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Paper for the House Committee meeting on 14 December 2007

Report of the Bills Committee on Mandatory Provident Fund Schemes (Amendment) Bill 2007

Purpose

This paper reports on the deliberations of the Bills Committee on Mandatory Provident Fund Schemes (Amendment) Bill 2007 (the Bill).

Background

2. The Mandatory Provident Fund Schemes Ordinance (Cap. 485) ("MPFSO") was enacted in 1995 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.

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 (subject to the minimum and maximum levels of relevant income) as mandatory contributions to the trustee of a MPF scheme. An employee who has attained the retirement age of 65 shall be entitled to be paid by the trustee the entirety of his benefits accrued in the MPF scheme. As at end September 2007, over 2.3 million employees and self-employed persons have enrolled in MPF schemes, and the total asset of the MPF constituent funds exceeded \$250 billion. 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 2001¹ to analyze proposals put forward by relevant parties to

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

amend the MPF legislation in connection with the administration and operation of MPF schemes. Based on the recent advice of the Review Committee, MPFA has made a number of recommendations to amend the MPFSO, the Mandatory Provident Fund Schemes (General) Regulation ("the General Regulation") and the Mandatory Provident Fund Schemes (Exemption) Regulation ("the Exemption Regulation") so as to improve the MPF System. The Administration has taken forward the amendment proposals by introducing the current Bill into the Legislative Council on 27 June 2007.

The Bill

4. The Bill seeks to amend the MPFSO, the General Regulation and the Exemption Regulation to implement proposals recommended by MPFA. The main legislative proposals seek, inter alia, to -

- (a) amend the definition of "relevant income" under the Ordinance to include housing allowance and other housing benefits for computation of mandatory contribution purpose;
- (b) improve the mechanism for recovering contribution in arrears by employers;
- (c) enhance the enforcement of the MPF System; and
- (d) improve the administration and regulation of MPF schemes.

The Bills Committee

5. At the House Committee meeting on 29 June 2007, Members agreed to form a Bills Committee to study the Bill. Under the chairmanship of Hon CHAN Kam-lam, the Bills Committee has held five meetings, including a meeting with deputations. The membership list of the Bills Committee is at **Appendix I**. A list of organizations/individuals that have submitted views to the Bills Committee is at **Appendix II**.

Deliberations of the Bills Committee

6. In principle, the Bills Committee supports the Bill which seeks to improve the operation of the MPF System and the protection for MPF scheme members. However, some members are concerned that the Administration/MPFA have not taken the opportunity to also introduce legislative amendments to tackle some other problems identified under the existing system.

Housing allowance and other housing benefit (Part 25 of the Bill)

7. Currently, for the purpose of calculating MPF contributions, housing allowance and other housing benefit are excluded from the definition of "relevant income" under MPFSO. As explained by the Administration, the primary justification for excluding housing allowance from the definition of "relevant income" when enacting the MPFSO in 1995 was that housing allowance could be quite substantial and the exclusion was needed to minimize the potentially significant contribution burden for employees receiving such allowances. It was also envisaged at that time that the exclusion would unlikely affect lower-paid employees because they usually were not entitled to housing allowance and benefit. In the light of implementation experience, MPFA has critically re-examined the basis for the exclusion and has come to the view that housing allowance should not be treated differently from any other types of allowance or remuneration items. Otherwise, it would be arguable that all other types of allowance provided by an employer to an employee should also be excluded from the scope of relevant income, resulting in substantial reduction in mandatory MPF contributions.

8. One of the problems identified under the existing arrangement is that some employers have deliberately designated part of their employees' wages as housing allowance so as to reduce the amount of relevant income in respect of which MPF contributions are payable. To safeguard against such abuse, the Administration/MPFA have proposed to include housing allowance and other housing benefit in the definition of "relevant income".

9. While most members of the Bills Committee support or indicate no objection to the proposal, some members have expressed reservation on account of the additional contribution burden on employers and employees and the implications of the revised definition of "relevant income" on the calculation of other employment benefits. Some chambers of commerce, as well as organizations representing small and medium enterprises and employers, are not entirely convinced of the justification for the proposed amendment. They are also concerned about the compliance burden and financial implications. Labour groups, some trade associations and the retirement schemes industry, on the other hand, welcome the proposal as it can better safeguard employees' retirement benefits. In submitting views to the Bills Committee, some deputations consider that the Administration should set a reasonable timeframe for implementing the new arrangement so that employers can have sufficient time to prepare for the new requirement.

10. To ascertain the extent of the problem, the Bills Committee has sought information on cases in which employers have tried to evade their responsibility to make MPF contributions. According to the MPFA, since the implementation of the MPF System in December 2000, it has handled complaint cases from about 400 employees working in some 55 enterprises of various industries and employing an estimated total of 20 000 to 30 000 employees. Although not every employee was in receipt of housing allowance, the percentage of housing component in the relevant income of some of the affected employees ranged from 10% to 65% of their monthly income. The Administration has therefore considered it necessary to tackle the

problem proactively in order to prevent unscrupulous employers from moving what would otherwise be part of the employee's "relevant income" to the deductible item of housing allowance, thereby evading payment of MPF contributions in full.

