

立法會
Legislative Council

LC Paper No. CB(1)2471/11-12
(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**

**Ninth meeting on
Tuesday, 15 May 2012, at 8:30 am
in Conference Room 2B of the Legislative Council Complex**

- Members present** : Hon WONG Ting-kwong, BBS, JP (Chairman)
Hon LEE Cheuk-yan
Hon LEUNG Yiu-chung
Hon Tommy CHEUNG Yu-yan, SBS, JP
Hon KAM Nai-wai, MH
Hon Cyd HO Sau-lan
Hon CHAN Kin-por, JP
Hon WONG Sing-chi
Hon WONG Kwok-kin, BBS
Hon IP Kwok-him, GBS, JP
Hon Alan LEONG Kah-kit, SC
- Members absent** : Hon LI Fung-ying, SBS, JP
Hon Andrew LEUNG Kwan-yuen, GBS, JP
Hon IP Wai-ming, MH
- Public officers attending** : Mr Patrick HO, JP
Deputy Secretary for Financial Services and the
Treasury (Financial Services)

Miss Emmy WONG
Principal Assistant Secretary for Financial Services and
the Treasury (Financial Services)

Mr Lawrence PENG
Senior Assistant Law Draftsman
Department of Justice

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

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 meetings

(LC Paper No. CB(1)1643/11-12(07) — Letter dated 5 April 2012 from
Assistant Legal Adviser to the
Administration

- LC Paper No. CB(1)1720/11-12(01) — Administration's response on whether guidelines issued under section 6H of the Mandatory provident Fund Schemes Ordinance (Cap. 485) are subsidiary legislation
- LC Paper No. CB(1)1803/11-12(01) — List of follow-up actions arising from the discussion at the meeting on 23 April 2012
- LC Paper No. CB(1)1803/11-12(02) — Administration's response to issues raised at the meeting on 23 April 2012
- LC Paper No. CB(1)1803/11-12(03) — List of follow-up actions arising from the discussion at the meeting on 27 April 2012
- LC Paper No. CB(1)1803/11-12(04) — Administration's response to issues raised at the meeting on 27 April 2012
- LC Paper No. CB(1)1835/11-12(01) — Draft Committee Stage amendments provided by the Administration
- LC Paper No. CB(1)1858/11-12(01) — Draft Committee Stage amendments provided by Hon KAM Nai-wai
- LC Paper No. CB(1)1858/11-12(02) — Draft Committee Stage amendments provided by Hon WONG Sing-chi
- LC Paper No. CB(1)1803/11-12(05) — Administration's paper on "First Exposure Draft of Guidelines on Conduct Requirements for Registered Intermediaries"
- 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

LC Paper No. CB(1)1331/11-12(01) — Letter dated 22 February 2012 from the Administration in reply to Assistant Legal Adviser's letter)

Discussion

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

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Follow-up actions to be taken by the Administration

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

- (a) provide information on the policy intent of the existing section 45G of the Mandatory Provident Fund Schemes Ordinance (Cap. 485); in other words, if a person has been found guilty of misconduct and an aggrieved person wishes to bring legal proceedings against the person under the existing section 45G, whether that provision has the effect of obviating the need for the plaintiff to prove liability in the civil proceedings leaving damages to be assessed; and
- (b) provide written explanations for the Committee Stage Amendments proposed by the Administration.

II Any other business

Legislative timetable

4. The Chairman said that the Bills Committee had completed scrutiny of the Bill and no further meeting would be required. If the Administration would give notice to resume the Second Reading debate on the Bill on 6 June 2012, the deadline for giving notice of amendment(s) to the Bill would be 28 May 2012. The Bills Committee would report its deliberations to the House Committee on 25 May 2012.

5. There being no other business, the meeting ended at 11:05 am.

Council Business Division 1
Legislative Council Secretariat
16 August 2012

**Proceedings of the
Bills Committee on Mandatory Provident Fund Schemes (Amendment) (No. 2) Bill 2011
Ninth meeting on Tuesday, 15 May 2012, at 8:30 am
in Conference Room 2B of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
000818 – 000902	Chairman	Opening remarks	
000903 – 000950	Administration	Briefing by the Administration on LC Paper No. CB(1)1720/11-12(01).	
000951 – 001951	Ms Cyd HO Administration Department of Justice (DoJ)	<p>Ms HO enquired about the guidelines to be made pursuant to the proposed regulatory regime under the Bill.</p> <p>The Administration responded that the Bill stipulated conduct requirements to be fulfilled by Mandatory Provident Fund ("MPF") intermediaries, and guidelines would be issued to provide guidance for MPF intermediaries in respect of the statutory conduct requirements. The Mandatory Provident Fund Schemes Authority ("MPFA") would consider whether an MPF intermediary had failed to fulfill any statutory conduct requirement in making a disciplinary decision. Non-compliance with the guidelines per se would not result in MPFA's disciplinary sanctions.</p> <p>Ms HO enquired about the basis for determining whether the codes of conduct or guidelines made under the provisions of primary legislation should carry legislative effect or otherwise.</p> <p>DoJ replied that:</p> <p>(a) Proposed section 6H(1) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) ("MPFSO") provided that MPFA might issue guidelines for guidance of certain persons (including regulated person) under MPFSO. If an MPF intermediary has complied with the relevant guidelines, the compliance would be evidence of his fulfillment of the conduct requirements. However, even though an MPF intermediary had not complied with the relevant guidelines, the MPF intermediary could still provide evidence of fulfillment of the</p>	

