

立法會
Legislative Council

LC Paper No. CB(1)1921/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/BC/1/11/2

**Bills Committee on Mandatory Provident Fund Schemes
(Amendment) (No. 2) Bill 2011**

**Sixth meeting on
Monday, 26 March 2012, at 8:30 am
in Conference Room 2A of the Legislative Council Complex**

Members present : Hon WONG Ting-kwong, BBS, JP (Chairman)
Hon LEE Cheuk-yan
Hon LI Fung-ying, SBS, JP
Hon Andrew LEUNG Kwan-yuen, GBS, JP
Hon KAM Nai-wai, MH
Hon Cyd HO Sau-lan
Hon CHAN Kin-por, JP
Hon WONG Kwok-kin, BBS
Hon IP Wai-ming, MH
Hon IP Kwok-him, GBS, JP
Hon Alan LEONG Kah-kit, SC

Members absent : Hon LEUNG Yiu-chung
Hon Tommy CHEUNG Yu-yan, SBS, JP
Hon WONG Sing-chi

Public officers attending : Miss Emmy WONG
Deputy Secretary for Financial Services and the
Treasury (Financial Services)(acting)

Miss Selina LAU
Senior Government Counsel
Department of Justice

Attendance by invitation : Mr Darren McSHANE
Executive Director (Regulation and Policy)
Mandatory Provident Fund Schemes Authority

Mrs Janet YUEN
Consultant (Policy Projects)
Mandatory Provident Fund Schemes Authority

Ms Amelia LEUNG
Senior Manager (Policy Development)
Mandatory Provident Fund Schemes Authority

Clerk in attendance : Ms Anita SIT
Chief Council Secretary (1)5

Staff in attendance : Miss Carrie WONG
Assistant Legal Adviser 4

Mr Hugo CHIU
Council Secretary (1)5

I Meeting with the Administration

Follow-up to issues arising from previous meeting

(LC Paper No. CB(1)1392/11-12(01) — Administration's response dated 22 March 2012 to an issue raised at the meeting on 23 February 2012)

Clause-by-clause examination of the Bill (starting with proposed section 34ZM of clause 13)

(LC Paper No. CB(3)232/11-12 — The Bill

LC Paper No. CB(1)939/11-12(01) — Marked-up copy of the Bill prepared by the Legal Service Division

LC Paper No. CB(1)1112/11-12(03) — Letter dated 9 February 2012 from Assistant Legal Adviser to the Administration on Mandatory Provident Fund Schemes (Amendment) (No. 2) Bill 2011

LC Paper No. CB(1)1331/11-12(01) — Letter dated 22 February 2012 from the Administration in response to Assistant Legal Adviser's letter on Mandatory Provident Fund Schemes (Amendment) (No. 2) Bill 2011)

Discussion

The Committee deliberated (Index of proceedings attached at **Appendix**).

Admin

Follow-up actions to be taken by the Administration

2. The Administration and the Mandatory Provident Fund Schemes Authority ("MPFA") were requested to:

- (a) regarding the giving of notice by MPFA under proposed sections 34ZN(5) and 34ZO(4) to the registered intermediary concerned before the suspension of registration is to take effect, consider replacing "at least 10 days" with "at least 15 days";
- (b) refine the drafting of the Chinese version (and the English version if necessary) of proposed sections 34ZQ(2)(a) and 34ZQ(2)(b);
- (c) refine the drafting of the Chinese version of proposed sections 34ZS(1) and 34ZS(2); and
- (d) provide information on the existing arrangements, including the relevant approving authority and legislative provisions, regarding the authorization of Mandatory Provident Fund schemes and products.

III Any other business

Date of next meeting

3. The Chairman reminded members that the next two meetings would be held on 29 March 2012 at 10: 45 am and 23 April 2012 at 4:30 pm.

