President's ruling on the Mandatory Provident Fund Schemes (Amendment) Bill 2009 proposed by Hon LEE Cheuk-yan

Hon LEE Cheuk-yan submitted to me on 10 December 2008 the Mandatory Provident Fund Schemes (Amendment) Bill 2009 ("the Bill") which he intends to introduce into the Legislative Council.

2. Rule 51(3) of the Rules of Procedure ("RoP") provides that Members may not either individually or jointly introduce a bill which, in the opinion of the President, relates to public expenditure or political structure or the operation of the Government. RoP 51(4) provides that in the case of a bill which, in the opinion of the President, relates to Government policies, the written consent of the Chief Executive ("CE") is required for its introduction. In considering whether Mr LEE's Bill relates to the restrictions prescribed in RoP 51(3) and (4), I have invited the Administration to comment on the Bill and Mr LEE to respond to the Administration's comments. The Administration's comments and Mr LEE's response are summarized in the **Appendix**.

Background

3. The Mandatory Provident Fund Schemes Ordinance (Cap. 485) ("MPFSO") was last amended by the Mandatory Provident Fund Schemes (Amendment) Bill 2008 ("the Amendment Bill") which was passed on 10 July 2008. According to the Legislative Council Brief issued by the Financial Services and the Treasury Bureau on 10 June 2008 in respect of the Amendment Bill, the proposal was to enable the Mandatory Provident Fund Schemes Authority ("the Authority") to implement the Government decision which the Financial Secretary ("FS") announced in the 2008-2009 Budget whereby a one-off injection of $6,000 would be made to the accounts of certain categories of persons who meet the threshold requirement of earning not more than $10,000 a month, for enhancing retirement protection for the lower-income working people.

4. As a result of the amendments effected, the Authority is now empowered to direct trustees to deposit any special contributions into specified sub-accounts of Mandatory Provident Fund ("MPF") accounts for holding mandatory contributions. This is reflected in section 19B(2) and (3) in Part IIIA of MPFSO. Under section 19F(b) in Part IIIA, special contributions shall be regarded as mandatory contributions.

5. Being treated as mandatory contributions, special contributions are subject to the same preservation rule and other legislative provisions that apply to mandatory contributions in existing MPF accounts, viz. a member may withdraw his MPF benefits only upon reaching the age of 65 or under specified circumstances such as death, total incapacity or permanent departure from

Hong Kong as prescribed in MPFSO (section 15 of MPFSO and sections 159 to 165 of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 subsidiary legislation A) ("General Regulation")).

Purpose of Hon LEE Cheuk-yan's proposed bill

6. Mr LEE has not provided any Brief for the Bill. To assist me in studying Mr LEE's Bill, I have sought the advice of Counsel to the Legislature regarding the legal effect of the amendments proposed in Mr LEE's Bill. Counsel advises that the legal effect of the Bill is to provide a legal framework whereby any special contribution that may be made by the Authority could be paid into a specified sub-account of an MPF account holding the voluntary contributions of a member of a registered scheme. Mr LEE's Bill would provide an alternative way of dealing with special contributions by the Authority.

7. Under MPFSO, accrued benefits derived from voluntary contributions are subject to different legislative provisions with the result that they may at the request of a scheme member be paid out in accordance with the governing rules of the registered scheme. According to Counsel's analysis, amendments proposed in Mr LEE's Bill would permit special contributions, which were paid into specified sub-accounts of MPF accounts for holding voluntary contributions, to be paid out to scheme members before the retirement age of 65 years.

The Administration's views

8. The Administration is of the view that Mr LEE's Bill relates to Government policy for the purpose of RoP 51(4). The Administration submits that Mr LEE's Bill relates to the Government policy to pay special contributions into MPF accounts of eligible persons to enhance their retirement protection. The Administration argues that special contributions should be subject to the preservation rule applicable to mandatory contributions under MPFSO, so that they will not be available for withdrawal by scheme members until reaching the retirement age of 65 years or otherwise permitted in exceptional circumstances under MPFSO. Treating special contributions as voluntary contributions, which may be withdrawn by scheme members before they reach retirement age, would defeat the policy objective of enhancing retirement protection.

