter the non-payment of contributions.

Retroactive application of certain provisions

9. Some members expressed the view that the improvement proposals of the Bill, if enacted, should take retroactive effect so as to achieve greater deterrent effect and provide better protection for employees. Examples included the improvement proposals in relation to protecting employees' entitlement to mandatory contributions and strengthening the enforcement of the MPF System. In this connection, members noted the Administration's proposal that employers in non-enrolment cases would be required to make mandatory contributions in respect of their employees' past period of service dated back to 1 December 2000 or a later date. However, proposed provisions seeking to create new offences (such as failure of employers to remit to the trustee the employee's deducted wages as mandatory contributions and providing false or misleading information in pay-records given to employees) would only take effect upon enactment.

Controllers of approved trustees

10. The Panel noted that one of the proposal under the MPFS (No.2) Bill was to amend the MPF legislation to set out clearly the approval requirements in respect of indirect controllers and minority shareholder controllers and the withdrawal of approval by MPFA of controllers of approved trustees under specified circumstances. However, the circumstances in question would not be set out explicitly in the

legislation. In this connection, some members were of the view that the circumstances should be specified in law for the sake of transparency and fairness. Members noted the MPFA's response that it might consider whether relevant guidelines should be issued.

11. MPFA further advised in response to members' concern that where there was collusion by parties to mislead MPFA to gain control of the approved trustee in question, MPFA might consider revoking the approval previously granted.

Other issues not dealt with under the MPFS (No.2) Bill

12. Some members had all along been very concerned that employees should be allowed to choose their preferred MPF trustees. The Panel noted that MPFA had completed a consultation with the industry and relevant stakeholders on the development of a proposal to increase employees' control over their MPF investments by allowing them to transfer accrued benefits derived from employees' mandatory contributions to a MPF scheme of their own choice. The Administration was studying MPFA's proposal in conjunction with the Department of Justice and would revert to the Panel in due course.

13. There was the concern that employees who had lodged complaints against their employers might face reprisal or other predicament such as losing their jobs. Some members therefore suggested that MPFA should also deal with and investigate into anonymous complaints for non-compliance. Furthermore, the personal information provided by an employee to substantiate his complaint should be treated in strict confidence. In this regard, the Panel noted that MPFA had formulated a proposal to offer greater protection to employees and the proposal was under consideration by the Government.

14. Some members had reiterated their concern that the existing offsetting arrangements for severance payment or long service payment should be abolished so as not to reduce the accrued benefits of MPF scheme members upon their retirement. Some members however questioned whether consideration should be given to abolishing long service payment altogether following the introduction of the MPF System which catered for the retirement needs of employees.

15. The Administration was also asked to consider the feasibility of allowing employees to claim arrears of MPF contributions from the Protection of Wages on Insolvency Fund upon their employers becoming insolvent.