(Post-meeting note: As the Council meeting of 28 March 2012 was resumed on 29 March 2012 at 9:00 am for continuation of unfinished business, the Bills Committee meeting scheduled for 29 March 2012 was cancelled.)

4. There being no other business, the meeting ended at 10:37 am.

Council Business Division 1
Legislative Council Secretariat
18 May 2012

**Proceedings of the
Bills Committee on Mandatory Provident Fund Schemes (Amendment) (No. 2) Bill 2011
Sixth meeting on Monday, 26 March 2012, at 8:30 am
in Conference Room 2A of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
000452 – 000748	Chairman	Opening remarks	
000749 – 000908	Mr CHAN Kin-por Chairman	<p>Mr CHAN said that subsequent to the last meeting on 20 March 2012, he had obtained from the Administration information on the penalty provisions in the Bill. He was consulting the Hong Kong Federation of Insurers ("HKFI") on those provisions and would revert to the Bills Committee after HKFI provided its feedback.</p> <p>The Chairman remarked that HKFI's feedback might be provided to the Bills Committee for discussion.</p>	
000909 – 001129	Administration	<p><u>Clause-by-clause examination of the Bill</u></p> <p><u>Clause 13 – Part IVA added</u></p> <p>Division 6—Conduct and Other Requirements for Intermediaries and Responsible Officers</p> <p><i>34ZM. Conduct requirements for responsible officer</i></p> <p><i>34ZN. Annual fees</i></p>	
001130 – 001257	Chairman Administration Mr CHAN Kin-por	<p>The Chairman enquired why the surcharge rate for late payment of the annual fee (i.e. 10%) was higher than that for late tax payment (i.e. 5%). Mr CHAN shared the Chairman's concern.</p> <p>The Administration replied that the surcharge rate of 10% was set with reference to the arrangement under the Securities and Futures Ordinance (Cap. 571) ("SFO") for late payment of licence fees by licensed corporations.</p> <p>In response to Mr CHAN's enquiry, the Administration advised that under the existing administrative regulatory arrangements, MPF intermediaries were not required to pay annual fees.</p>	

Time Marker	Speaker	Subject(s)	Action Required
001258 – 001611	Ms LI Fung-ying Administration Mr Andrew LEUNG Chairman	<p>In reply to Ms LI's enquiry, the Administration advised that unless otherwise specified, the expression 'days' in the Bill referred to calendar days, rather than working days.</p> <p>Regarding the giving of notice by Mandatory Provident Fund Schemes Authority ("MPFA") under proposed section 34ZN(5) to the registered intermediary concerned before the suspension of registration was to take effect, Mr LEUNG requested the Administration to consider replacing "at least 10 days" with "at least 15 days", and said that the relevant Bills Committee had agreed on a similar amendment to the Companies Bill. The Chairman expressed support to Mr LEUNG's suggestion.</p>	The Administration to take action as per paragraph 2 of the minutes.
001612 – 001726	Administration	<p><i>34ZO. Annual return</i></p> <p>The Administration said that it would also review whether the expression "at least 10 days" in proposed section 34ZO(4) should be replaced with "at least 15 days".</p>	The Administration to take action as per paragraph 2 of the minutes.
001727 – 001755	Chairman Administration	The Chairman enquired whether the annual return under proposed section 34ZO had to be made using a specified form. The Administration replied in the affirmative and advised that the requirement was set out in proposed section 34ZO(1).	
001756 – 001914	Administration	<i>34ZP. Continuing training</i>	
001915 – 001952	Chairman Administration	The Chairman enquired why the last sentence of proposed section 34ZP(2) contained the phrase "or any longer period specified in the notice". The Administration advised that the phrase was included in case the relevant continuing training course was not immediately available within a certain period. This would enable the Mandatory Provident Fund ("MPF") intermediary concerned to fulfill the training requirement within a practicable period of time.	
001953 – 002112	Administration	Division 7—Inspection and Investigation Concerning Failure to Comply with Performance Requirement	