9. The Administration points out that the Government policy was clearly spelt out by FS in his Budget Speech delivered on 27 February 2008, when he announced the Government's one-off injection of $6,000. The policy was reiterated by the Secretary for Financial Services and the Treasury ("SFST"), when responding to the Committee Stage Amendments ("CSAs") moved by Mr LEE during the resumption of the Second Reading debate on the Amendment Bill on 10 July 2008. The policy was also made very clear by SFST and other Government officials in public documents and during deliberations of the Council and its relevant committees on various occasions.

Hon LEE Cheuk-yan's views

10. Mr LEE does not agree that his Bill relates to Government policy for the purpose of RoP 51(4). Mr LEE submits that under the existing arrangement, the Government will sign a written agreement with the Authority setting out the implementation details for payment of special contributions ("the Agreement"). The injection exercise will be executed and the policy objective will be achieved as the Authority carries out the terms of the Agreement. His Bill, if passed, will not have any effect on this exercise.

11. Mr LEE also submits that the Government policy reflected in the Amendment Bill is to provide a one-off injection of $6,000 into the MPF accounts of lower-income persons. The Amendment Bill only provides the legal framework or legal vehicle for implementing the injection and "that legal vehicle should not be taken as a Government policy".

12. Mr LEE points out that the amendments proposed in his Bill are different from the CSAs he proposed to the Amendment Bill. His CSAs then required that special contributions be treated as voluntary contributions and not mandatory contributions. There is no such requirement in his Bill.

13. Mr LEE argues that the Government has yet to make any policy decision on future injection of funds into MPF accounts, including whether it will at all make any injection into MPF accounts, and, if it will, the criteria of eligible accounts, the amount to be injected, and whether the injected amount will be treated as voluntary contributions. Mr LEE further argues that treating the contribution made by the Authority as voluntary contributions is to provide a kind of savings in reserve. Scheme members could withdraw the funds to meet contingent needs whenever necessary, thus enhancing their ability to face economic adversities. Although this objective is different from the purpose of the Government injection proposal made in the 2008-2009 Budget, namely, for enhancing retirement protection, his Bill does not require the Government to implement the policy of providing savings in reserve. The effect of his Bill is only to provide a legal framework for implementation if and when the Government decides on such a policy.

My opinion

14. RoP 51(3) and (4) are made for implementing Article 74 of the Basic Law.

15. I am of the view that the current Government policy relating to special contributions to MPF accounts, i.e. contributions other than made by scheme members and their employers, is clearly reflected in MPFSO and the General Regulation. The policy is :

(a) special contributions may only be paid into specified sub-accounts of MPF accounts for holding mandatory contributions; and

(b) special contributions are to be dealt with as mandatory contributions so that they may only be withdrawn by scheme members concerned upon reaching their retirement age of 65, or under specified circumstances referred to in paragraph 5 above.

The amendments to be effected by Mr LEE's Bill would permit special contributions to be paid into specified sub-accounts other than those holding mandatory contributions, and to be regarded not as mandatory contributions but as voluntary contributions instead. That would enable the scheme members concerned to withdraw the special contributions before the retirement age. As such, Mr LEE's Bill clearly impacts upon the current Government policy, and the effect cannot be said to be negligible or minimal.

16. It has been established through the previous rulings of my predecessor that in order for a bill not to be caught by RoP 51(3) and (4), the bill must not have substantive effect on one or more than one of the areas prescribed in this Rule, and that Government policies for the purpose of RoP 51(4) include policies reflected in legislation. I am of the view that Mr LEE's Bill, if enacted, will have substantive effect on the Government policy reflected in MPFSO and the General Regulation.

My ruling

17. I rule that Mr LEE's Bill relates to Government policies for the purpose of RoP 51(4). The Bill may not be introduced without the written consent of CE.