11. To clarify doubts raised by some members and deputations, the Administration has confirmed that only housing allowance/benefit payable in cash terms will be included as "relevant income". The monetary value of quarters or accommodation provided by the employer would not count towards "relevant income". Furthermore, the inclusion of housing allowance/benefit in the definition of "relevant income" is only for the purpose of calculating MPF contributions and will not affect the calculation of other employment benefits and entitlements. The Bills Committee also notes that the proposal will not increase the contribution burden in respect of employees earning more than \$20,000 a month (excluding housing allowance and benefit) as this is the maximum relevant monthly income for the purpose of calculating MPF contributions. The Administration has also advised that it will consider providing a transitional period to enable the parties concerned to revise their systems and procedures. The MPFA will launch publicity and education programmes to increase awareness of the upcoming changes and will encourage trustees to communicate with their clients to facilitate the transition.

Improvement of the arrears recovery mechanism (Part 27 of the Bill)

12. The procedures for recovering arrears of MPF contributions are prescribed in sections 132 to 136 of the General Regulation. At present, an employer is required to pay the mandatory contributions by the contribution day, which normally falls on the 10th day after the last day of the relevant calendar month. If the employer defaults payment, the trustee will issue a reminder notice to the employer requiring the latter to settle the default contribution by the end of the 30-day settlement period. The Bills Committee notes that the original purpose of the 30-day settlement period is to allow some time for the trustee to help the employer resolve default cases, particularly those arising from inadvertent omission or computation errors. Cases that can be resolved during the 30-day period do not need to be reported by the trustee to MPFA. This arrangement has worked well during the initial implementation of the MPF System as many employers were not yet familiar with the calculation of MPF contributions and the buffer period would enable them to rectify unintended mistakes. However, following some seven years of operation and the simplification of calculation method in 2002, the continued need for such a buffer period is questionable. Operational experience has also indicated that some employers have taken advantage of the 30-day settlement period to delay payment of MPF contributions until towards the expiry of the period. There are concerns that the current arrears recovery process is too cumbersome, thus affecting the ability to recover default contributions in a timely manner from employers, especially in cases where an employer has entered into bankruptcy or liquidation.

13. The Bills Committee notes that the existing law is unclear as to whether MPFA can impose contribution surcharge and institute civil proceedings against an employer to recover the default contributions and contribution surcharges by virtue of

section 18 of MPFSO² only after all the recovery procedures have been complied with. Moreover, the existing requirement under the General Regulation on the MPFA to issue a surcharge notice to an employer after receiving from the trustee a first report that the employer has failed to make a contribution may lead to wastage of enforcement resources in cases where the employer cannot be contacted or have already been wound up. To address the shortcomings of the existing arrears recovery mechanism, the Administration has proposed to amend the General Regulation to remove the 30-day settlement period and allow MPFA not to issue surcharge notices to employers in specified circumstances, and to clarify the uncertainty in the law to facilitate the recovery of default contributions by MPFA even if some of the recovery steps cannot be complied with.

14. In principle, the Bills Committee supports proposed amendments which seek to streamline existing procedures and remove impediments to timely recovery of outstanding MPF contributions. Regarding some deputations' view that employers should still be given a buffer period for settling the default contributions with the trustees, the Administration points out that the proposed changes will not affect the existing requirement under which an employer has to remit MPF contributions to the trustee by the contribution day (i.e. normally the 10th day after the end of the relevant calendar month). Where the contributions are still outstanding, the trustees are encouraged to first follow up with the employers concerned within the 10 days immediately following the contribution day before reporting these cases to the MPFA as default cases.

15. Some labour groups have pointed out that as MPF service providers only issue the Annual Benefit Statement (ABS) once a year, MPF scheme members may not be able to detect the problem of default payment in a timely manner and may delay the arrears recovery process. They consider that it may be desirable to amend section 133 of the General Regulation to the effect that the trustee should notify the employee concerned in writing of the default contributions after the contribution day. The Administration/MPFA's response is that a central enquiry line has been launched since August 2007 to facilitate employees' checking of their MPF account balances and early detection of default contributions. MPF scheme members can also enquire on the contribution status of their accounts through the Internet or other channels as provided by different trustees.

Proposals to enhance the enforcement of the MPF System

16. In general, the Bills Committee and deputations support proposed amendments to improve the efficacy of enforcement actions.

² Section 18 of MPFSO states in very broad and general terms that MPFA is empowered to impose a contribution surcharge on the defaulter, and to recover the default contributions and contribution surcharges from the defaulter.