Time Marker	Speaker	Subject(s)	Action Required
		<i>34ZQ. Initiating inspection powers for monitoring compliance</i>	
002113 – 002518	Ms LI Fung-ying Department of Justice (DoJ) Chairman	<p>Ms LI said that the phrases "或沒有遵從" and "或不遵從" in the Chinese version of proposed section 34ZQ(2)(a) and 34ZQ(2)(b) might be superfluous.</p> <p>The Administration was requested to refine the drafting of the Chinese version (and the English version if necessary) of proposed section 34ZQ(2)(a) and 34ZQ(2)(b).</p>	The Administration to take action as per paragraph 2 of the minutes.
002519 – 002816	Administration	<i>34ZR. Inspection powers</i>	
002817 – 003305	Chairman Administration	<p>The Chairman enquired what information was referred to by the expression "information concerned" in proposed section 34ZR(7). The Administration advised that the information referred to was mentioned in proposed section 34ZR(1)(b) and 34ZR(1)(d) and that only information relevant to the regulated activities would be covered.</p> <p>The Chairman expressed concern that the inspectors would conduct fishing expedition on personnel records. The Administration responded that the inspectors prescribed and directed by the frontline regulators ("FRs") would only inspect personnel information relevant to the fulfillment of conduct requirements and whether the person met the qualification to carry on regulated activities. The inspectors would not inspect irrelevant information such as salaries.</p> <p>The Chairman enquired whether an inspector had to obtain a warrant first before the inspector could enter the place of business of the MPF intermediary concerned to conduct inspection. The Administration replied in the negative, and pointed out that proposed section 34ZQ specified that the FR directing a prescribed person to conduct inspection must provide the person with a copy of the direction. The inspector was required to produce a copy of the direction to the regulated person concerned before exercising the inspection powers.</p>	

Time Marker	Speaker	Subject(s)	Action Required
003306 – 003356	Administration	<i>34ZS. Inspection powers exercisable in relation to former regulated person</i>	
003357 – 004143	Mr IP Wai-ming Administration DoJ Chairman	Mr IP remarked that the expressions "某行業監督" and "某身為受規管者的人" in proposed section 34ZS(1) and 34ZS(2) referred to different entities, but the current drafting might cause a reader to think that they refer to the same entity. To avoid confusion, the Administration was requested to refine the drafting of proposed section 34ZS(1) and 34ZS(2).	The Administration to take action as per paragraph 2 of the minutes.
004144 – 004507	Administration	<i>34ZT. Initiating investigation powers for suspected noncompliance</i> <i>34ZU. Investigation powers</i>	
004508 – 005439	Mr KAM Nai-wai Administration	<p>Mr KAM enquired whether information obtained in the course of investigation had to be kept confidential and whether such information could be released by the investigator to the complainant concerned. The Administration replied that the Bill proposed to include new provisions to enable FRs and MPFAs the sharing of information among themselves so as to facilitate their exercise of functions under Part IVA. FRs would be able to pass information obtained in investigation to MPFA for it to make disciplinary decisions. MPFA would decide the kind of relevant information to be disclosed to the complainant concerned, including the outcome of follow-up actions taken and, if applicable, any resultant enforcement actions. The Administration added that it had already agreed to provide written response on the issue at an earlier meeting.</p> <p>Mr KAM remarked that for the sake of equity, the MPF intermediary being investigated should also be informed of what information about him would be disclosed to the complainant concerned. Mr KAM also considered that the Bill should specify how the information obtained in the course of investigation would be handled and disclosed to the complainant concerned.</p> <p>The Administration replied that the Bill had a confidentiality clause ("保密條款") governing the regulator's disclosure of information obtained in</p>	