(Jasper TSANG Yok-sing)
President
Legislative Council

5 February 2009

Appendix

Mandatory Provident Fund Schemes (Amendment) Bill 2009

Summary of the Administration's comments on the Bill proposed by Hon LEE Cheuk-yan and Mr LEE's response to such comments

Purpose of Hon LEE Cheuk-yan's Bill	**The Administration's comments**	**Hon LEE Cheuk-yan's response**
The Bill seeks to amend MPFSO and the General Regulation to provide a legal framework whereby any special contribution that may be made by the Authority could be paid into a specified sub-account of an MPF account holding the voluntary contributions of a member of a registered scheme.	The Administration is of the view that the Bill relates to Government policies referred to in RoP 51(4) of LegCo and the written consent of the Chief Executive is required for its introduction into LegCo. Specifically, the Bill relates to Government policy with regard to the payment of special contributions into MPF accounts of eligible persons to enhance their retirement protection. It is Government policy that the payment of special contributions into MPF accounts is to enhance retirement protection and therefore the special contributions should be subject to the same preservation requirements as mandatory contributions under MPFSO, such that the special contributions will not be available for withdrawal by scheme members until reaching the retirement age of 65 or otherwise permitted in exceptional circumstances under MPFSO. If the special contributions are treated as voluntary contributions, they will not be bound by the statutory preservation requirements and may be withdrawn by scheme members before they reach retirement age. Hence, treating special contributions as voluntary contributions will defeat the policy objective of enhancing retirement protection. The Government	The Bill does not relate to Government policies for the purpose of RoP 51(4). There is no provision in the Bill which prescribes the circumstances under which the Government is required to make special contributions through the Authority. If the Government decides to make special contributions, there is also no provision in the Bill which stipulates the eligibility criteria of the persons who may benefit from the special contributions, the amount of special contributions and the account into which the special contributions are to be paid. According to the existing arrangement, the Government will sign a written agreement with the Authority to prescribe the implementation details for making special contributions. In other words, to implement the measure and policy objective proposed in the Budget, the Government needs only to prescribe in the written agreement signed with MFPA that the special contributions shall be deposited in the sub-account specified under section 78(6)(*c*), (7)(*b*) or (8)(*a*) of the General Regulation. It can be seen that if the Bill is passed, it will not have any direct, indirect, corresponding or incidental effect on the measure proposed in the Budget.

Purpose of Hon LEE Cheuk-yan's Bill	The Administration's comments	Hon LEE Cheuk-yan's response
	policy intention has been clearly spelt out by SFST when he responded to the CSAs moved by Hon LEE Cheuk-yan during the resumption of the Second Reading debate on the Amendment Bill on 10 July 2008. The Administration considers that the CSAs proposed by Hon LEE Cheuk-yan to the Amendment Bill, which seeks to prescribe that special contributions be deposited into the sub-accounts of MPF accounts for holding voluntary contributions, will make it impossible for the policy of enhancing retirement protection to be implemented. It is a conscious decision of the Government in pursuance to the stated Government policy that the special contributions shall not be treated as voluntary contributions, since the latter are not subject to any preservation requirements under MPFSO. On other occasions, Government officials have also made clear the Government policy that special contributions are paid to MPF accounts for the purpose of enhancing retirement protection. It was first announced in the 2008-2009 Budget Speech delivered by the Financial Secretary on 27 February 2008, when the Government set out the proposal to set aside public funds for making an injection of $6,000 into MPF accounts of those provident fund scheme members who are earning not more than $10,000 a month. The above policy has been reiterated by other	The Government policy reflected in the Amendment Bill is only the measure of making a one-off fund injection of $6,000 into MPF accounts of low-income persons. The implementation of his Bill will not have substantive effect on the above measure. Therefore, his Bill does not relate to Government policies for the purpose of RoP 51(4). The amendments in the Bill are different from the CSAs he proposed to the Amendment Bill. The CSAs to the Amendment Bill seeks to require that special contributions be treated as voluntary contributions and not mandatory contributions. There is no such requirement in his Bill. The speech of SFST, which was made during the resumption of the Second Reading debate on the Amendment Bill on 10 July 2008, only focused on the fund-injection proposal put forward in the 2008-2009 Budget. It did not make any announcement on the Government's decision regarding the policy on fund injection into MPF accounts in the future. From SFST's speech, it can be seen that the Government has yet to make a policy decision on future injection of funds into MPF accounts, including whether it will make any injection of funds, and, if it will, the criteria of eligibility of the persons, the amount of funds to be injected, and whether the funds injected will be treated as voluntary contributions. Before submitting the Bill to the Law Draftsman (that is, before 26 November 2008), neither SFST nor other official had announced