*Extension of the prosecution time bar
(Part 18 of the Bill)*

17. The time limit for instituting criminal proceedings for an offence under sections 43C and 43E of the MPFSO and section 26 of the Exemption Regulation is now governed by section 26 of the Magistrates Ordinance (Cap. 227), which is six months after the occurrence of the offence. To facilitate MPFA to take enforcement action more effectively, the Administration has proposed to amend the relevant sections to the effect that criminal proceedings may be instituted for an offence under these sections within six months after the offence is discovered by, or comes to the notice of, MPFA.

18. The Bills Committee notes the Hong Kong Bar Association (the Bar Association)'s concern that the extension of the prosecution period as currently proposed would provide for potentially open ended periods in cases where offences remained undiscovered for a long time. It considers that there should be a "long-stop" alternative date beyond which prosecution cannot be taken out. The Bar Association also makes reference to section 389 of the Securities and Futures Ordinance (Cap. 571) (SFO) providing for a "long-stop" prosecution period of three years after the commission of an offence (other than an indictable offence). After consideration, the Administration has taken on board the suggestion and will move Committee Stage Amendments (CSAs) to the effect that prosecution may be instituted for an offence within six months after it is discovered or comes to the notice of MPFA; or within three years of the commission of the offence, whichever is the earlier. On whether the "long-stop" period should be extended to six years as suggested by a member, the Administration's view is that the proposed three-year period is considered reasonable and broadly in line with that provided under section 389 of SFO.

19. Some members are concerned whether the "long-stop" date will also apply to the prosecution against employers who have failed to enrol employees in a MPF Scheme or make MPF contributions, thereby undermining the deterrent effect on non-compliant employers. In clarification, the Administration has confirmed that the aforesaid offence is dealt with under section 43B of MPFSO to which no amendment is being proposed. The proposed "long-stop" date will only be added to sections 43C and 43E of MPFSO and section 26 of the Exemption Regulation which deal with offences committed by self-employed persons, persons making false or misleading statements to MPFA or an approved trustee, and employers failing to provide information to certain employees to elect between an occupational retirement scheme and a MPF scheme.

*Service of summonses
(Part 20 of the Bill)*

20. Service of a summons on a body corporate under MPFSO is governed by the Companies Ordinance (Cap. 32) which provides that a summons may be served on a company by leaving it or sending it by post to the registered office of the company. However, the service would not be effective if the registered address of a company is not valid or if there is nobody to acknowledge receipt. The Bill proposes an

alternative mechanism whereby the summons may be served on the employer by leaving it at, or sending it by post to, any place at which the employer carries on business. In principle, members and deputations agree that the existing mechanism should be improved so as to increase the chance of successful service of summons and prevent abuse by unscrupulous employers who may try various means to deny the receipt of summons.

21. In this connection, the Bar Association has commented that the Rules of the High Court allow the service of summons at the defendant's "principal place of business", but not at "any place at which the employer carries on business" as proposed under the Bill. It is also concerned that leaving a summons at any place at which the employer carries on business would not be effective in bringing the document to the employer's attention promptly. Instead, it suggests that the summons may be served to the address stated in the employer's business registration certificate or in the absence of which, to any place at which the employer carries on business. The Administration's view is that the legislative intent of the new provision is to ensure that more effective enforcement action can be taken for the purpose of protecting the integrity of the MPF System. According to MPFA's operational experience, employers are likely to have an address stated in their business registration certificate but without any business operating at the stated address. As such, the Administration considers that it may not be appropriate to adopt the Bar Association's suggestion.

*Expansion of MPFA's power to require production of records
(Part 26 of the Bill)*

22. Currently, the MPF legislation does not explicitly empower MPFA to require the production of records from employers and self-employed persons except during on-site inspections. The Bill proposes to add a new section 19A to MPFSO to confer on MPFA an explicit power to serve a notice on an employer, a self-employed person or any other person requiring the person to produce records to MPFA within a specified period for the purpose of ensuring compliance with the provisions of the MPF legislation. The proposed power can be exercised by MPFA during or outside the course of inspections. The employer, self-employed person or any person being served with the notice who, without reasonable excuse, fails to comply with the request commits an offence and is liable on first conviction to a fine of \$100,000 and imprisonment for 12 months; and on subsequent conviction, to a fine of \$200,000 and imprisonment of two years.

23. In this connection, the Bills Committee notes the concern raised by the labour sector that MPFA should be empowered to inspect the contracts and examine the working relationship between employers and self-employed persons for the purpose of ascertaining any attempt by the employer to evade MPF contributions by requiring his employees to become self-employed persons. The MPFA's response is that the proposed section 19A, when enacted, would strengthen MPFA's investigation and enforcement powers and would address this concern more effectively.

Improvement to the administration and regulation of MPF schemes

Transfer of accrued benefits on cessation of employment (Part 9 of the Bill)

24. The General Regulation requires an employer to notify the trustee of the cessation of employment of an employee within 30 days after the cessation of employment of the employee. Failure of the employer to do so may hinder the trustee to process the transfer of accrued benefits as requested by the employee. To overcome this difficulty, the Bill proposes to allow the trustee to accept from the employee a notice of cessation of employment by statutory declaration where his employer cannot be located or refuses to submit the requisite notice so that the employee's accrued benefits can still be transferred.