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		<p>an investigation. As in the case of other legislation, the confidentiality clause specified the principles to be applied for information disclosure.</p> <p>Mr KAM remarked that he would revert to the issue when the Bills Committee examined the confidentiality clause of the Bill.</p>	
005440 – 005557	Chairman Administration	The Chairman enquired about the difference between an "inspector" and an "investigator" in the Bill. The Administration advised that an inspector would conduct day-to-day inspection and supervision while an investigator would conduct investigation on specific cases, e.g. non-compliance with conduct requirements.	
005558 – 005838	Mr KAM Nai-wai Administration	Mr KAM enquired whether the party being investigated had the right to silence. The Administration advised that there were clauses in the Bill governing the issue and the protection against self-incrimination, and the relevant clauses would be covered in the clause-by-clause examination of the Bill in due course.	
005839 – 010317	Administration	<p><i>34ZV. Investigation powers exercisable in relation to former regulated persons</i></p> <p>Division 8—Disciplinary Order for Failure to Comply with Performance Requirements</p> <p><i>34ZW. Authority may make disciplinary order</i></p>	
010318 – 011117	Mr CHAN Kin-por Administration Mandatory Provident Fund Schemes Authority (MPFA) Chairman	<p>In response to Mr CHAN's enquiry, the Administration advised that reference had been made to SFO in drafting proposed section 34ZW(6)(a) and 34ZW(6)(b) regarding pecuniary penalty.</p> <p>Mr CHAN pointed out that SFO covered a wide range of offences and the amount of money involved in such offences would usually be large. On the other hand, most of the offences committed by MPF intermediaries under the Bill were related to negligence and the amount of money involved would be relatively small. Mr CHAN requested the Administration and MPFA to provide a scenario in which an MPF intermediary committed an offence warranting a pecuniary penalty of \$10 million as provided under proposed 34ZW(6)(a).</p>	

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		<p>The Administration replied that the proposed penalty level of \$10 million or 3 times the amount of the profit gained or loss avoided by the regulated person as a result of the conduct failure were the maximum level that could be imposed. The actual amount of pecuniary penalty would be decided having regard to relevant factors. The MPF intermediary concerned could also lodge an appeal against the pecuniary penalty imposed on him;</p> <p>MPFA added that –</p> <p>(a) A scenario in which an MPF intermediary might be subject to a large pecuniary penalty was as follows: an MPF intermediary misled a scheme member who had invested in guaranteed funds into transferring his accrued benefits to another MPF scheme before maturity and subsequently lost the guaranteed benefits of the original MPF scheme; and</p> <p>(b) in practice, pecuniary penalty was generally not the sort of remedy a regulator would primarily resort to. The first recourse would usually be suspension/revocation of registration rather than pecuniary penalty.</p> <p>Mr CHAN enquired whether the Bill had provisions on compensation for MPF scheme members. The Administration advised that under proposed section 34ZY, if MPFA was considering imposing disciplinary sanctions on an MPF intermediary, MPFA and the intermediary concerned might enter into an agreement such that MPFA might consider a lighter sanction if the intermediary agreed to make compensation to the MPF scheme member(s) concerned.</p> <p>The Administration also referred to Mr KAM Nai-wai's remark at the past meeting regarding the compensation arrangements of other jurisdictions and advised as follows:</p> <p>(a) So far, the Administration was not aware of any provisions in the legislation of other jurisdictions that empowered a regulator to order a person subject to its regulation to make compensation to an aggrieved party; and</p>	