Purpose of Hon LEE Cheuk-yan's Bill	The Administration's comments	Hon LEE Cheuk-yan's response
	Government officials in public documents and in deliberations at meetings of LegCo and its committees on various occasions. To implement the stated Government policy, LegCo passed the Amendment Bill on 10 July 2008 which, amongst others, requires that – (a) the special contributions may only be paid into specified sub-accounts of MPF accounts for holding mandatory contributions (section 19B(2)&(3) of MPFSO); and (b) the special contributions shall be regarded as mandatory contributions under MPFSO (section 19F(b) of MPFSO). By virtue of section 19F(b) of MPFSO, special contributions shall be subject to the same preservation requirements as mandatory contributions. According to the preservation requirements stipulated in section 15 of MPFSO as well as sections 159 to 165 of the General Regulation, accrued benefits derived from mandatory contributions and special contributions shall not be withdrawn by scheme members until they reach the retirement age of 65 or unless in exceptional circumstances such as death, total incapacity, etc. The new sections 19B(2), 19B(3) and 19F(b) of MPFSO reflect the Government policy that the payment of the special contributions is for the purpose of enhancing retirement protection, by subjecting the withdrawal of these special contributions by scheme members to the	that the Government had already made a decision on the policy regarding fund injection into MPF accounts in the future. Some people may point out that deeming special contributions only as mandatory contributions is in itself a Government policy, and that the Bill obviously has substantive effect on that policy. This argument should not stand for the following reasons: First, special contributions (and the Amendment Bill) is only a legal framework or vehicle for the implementation of the proposals put forward in the 2008-2009 Budget (that is, to make a one-off fund injection of $6,000 into MPF accounts of low-income persons in order to enhance retirement protection). That legal vehicle should not be regarded as a Government policy. Second, the intention of treating the funds injected by MPFA as voluntary contributions is to provide a kind of savings in reserve, so that the persons benefited can withdraw the funds to cope with contingent needs whenever necessary, thus enhancing their ability to meet with economic adversities. This is a policy different from that proposed in the Budget for enhancing retirement protection. The Government has yet to make a policy decision concerning savings in reserve. Also, the Bill does not provide that the Government is required to implement this policy. The purpose of the Bill is only to make use of special contributions as a legal vehicle, so as to enable the Government to have a

Purpose of Hon LEE Cheuk-yan's Bill	The Administration's comments	Hon LEE Cheuk-yan's response
	same preservation requirements that are applicable to mandatory contributions. The Administration maintains the same view that the Bill relates to Government policies even if one might argue that the Bill only provides for an alternative option such that special contributions may be treated as voluntary contributions. As stated clearly by SFST during resumption of the Second Reading debate on the Amendment Bill on 10 July 2008, the Government policy with regard to the payment of special contributions into MPF accounts of eligible persons is to enhance retirement protection and the special contributions should be treated as mandatory contributions and not voluntary contributions, such that the withdrawal of the special contributions should be subject to the statutory preservation requirements.	legal framework to implement the policy concerned once it has decided on it. Third, the argument that deeming special contributions only as mandatory contributions is in itself a Government policy is merely playing with words. This is because when drafting the Bill, he could add a new category of contributions under another name and then insert the same provisions relating to special contributions (except the provisions on the vesting of accrued benefits), and achieve the same legal effect as the Bill, while at the same time the restriction in RoP 51(4) could be avoided. The key issue is not the terms used in the Bill, but the aforesaid Government policy on fund injection into MPF accounts in the future.

Abbreviations

the Amendment Bill	Mandatory Provident Fund Schemes (Amendment) Bill 2008
the Authority	Mandatory Provident Fund Schemes Authority
the Bill	Mandatory Provident Fund Schemes (Amendment) Bill 2009 proposed by Hon LEE Cheuk-yan
CSAs	Committee Stage Amendments
General Regulation	Mandatory Provident Fund Schemes (General) Regulation
LegCo	Legislative Council
MPF	Mandatory Provident Fund
MPFSO	Mandatory Provident Fund Schemes Ordinance
RoP	Rules of Procedure
SFST	Secretary for Financial Services and the Treasury