25. On whether the proposed arrangement will cause any unfairness to employers, the Bills Committee has been advised that the proposal is intended primarily to cater for cases where the trustee can no longer reach the employer or where the latter has refused to provide a notice on the termination of employment. As the trustee would attempt to contact the employer concerned before accepting the statutory declaration from the employee, the proposal would not affect the employer's rights, such as using the accrued benefits derived from the employer's contributions to offset long service payment or severance payment.

26. While members have no objection in principle to the proposed amendments, concern has been raised on the consequences faced by an employee if he has inadvertently given false or misleading information in the statutory declaration concerned, which may attract criminal liability and upon conviction be sentenced to a maximum of two years' imprisonment and a fine. The MPFA has advised that whether prosecution will be taken out against an employee will be considered on the facts of individual cases, having regard to factors such as the harm caused by the act in question and the intention of the person concerned etc. Although prosecution may not be resorted to in each and every case, it is still necessary to put in place an enforcement mechanism to provide deterrent effect against employees making false or misleading declarations.

Disclosure of information by MPFA (Part 14 of the Bill)

27. Pursuant to section 41 of MPFSO, MPFA is not allowed to disclose to any person the information it has obtained in the exercise and performance of functions except under certain specified circumstances. The Bills Committee notes that the general public, in particular prospective and existing scheme members, may need certain information such as the fees and charges of the MPF constituent funds to help them make investment decisions. The MPFSO at present does not specifically allow MPFA to compile and disclose any comparative information to assist members for this purpose. It has also come to the notice of the Bills Committee that MPFA has been requested by some parties (e.g. employees) to release their information to third parties (e.g. the Labour Tribunal) to facilitate the processing of their cases. However, such

requests cannot be entertained even if consent from the information subject has been obtained. The MPFA is also not able to disclose information to the Official Receiver or liquidator to facilitate their discharge of duties. It is generally considered that such restriction may not be in the interest of scheme members and the public. Against this background, the Administration/MPFA have proposed to amend section 42(1) of MPFSO to enhance the existing disclosure regime.

28. One of members' main concern is the need to improve the transparency of fees and charges of MPF constituent schemes. They have sought information on the work of MPFA in this regard. The MPFA has informed the Bills Committee that in June 2004, it issued the Code on Disclosure for MPF Investment Funds (the Code) to improve the comprehensibility and comparability of fees and charges. One of the key tools introduced by the Code is the Fund Expense Ratio (FER) that shows fund expenses as a percentage of fund size. The MPFA has also undertaken consultation with stakeholders over the past year on improvements to the ABS. New requirements to enhance disclosure of fees and charges in the ABS, including those incurred by transactional activities undertaken by scheme members, will take effect when proposed provisions under the Bill to add content requirements to the ABS are enacted. The Bills Committee has also discussed with MPFA Phase I of the Fee Comparative Platform (FCP) launched on 13 July 2007 which provides scheme members with information about the highest, average and lowest FER by fund types. Members have urged that disclosure via FCP should be enhanced by providing detailed information on the fees and charges of each individual fund. The MPFA has advised that further disclosure will be implemented under Phase II of FCP which will be launched after the amendments proposed under the Bill to existing section 42(1) of MPFSO have been enacted.

29. In submitting views to the Bills Committee, a number of deputations, notably those from the investment and retirement scheme industry, have taken the opportunity to request MPFA to include the information in the relevant fund fact sheets in FCP. MPFA has agreed to consider the suggestion and reiterated its commitment to improving transparency of fees so as to bring market forces into full play to help lower fees and charges. Responding to the fund industry's call for more extensive use of the electronic means to disseminate MPF-related information, MPFA supports and encourages trustees to offer electronic transmission as an option for scheme members and points out that the existing legislation generally presents no barrier to the electronic dissemination of MPF-related information. However, it calls upon the trustees to consider the needs of different stakeholders, their ability to access electronic information and the nature of the information in question.

30. Regarding the purpose of the power to be conferred on MPFA under proposed section 42(1)(g) of the Bill, MPFA has explained that it is seeking a power to provide information to the public about provident fund schemes, constituent funds and approved pooled investment funds such as the applicable fees and charges, so that members of the public can make comparative decisions without having to collect literature from each service provider. The Bills Committee notes the concern of the Law Society of Hong Kong that the scope of the power under proposed section 42(1)(g) may be too broad, and its suggestion that MPFA may only exercise the power

to disclose relevant information when it "reasonably" considers that such disclosure can meet the specified purposes set out in proposed section 42(1)(g)(i) to (iii). The Administration's response is that the information which can be disclosed by MPFA under proposed section 42(1)(g) has already been confined to information relating to provident fund schemes or constituent funds or approved pooled investment funds for the specified purposes. Besides, MPFA is a public body carrying out public functions and must exercise its statutory powers reasonably according to administrative law principles. The Administration and MPFA therefore do not consider it necessary to subject MPFA's consideration to the test of "reasonableness".