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		<p>(b) Regarding the example mentioned by Mr KAM that a bank had recently been ordered by the Financial Services Authority ("FSA") of the United Kingdom to make compensation to elderly customers for mis-selling of investment products to these customers, the Administration clarified that the FSA fined the bank for mis-selling instead of ordering it to make compensation to the customers. According to the information released by FSA, it had taken into account the bank's compensation arrangements for the affected customers in imposing a lower level of financial penalty on the bank.</p> <p>Mr CHAN remarked that he would consult the industry on proposed sections 34ZW(6)(a) and 34ZW(6)(b) regarding pecuniary penalty.</p> <p>The Chairman said that it was inappropriate for MPFA to be directly involved in (a) the compensation negotiation between an MPF intermediary and an MPF scheme member; and (b) the determination of the amount of compensation.</p>	
011118 – 011203	Mr CHAN Kin-por Administration	In reply to Mr CHAN's enquiry, the Administration advised that proposed section 34ZW(6)(a) and 34ZW(6)(b) applied to principal intermediaries, subsidiary intermediaries and responsible officers.	
011204 – 013809	Mr KAM Nai-wai Administration Chairman	<p>Mr KAM said that he disagreed with the Chairman's view regarding the role of MPFA in the compensation arrangements for MPF scheme members. He considered that one of the lessons of the "Lehman Brothers Incident" was that regulators should play an active role in the compensation arrangements for investors.</p> <p>Mr KAM enquired whether the Bill had any provision relating to financial dispute resolution mechanism to be launched in 2012. The Administration advised that upon the commencement of the operation of the Financial Dispute Resolution Centre in mid-2012, the regulatees of the Hong Kong Monetary Authority (HKMA) and the Securities and Futures Commission (SFC) would be required to</p>	

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		<p>participate in the financial resolution mechanism and such requirement would be implemented administratively, for example, through the licensing conditions. As such, an MPF intermediary who was the regulatee of HKMA and SFC would be subject to the mechanism and have to enter into mediation with a complainant at the latter's request. There was no need to specify the relevant arrangement in the Bill.</p> <p>Mr KAM expressed concern that under the proposed regulatory regime, a complainant had to negotiate with the MPF intermediary concerned without access to the details of the investigation of the MPF intermediary. Mr KAM considered that this would place the complainant in a less advantageous position in the negotiation. The Administration should devise measures to ensure that a complainant and the MPF intermediary concerned would be on equal footing in the negotiation process. Mr KAM remarked that the complainant should be informed of the details of investigation on the MPF intermediary concerned so that the complainant would be on equal footing with the MPF intermediary in the negotiation process.</p> <p>The Chairman agreed that the complainant should be duly informed about the results of the investigation concerned.</p> <p>The Administration replied as follows:</p> <p>(a) The complainant would be informed of the relevant information of the investigation concerned after MPFA had made a decision on the case including decision on disciplinary sanction, if any. The full details of the investigation to be disclosed to the complainant would be subject to the relevant secrecy provision; and</p> <p>(b) The complainant should already have knowledge as regards his dealing with the MPF intermediary, such as whether the MPF intermediary had made false representations.</p> <p>Mr KAM enquired whether a complainant would be informed of the results of investigation before MPFA made a disciplinary decision on the</p>	

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		<p>intermediary. The Administration responded that when MPFA had made disciplinary decisions, it would notify the complainant of the outcome of the investigation and disciplinary process. Mr KAM and the Chairman requested the Administration to consider requiring MPFA to inform the complainant of the outcome of the investigation before MPFA made disciplinary decisions.</p> <p>The Administration responded as follows:</p> <ul style="list-style-type: none"> (a) It had to take into account the fact that MPFA's disciplinary decisions might be appealed against; and (b) While proposed section 34ZY empowered MPFA to reach an agreement with a regulated person if necessary, the power would not be invoked unless the criteria set out in proposed section 34ZY(2)(c) were met. <p>The Chairman remarked that the issue should be further discussed when the Bills Committee scrutinized the relevant clauses.</p>	
013810 – 014307	Mr KAM Nai-wai Administration Chairman Mr CHAN Kin-por	<p>Mr KAM referred to the pecuniary penalty specified in proposed section 34ZW(6)(a) and 34ZW(6)(b) and enquired about:</p> <ul style="list-style-type: none"> (a) the penalties in other legislation in Hong Kong to which the Administration had made reference; and (b) relevant penalties in other jurisdictions. <p>The Administration replied as follows:</p> <ul style="list-style-type: none"> (a) Reference had been made to the corresponding penalty on licensed persons under SFO, and there was no information on relevant examples of other jurisdictions at hand in terms of penalty level; and (b) Proposed section 34ZW(6) only specified the maximum level of pecuniary penalty and allowed flexibility regarding the exact amount of fine to be decided by the Court. 	

