

立法會
Legislative Council

LC Paper No. LS32/07-08

**Paper for the House Committee Meeting
on 11 January 2008**

**Legal Service Division Report on
Mandatory Provident Fund Schemes (Amendment) (No. 2) Bill 2007**

I. SUMMARY

1. **Object of the Bill** To amend the Mandatory Provident Fund Schemes Ordinance (Cap. 485) (MPFSO) and the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A) (the Regulation) to—
 - (a) increase the penalties for an employer's failure to comply with the requirements of section 7 or 7A(8) of MPFSO;
 - (b) provide for employer's obligation to pay contributions even when the relevant employee was not a member of a registered scheme and related matters;
 - (c) add a new Part IVA to the Regulation for regulating the approval of indirect controllers and substantial shareholders of approved trustees and the appointment of officers of approved trustees; and
 - (d) make it an offence for a participating employer to provide false or misleading information in pay-records provided to employees.
2. **Comments**
 - (a) The proposed amendments are mainly technical.
 - (b) A duty will be imposed on approved trustees to check the correctness of the contributions made by employers and to require an employer to rectify any discrepancy.
3. **Public Consultation** The MPFS Operation Review Committee and the MPFS Advisory Committee had thoroughly deliberated on and supported the legislative proposals. The Labour Advisory Board has been informed.
4. **Consultation with LegCo Panel** The Panel on Financial Affairs was briefed on the proposals at the meeting on 8 November 2007.
5. **Conclusion** Subject to Members' views on the need to deliberate on the policy and drafting aspects of the Bill, a further report will be submitted after the Administration's response to drafting queries has been received.

II. REPORT

Objects of the Bill

To amend the Mandatory Provident Fund Schemes Ordinance (Cap. 485) (MPFSO) and the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A) (the Regulation) to—

- (a) increase the penalties for an employer's failure to comply with the requirements of section 7 or 7A(8) of MPFSO;
- (b) provide for employer's obligation to pay contributions to the MPFS Authority (the Authority) even when the relevant employee was not a member of a registered scheme and related matters;
- (c) add a new Part IVA to the Regulation for regulating indirect controllers and substantial shareholders of approved trustees and the appointment officers of approved trustees; and
- (d) make it an offence for a participating employer to provide false or misleading information in pay-records provided to employees.

LegCo Brief Reference

2. File Ref.: FSB CRG4/51C(2007) issued by the Financial Services and the Treasury Bureau and dated 27 December 2007.

Date of First Reading

3. 9 January 2008.

Comments

4. MPFSO only requires an employer to arrange for employees to become members of a registered scheme (scheme member) and to make contributions to such scheme. When an employer has failed to enroll a relevant employee to be a scheme member, his legal obligation to contribute does not arise. MPFSO has not stated that an employer has the obligation to pay contributions to MPFS in respect of a relevant employee from the commencement of MPFS. The Administration now seeks to address the problem by imposing an obligation on an employer to pay contributions to the Authority for the period during which the relevant employee is not a scheme member. This obligation is also made retroactive from the commencement date of MPFS, i.e. 1 December 2000 (clause 5 – proposed sections 7AA and 7AE). The Authority will then pay contributions so received from the employers to the appropriate approved trustees for the credit of the accounts of the relevant employees (clause 5 – proposed section 7AC). Amendments to the Regulation, including imposition of new financial penalties, are

made consequential upon these new provisions (clauses 17, 22 and 24).

5. The proposed amendments also impose an obligation on the approved trustees (i.e. persons or corporations administering a registered scheme) to check the arithmetic correctness of contributions paid by employers under the proposed section 7AC and to take action to require the employers to rectify any discrepancy (clause 5 – proposed section 7AD). The extent of the obligation to take action is not clear. Must an approved trustee commence legal proceedings against a delinquent employer and pursue the matter, if necessary, until the bankruptcy or liquidation of such an employer? It is also unclear who is to bear such extra costs when they could not be recovered from the employer at fault.

6. The amendments also increase the maximum penalties for non-payment of contributions and non-enrolment as well as for failure of employers to remit employee mandatory contributions that are deducted from wages (clauses 3 and 11):-

Offence	Current Maximum Penalties	Proposed Amendment	New Maximum Penalties
Non-enrolment	Fine at level 6 (\$100,000) & imprisonment for 6 months	Proposed 43B(1)	Fine of \$350,000 and imprisonment for 3 years
Non-payment of deducted employee contribution	Fine at level 6 (\$100,000) & imprisonment for 6 months and upon each subsequent conviction, fine of \$200,000 and imprisonment for 12 months	Proposed 43B(1C)(a)	Fine of \$450,000 and imprisonment for 4 years
Non-payment of employer contribution	Ditto	Proposed 43B(1C)(b)	Fine of \$350,000 and imprisonment for 3 years

7. A new offence is created by the proposed section 43F (clause 33) against an employer who, in any pay-record given to an employee, provides any information that the employer knows to be false or misleading in a material respect, or recklessly provides any information that is false or misleading in a material respect. The penalties are a fine at level 6 (\$100,000) and imprisonment for 6 months for first conviction, and a fine of \$200,000 and imprisonment for 2 years upon each subsequent conviction.

8. The Bill would also enhance the power of the Authority to regulate approved trustees that are companies. Section 46(1A) of MPFSO is amended by adding a paragraph (*sa*) to enable the Authority to make regulations in relation to approved trustees that are companies providing for the composition of the board and committees of such trustees, the change or proposed change of controllers of such trustees and the

objection by the Authority to the existing controllers continuing to be such controllers (clause 29). The detailed regulations are set out in the new Part IVA proposed to be added to the Regulation (clause 31). The basic principle is that the Authority's prior consent is required for any person to become an indirect controller or a substantial shareholder, or to be appointed an officer of an approved trustee. The provisions are broadly similar to comparable provisions contained in the Securities and Futures Ordinance (Cap. 571) except that the fit and proper standards seem not to have been fully adopted. Financial penalties are also imposed for non-compliance with the new provisions (clause 32).

Public Consultation

9. According to the Administration, The MPFS Operation Review Committee and the MPFS Advisory Committee have thoroughly deliberated on the legislative proposals and support the same. The Labour Advisory Board has also been informed.

Consultation with LegCo Panel

10. The Panel on Financial Affairs was briefed on the legislative proposals at its meeting held on 8 November 2007. Members were supportive of the proposed amendments as measures for further strengthening the enforcement of MPFS regime. They also expressed views on the appropriate level of penalties to be imposed against non-enrollment, the need to set out in the legislation circumstances in which consent to the existing controllers or indirect controllers of an approved trustee would be revoked by the Authority, and whether some improvement proposals should also be made retroactive to afford better protection to employees.

Conclusion

11. The Bill contains mainly technical provisions. The Legal Service Division has identified a number of drafting issues and has requested the Administration to address them. Subject to Members' views on the need to deliberate on the policy and drafting aspects of the Bill, a further report will be submitted after the Administration's response to the issues raised has been received.

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