31. The Bills Committee has also deliberated on the scope of information that can be disclosed by MPFA under proposed section 42(1)(g) and suggested that the items of information should be more clearly specified to avoid uncertainty. The Administration has taken on board members' suggestion and would move a CSA to set out the type of information and to allow for the disclosure of additional information when such a need arises.

*Consent to restructuring of MPF schemes
(Part 19 of the Bill)*

32. In scheme restructuring, some trustees may encounter difficulties in obtaining the consent of scheme members, particularly when members' whereabouts cannot be traced. At present, the trustee will apply to MPFA for consent by virtue of section 34B of MPFSO. However, the existing legislation is unclear as to whether the consent given by MPFA³ overrides the requirements to obtain members' consent and whether it is binding on all parties concerned. The Administration has therefore proposed to amend section 34B of MPFSO to put that beyond doubt.

33. Some members of the Bills Committee share a deputation's reservation about the proposal that MPFA's consent may override the requirement on the trustee to obtain scheme members' consent for scheme restructuring. There is a view that in order to safeguard the interest of scheme members, the consent for scheme restructuring should be entrusted to high-level government officials and not solely to MPFA.

34. As explained by MPFA, under the existing legislation, MPFA may consent to the scheme restructuring application only if satisfied, among other things, that the interests of scheme members will be adequately protected. The MPFA always encourages trustees/employers to communicate well with scheme members regarding matters that may have an impact on scheme members. It has assured members that this arrangement will continue, notwithstanding the proposed amendments which only seek to clarify the effect of the consent given by MPFA on scheme restructuring.

³ Before consent is given to any application for restructuring of MPF schemes, MPFA is required to be satisfied, amongst other things, that there are proper arrangements in place for transferring the accrued benefits of scheme members into the new schemes and that the interest of scheme members will be adequately protected.

Unclaimed benefits
(Part 12 of the Bill)

35. Over the years, MPFA has reported a number of operational difficulties in handling unclaimed benefits. One example is that it is unclear as to when certain benefits (such as a cheque to pay accrued benefits but which remains unrepresented by its expiry date) become unclaimed benefits. Another example is that the trustee is now required to publish newspaper notices to invite the member to lodge a claim if a scheme member who is entitled to be paid accrued benefits cannot be located. If no claim is made after publication of the notices, the benefits may be treated as unclaimed benefits. However, the existing legislation is silent on when the trustee should publish such a notice. To overcome the various difficulties, the Bill proposes to amend the General Regulation for the following purposes:

- (a) setting out clearly the timeframe for MPF benefits to become unclaimed benefits (i.e. if the trustee cannot locate the scheme members concerned for six months);
- (b) removing the requirement for trustees to publish newspaper notices to locate untraceable scheme members while MPFA will take steps through advertising and educational material to increase members' awareness of the availability and content of the register for unclaimed benefits maintained by MPFA and the process for claiming unclaimed benefits;
- (c) requiring the trustees to report any newly identified unclaimed benefits and those unclaimed benefits that have subsequently been claimed by members to MPFA on a quarterly basis; and
- (d) requiring the trustees to remind scheme members who have reached retirement age that they can apply for withdrawal of benefits at any time.

36. In principle, members have no objection to the proposed amendments to the General Regulation. However, they have examined whether there is a need to state the purpose of the unclaimed benefits register in the legislation, which will be effected by way of a CSA to be moved by the Administration. This concern has arisen from the Bills Committee's consideration of the three public registers specified under Part 7 of the Bill (namely, the register of exempt schemes, the register of approved trustees and the register of schemes). Members are concerned that the proposal to specify the purposes of the three registers in the legislation may have the unintended effect of imposing unnecessary restriction on public inspection of these registers in that such inspection must be for the specified purposes only. As the three registers do not contain any personal data, members have queried the need to specify the purposes which may restrict access to the registers. Having considered members' concern, the Administration has agreed to remove, by way of CSAs, the proposed provisions specifying the purposes of these registers. The Administration has also confirmed that the Office of the Privacy Commissioner for Personal Data (PCPD) has been consulted and has raised no objection to such removal. As regards the unclaimed

benefits register, the Administration and MPFA hold a different view and maintain that there is a need to state the purpose of the register to define the scope for proper use of the data as the register contains information relating to individual scheme members. The Administration has advised that PCPD is supportive of this approach.