Time Marker	Speaker	Subject(s)	Action Required
		<p>Mr CHAN remarked that (a) it might not be appropriate for the pecuniary penalty clause in the Bill to model upon the relevant penalty provision in SFO; and (b) the pecuniary penalty level under proposed section 34ZW(6) might be too high.</p>	
014308 – 015031	Mr IP Kwok-him Administration MPFA	<p>Mr IP expressed concern that MPFA might have too much discretion in determining the pecuniary penalty, and queried whether it was necessary to set the maximum pecuniary penalty at such a high level as \$10 million.</p> <p>The Administration reiterated that reference had been made to the penalty provision in SFO and the MPF intermediary subject to a disciplinary order of pecuniary penalty could appeal against the disciplinary order.</p> <p>MPFA added that the proposed section 34ZW(6)(b) would have limited applicability in practice because there would be few opportunities for MPF intermediaries to generate profits for themselves as a consequence of failing to comply with the conduct standards.</p> <p>The Chairman remarked that the extent of the deterrent effect of proposed section 34ZW varied greatly among different types of MPF intermediaries.</p>	
015032 – 015233	Mr CHAN Kin-por	<p>Mr CHAN remarked that in practice it was more likely for proposed section 34ZW(6)(a) instead of proposed section 34ZW(6)(b) to be applied to MPF intermediaries. Mr CHAN also questioned the necessity of setting a high pecuniary penalty level under 34ZW(6)(a) given that other sanctions under proposed section 34ZW could have effective deterrent effect on MPF intermediaries. As such, he would consult the industry on the issue.</p>	
015234 – 015843	Administration	<p>Briefing by the Administration on LC Paper No. CB(1)1392/11-12(01) ("the paper").</p>	
015844 – 020229	Mr KAM Nai-wai Administration Chairman	<p>Mr KAM enquired about:</p> <p>(a) which party would conduct investigation on systemic risks of MPF schemes; and</p> <p>(b) whether MPFA would initiate its own investigation.</p>	

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		<p>The Administration advised that:</p> <p>(a) The Bill did not empower MPFA to conduct its own investigation on MPF intermediaries regarding compliance with performance requirements; any such investigations would be conducted by the FRs; and</p> <p>(b) MPFA would maintain close liaison with the FRs. If MPFA identified possible systemic risks, it would discuss with the FRs on whether further investigation would be necessary.</p>	
020230 – 020436	Mr KAM Nai-wai Administration Chairman	Mr KAM requested the Administration to provide information on the existing arrangements, including the relevant approving authority and legislative provisions, regarding the authorization of MPF schemes and products.	The Administration to take action as per paragraph 2 of the minutes.
020437 – 020549	Mr IP Kwok-him Administration	In response to Mr IP's enquiry, the Administration advised that the enabling provisions for the FRs were set out in the proposed sections 34Z, 34ZA and 34ZB.	
020550 – 020645	Ms Cyd HO Administration	<p>Ms HO pointed out that paragraph 5 of the Annex to LC Paper No. CB(1)1289/11-12(02) specified that "MPFA will take up the investigation direct as part of its statutory functions under the existing Mandatory Provident Fund Schemes Ordinance (Cap. 485) ("MPFSO")" and enquired whether this would be contradictory to the Administration's remark that MPFA would not conduct its own investigations.</p> <p>The Administration clarified that the paragraph referred to investigations in relation to the approval of MPF schemes and products by MPFA under MPFSO, rather than investigations regarding the compliance of MPF intermediaries with the performance requirements in the Bill.</p>	
020646 – 020705	Chairman	Date of next meeting	