Commencement (Part 1 of the Bill)

37. In the course of scrutiny, the Bills Committee has noted that employers and the trustee industry have requested to be given sufficient lead time to implement changes to their systems and procedures so as to comply with the new legislative requirements, such as the computation of relevant income and the treatment of unclaimed benefits. To enable the parties concerned to make the necessary preparation, the Administration has agreed to defer the commencement of relevant provisions under Parts 12, 25 and 27 of the Bill relating respectively to :

- (a) treatment of unclaimed benefits where trustees would need to amend their scheme administration procedures and systems; and trustees and MPFA would need to align their databases on members with unclaimed benefits;
- (b) the removal of the exclusion of housing allowance and other housing benefit from the definition of "relevant income" where some employers would need to adjust their payroll systems and the design of their employees' benefits packages; and
- (c) the improvement of the arrears recovery mechanism under which employers would need to adapt to the removal of the 30-day settlement period as a buffer for them to remit contribution data and payment by the end of the contribution day.

38. A summary of Parts 12, 25 and 27 of the Bill is in **Appendix III**. The Administration has proposed that with the exception of these provisions which shall come into operation on a day to be appointed by the Secretary for Financial Services and the Treasury by notice published in the Gazette, all other sections shall commence operation on the date of gazettal. The Bills Committee has no objection to the proposal and the related CSAs to be moved by the Administration.

Other issues of concern

39. Members of the Bills Committee have taken the opportunity to reiterate their ongoing concerns about the MPF System and urge the Administration/MPFA to expedite action to address a number of MPF-related issues which are not covered in the current Bill. They note that some of these issues will be dealt with in a separate bill while some are still under consideration by the Administration.

Forthcoming Amendment Bill

40. Under the existing legislation, where an employer has failed to enrol an employee in a MPF scheme and thus has not been making mandatory contributions for the employee, criminal prosecution can be brought against the employer for non-enrolment, but not for his failure to make MPF contributions. According to the Administration, it was intended that the current Bill would tackle the deficiency. However, as more time was needed to draft the legislative amendments, the Administration has taken out the proposal from the Bill in order not to hold up the legislative exercise. The Bills Committee notes that the relevant amendments will be included in another Amendment Bill to be introduced into the Council in January 2008.

41. Members note that in response to calls to increase the deterrent effect of the legislation, the Administration has proposed in the forthcoming Amendment Bill to increase the maximum penalty for non-enrolment and non-payment of MPF contributions to a level on par with that applicable to defaulting payment of wages under the Employment Ordinance (Cap.57), i.e. a maximum fine of \$350,000 and imprisonment for three years.

Increasing employees' control over MPF investments

42. The Bills Committee notes that MPFA has 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. On the way forward, the Administration has informed members that it is in the course of studying MPFA's proposal and would revert to Members when ready.

Protection for "whistle-blowing"

43. Some members have expressed concern about the possible predicament (such as termination of employment or other forms of discrimination) faced by an employee who lodges a complaint with MPFA about his employer's non-compliance. The Administration has advised that MPFA has submitted a proposal on providing better protection to employees and the proposal is being examined.

The offsetting arrangements

44. Some members have 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 in the longer run. Some members however hold a different view and enquire whether consideration should be given to abolishing long service payment following the introduction of the MPF System which caters for the retirement needs of employees.

45. The Administration has advised that the existing offsetting arrangements have been reached after prolonged negotiation prior to the passage of the MPF Schemes Bill in 1995. At present, there is no immediate plan to review or change the offsetting arrangements.

Committee Stage Amendments

46. The full set of CSAs to be moved by the Administration is at **Appendix IV**. The Bills Committee supports the proposed amendments and will not move any CSAs in its name.

Recommendation

47. The Bills Committee supports the resumption of the Second Reading debate on the Bill on 9 January 2008.

Advice sought

48. Members are invited to note the Bills Committee's recommendation in the preceding paragraph.

Council Business Division 1
Legislative Council Secretariat
13 December 2007

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

Membership list

Chairman	Hon CHAN Kam-lam, SBS, JP
Members	Hon LEE Cheuk-yan Dr Hon LUI Ming-wah, SBS, JP Hon CHAN Yuen-han, SBS, JP Hon LEUNG Yiu-chung Hon SIN Chung-kai, SBS, JP Hon TAM Yiu-chung, GBS, JP Hon LI Fung-ying, BBS, JP Hon Tommy CHEUNG Yu-yan, SBS, JP Hon Audrey EU Yuet-mee, SC, JP Hon WONG Kwok-hing, MH Hon LI Kwok-ying, MH, JP Hon Andrew LEUNG Kwan-yuen, SBS, JP Hon Alan LEONG Kah-kit, SC Dr Hon Fernando CHEUNG Chiu-hung Hon WONG Ting-kwong, BBS Hon TAM Heung-man
	(Total : 17 Members)
Clerk	Miss Polly YEUNG
Legal Adviser	Mr Kelvin LEE
Date	17 July 2007

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

**Organizations/individuals which/who have submitted views on the Mandatory
Provident Fund Schemes (Amendment) Bill 2007 to the Bills Committee**

Business and industry associations

1. The Chinese General Chamber of Commerce
2. The Chinese Manufacturers' Association of Hong Kong
3. Employers' Federation of Hong Kong
4. The Hong Kong Chamber of Small and Medium Business Limited
5. The Hong Kong Chinese Enterprises Association
6. The Hong Kong Chinese Importers' & Exporters' Association
7. Hong Kong Investment Funds Association
8. The Hong Kong Retirement Schemes Association
9. Hong Kong Small and Medium Enterprises Association
10. Hong Kong Trustees' Association Ltd

Labour unions

11. The Federation of Hong Kong and Kowloon Labour Unions
12. Hong Kong Confederation of Trade Unions
13. The Hong Kong Federation of Trade Unions (Rights and Benefits Committee)

Professional bodies

14. Hong Kong Bar Association
15. Law Society of Hong Kong

Individuals

16. Mr LAI Chi-lap, member of Yau Tsim Mong District Council
17. Mr MAK Ip-sing, member of Yuen Long District Council

Summary of Parts 12, 25 and 27 of the Bill

- Part 12 amends sections 170, 171 and 172 of the General Regulation, which set out the duties of approved trustees in different circumstances where scheme members are entitled to be paid his accrued benefits but cannot be located. The relationship among the three existing sections is clarified and the procedures under section 172 for locating and ascertaining the intention of scheme members are simplified. This Part also adds new sections 172A, 172B and 172C to the General Regulation. Section 172A deals with the situation where a scheme member whose accrued benefits are retained in a registered scheme cannot be located. Section 172B requires approved trustees to submit quarterly reports to the Authority to provide particulars of scheme members who have unclaimed benefits in the schemes. Section 172C is a reproduction of the existing section 172(11) and (12).
- Part 25 amends the definition of "relevant income" in section 2(1) of the Ordinance so that any housing allowance or other housing benefit expressed in monetary terms will form part of the relevant income of an employee.
- Part 27 amends section 18 of the Ordinance to clarify that the liability to pay a contribution surcharge and the exercise by the Authority of its power to recover arrears and contribution surcharges by proceedings are not dependent on the compliance with the regulations relating to recovery of arrears. The procedures for recovery of arrears set out in sections 132 to 136 of the General Regulation are also simplified so as to speed up the arrears recovery process. The English text of section 136(1)(a) is amended to correct a minor error.

MANDATORY PROVIDENT FUND SCHEMES
(AMENDMENT) BILL 2007

COMMITTEE STAGE

Amendments to be moved by the Secretary for
Financial Services and the Treasury

<u>Clause</u>	<u>Amendment Proposed</u>
2	<p>By deleting the clause and substituting –</p> <p>“2. Commencement</p> <p>(1) Subject to subsection (2), this Ordinance shall come into operation on the day on which it is published in the Gazette.</p> <p>(2) Sections 35, 36, 37, 38, 60, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71 and 72 shall come into operation on a day to be appointed by the Secretary for Financial Services and the Treasury by notice published in the Gazette.”.</p>
3	<p>By deleting “a written undertaking to the Authority by deed, or by like form” and substituting “an undertaking to the Authority by deed, or by a document of like effect”.</p>
4	<p>By deleting “a written undertaking to the Authority by deed, or by like form” and substituting “an undertaking to the Authority by deed, or by a document of like effect”.</p>

- 5 By deleting everything after “amended” and substituting “by repealing “a written undertaking to the Authority” and substituting “an undertaking to the Authority by deed, or by a document of like effect acceptable to the Authority,”.”.
- 6 By deleting everything after “amended” and substituting “by repealing “a written undertaking to the Authority” and substituting “an undertaking to the Authority by deed, or by a document of like effect acceptable to the Authority,”.”.
- 7(1) By deleting everything after “amended” and substituting “by repealing “a written undertaking” and substituting “an undertaking by deed, or by a document of like effect,”.”.
- 7(2) By deleting everything after “amended” and substituting “by repealing “a written undertaking” and substituting “an undertaking by deed, or by a document of like effect,”.”.
- 8 By deleting “a written undertaking to the Authority by deed, or by like form” and substituting “an undertaking to the Authority by deed, or by a document of like effect”.
- 9 By deleting “a written undertaking to the Authority by deed, or by like form” and substituting “an undertaking to the Authority by deed, or by a document of like effect”.
- 10 In the proposed section 7(3A) of Schedule 3, by deleting “like form” and substituting “a document of like effect”.

- 15 In the proposed section 20(6)(b), by deleting “a written undertaking to the Authority by deed, or by like form” and substituting “an undertaking to the Authority by deed, or by a document of like effect”.
- 16 In the proposed section 21(8), by deleting “a written undertaking with respect to the administration of the scheme by deed, or by like form” and substituting “an undertaking with respect to the administration of the scheme by deed, or by a document of like effect”.
- 17 In the proposed section 21A(8), by deleting “a written undertaking with respect to the administration of the scheme by deed, or by like form” and substituting “an undertaking with respect to the administration of the scheme by deed, or by a document of like effect”.
- 19(4) In the proposed section 14(3), in the English text, by adding “is or” before “are”.
- Part 7 By deleting the Part.
- 23 By deleting the clause and substituting –
- “23. Section added**
- The Mandatory Provident Fund Schemes Ordinance (Cap. 485) is amended by adding –
- “7D. Application of Ordinance to certain employees and self-employed persons**
- (1) If –
- (a) an employer enters into a

contract of employment with an employee who is less than 18 years of age; and

- (b) the employee reaches 18 years of age on or after the date of commencement of this section; and
- (c) the employer continues to employ the employee after he reaches 18 years of age,

then this Ordinance applies to the employer and the employee as if they had entered into the contract of employment on the day on which the employee reaches 18 years of age and the employment had begun or commenced on that day.

(2) If –

- (a) a person is self-employed before he is 18 years of age; and
- (b) he reaches 18 years of age on or after the date of commencement of this section; and
- (c) he continues to be self-employed after reaching 18 years of age,

then this Ordinance applies to him as if he had become a self-employed person on the day on which he reaches 18 years of age.”.”.

- 24 By deleting the clause.
- 37 (a) In the proposed section 172C, by adding –
“(3A) The register is to be made available for inspection to enable a person who may be entitled to benefits in a registered scheme to ascertain whether he has any unclaimed benefits in the scheme.”.
- (b) In the proposed section 172C(4), by deleting “to ascertain whether he has any unclaimed benefits in the scheme”.
- 41 By adding –
“(5) Section 42 is amended by adding –
“(5A) The information that may be disclosed under subsection (1)(g) includes (but is not limited to) information relating to –
(a) the investment portfolios and investment policies of provident fund schemes, constituent funds or approved pooled investment funds;
(b) the investment performances of provident fund schemes, constituent funds or approved pooled investment funds;
(c) the risks associated with investing in provident fund schemes, constituent funds or approved pooled investment

funds;

- (d) the fees and charges payable under provident fund schemes, constituent funds or approved pooled investment funds; and
- (e) the types of services available to members of provident fund schemes.”.”.

47 By deleting the proposed section 43C(3) and substituting –

“(3) Notwithstanding section 26 of the Magistrates Ordinance (Cap. 227), proceedings may be instituted for an offence against this section –

- (a) within 6 months after the offence is discovered by, or comes to the notice of, the Authority; or
- (b) within 3 years of the commission of the offence,

whichever period expires first.”.

48(2) By deleting the proposed section 43E(2) and substituting –

“(2) Notwithstanding section 26 of the Magistrates Ordinance (Cap. 227), proceedings may be instituted for an offence against this section –

- (a) within 6 months after the offence is discovered by, or comes to the notice of, the Authority; or
- (b) within 3 years of the commission of the offence,

whichever period expires first.”.

- 49(2) By deleting the proposed section 26(2) and substituting –
- “(2) Notwithstanding section 26 of the Magistrates Ordinance (Cap. 227), proceedings may be instituted for an offence against subsection (1)(a) consisting of a failure to comply with section 4(1) or 15(1) –
- (a) within 6 months after the offence is discovered by, or comes to the notice of, the Authority; or
- (b) within 3 years of the commission of the offence,
- whichever period expires first.”.
- 54 (a) By renumbering the clause as clause 54(1).
- (b) By adding –
- “(2) Section 56(5) is amended by repealing “(f)” and substituting “(fa)”.”.
- 58 (a) In the English text, by adding “a” before “related”.
- (b) In the English text, by adding “an” before “associated”.
- New By adding immediately after clause 60 –
- “60A. Application of the Mandatory Provident Fund Schemes (Amendment) Ordinance 2007**
- The Mandatory Provident Fund Schemes Ordinance (Cap. 485) as amended by section 60 of the Mandatory Provident Fund Schemes (Amendment) Ordinance 2007 (of 2007) applies in relation to a contribution period that begins on or after the date of

commencement of that section.”.

63(6)

By deleting the proposed section 18(5) and substituting –

“(5) The Authority must pay any arrears or contribution surcharge paid to or recovered by the Authority –

- (a) in the case of an employee who is still employed by the employer concerned at the time the Authority makes payment –
 - (i) to the approved trustee of the registered scheme nominated by the employer for this purpose; or
 - (ii) if the employer has not nominated a registered scheme, to the approved trustee of the registered scheme nominated by the employee for this purpose; or
 - (iii) if neither the employer nor the employee has nominated a registered scheme, to the approved trustee of a registered scheme that the Authority considers appropriate; or
- (b) in the case of an employee who has ceased to be employed by the employer concerned at the time the Authority makes payment –

- (i) to the approved trustee of the registered scheme nominated by the employee for this purpose; or
 - (ii) if the employee has not nominated a registered scheme, to the approved trustee of a registered scheme that the Authority considers appropriate; or
- (c) in the case of a self-employed person –
 - (i) to the approved trustee of the registered scheme nominated by the self-employed person for this purpose; or
 - (ii) if the self-employed person has not nominated a registered scheme, to the approved trustee of a registered scheme that the Authority considers appropriate.”.