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		<p>conduct requirements through other means ; and</p> <p>(b) the status of guidelines or codes of conduct was determined by the relevant provisions of the primary legislation concerned.</p>	
001952 – 003632	Mr KAM Nai-wai DoJ Administration Chairman ALA4	<p>Mr KAM referred to Article I.5 of the "First Exposure Draft of Guidelines on Conduct Requirements for Registered Intermediaries" ("Draft Guidelines"), which stated that "The Guidelines do not have the force of law. They should not be interpreted in a way that would override the provision of any law.", he asked whether this implied that non-compliance with the guidelines did not constitute a contravention of the conduct requirements under MPFSO.</p> <p>DoJ responded that a non-compliance with the guidelines per se would not be a contravention of the conduct requirements under MPFSO. An MPF intermediary might provide evidence of fulfillment of the conduct requirements through other means.</p> <p>Mr KAM expressed concern that the effectiveness of the guidelines might be impaired if non-compliance with the guidelines by MPF intermediaries was allowed. The Administration clarified that:</p> <p>(a) MPFSO stipulated the conduct requirements that had to be fulfilled by all MPF intermediaries. MPFA issued guidelines to help MPF intermediaries know how to fulfill them; and</p> <p>(b) although an MPF intermediary might utilize means not specified in the guidelines to fulfill the conduct requirements, he must prove that such means could actually fulfill the conduct requirements. The means must also be acceptable to MPFA.</p> <p>Mr KAM further enquired:</p> <p>(a) why neither the Bill nor the Draft Guidelines mentioned that an MPF intermediary could use means not specified in the guidelines to fulfill the conduct requirements; and</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>(b) how the public would be informed of the existence of the guidelines.</p> <p>The Administration replied that:</p> <p>(a) MPFA would conduct publicity and public education, including the promotion of the relevant guidelines;</p> <p>(b) although an MPF intermediary might utilize means not specified in the guidelines to fulfill the conduct requirements, the MPF intermediary must prove that such means could actually fulfill the conduct requirements. The means must also be acceptable to MPFA; and</p> <p>(c) the wording in Article I.5 of Draft Guidelines was in line with the relevant provision in MPFSO.</p>	
<p>003633 – 004233</p>	<p>Mr KAM Nai-wai Administration ALA4 DoJ</p>	<p>Pointing out that section 6H(2) of MPFSO provided that "A guideline may consist of a code, standard, rule, specification or provision relating to provident fund schemes or a class of such schemes", ALA4 enquired why the scope of guidelines issued under section 6H(1) was wider than that of other legislation. ALA4 referred to LC Paper No. CB(1)1720/11-12(01) and enquired whether the legislative intent was that guidelines issued under section 6H of MPFSO were not subsidiary legislation and hence such guidelines would not be subject to the scrutiny of the Legislative Council ("LegCo").</p> <p>The Administration responded that section 6H(2) of MPFSO was not amended by the Bill, and that guidelines made under section 6H of MPFSO were not subsidiary legislation, which was consistent with the legislative intent.</p> <p>DoJ confirmed the Chairman's understanding that whether an MPF intermediary was obliged to use means specified in the guidelines to fulfill the conduct requirements depended on whether the guidelines concerned had legislative effect.</p> <p>Mr KAM opined that guidelines for MPF intermediaries should be subject to the scrutiny of LegCo. He enquired how the public would be made aware of the existence of the guidelines.</p>	

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		<p>The Chairman enquired whether the relevant publicity and public education would cover the guidelines.</p> <p>The Administration responded that MPFA would upload the guidelines onto its website and would cover the new regulatory regime for MPF intermediaries in its publicity and public education programmes.</p> <p>ALA4 requested the Administration to provide examples of guidelines in the form of a code, rule or provision issued under section 6H(1) of MPFSO that were not subsidiary legislation for members' consideration. DoJ advised that the purpose of the guidelines issued under section 6H(1) was to provide guidance. The Chairman remarked that the scope of section 6H had been widened and made more precise by the addition of the phrase "regulated persons" to section 6H(1) under the Bill.</p>	
004234 – 004416	Administration	Briefing by the Administration on LC Paper No. CB(1)1803/11-12(02)	
004417 – 005249	Chairman ALA4 DoJ Administration	<p>Briefing by the Administration on LC Paper No. CB(1)1803/11-12(04)</p> <p>Referring to item 4 of the above paper, the Chairman remarked that he would not insist that the word "Nil" should be replaced by "\$0". He however hoped that the Administration could take his suggestion into account in the drafting of legislation in future. The Administration agreed to take into account the Chairman's suggestion in future legislative exercises.</p> <p>In view of the Chairman's comment, ALA4 remarked that if "Nil" is replaced by "\$0" as the amount of prescribed fees under clause 27(2) of the Bill in this legislative exercise, the Administration might consider to amend the relevant Schedules to the Mandatory Provident Fund Schemes (Fees) Regulation (Cap. 485 sub. leg. C) consequentially by replacing "Nil" with "\$0" using its editorial amendment power under section 12 of the Legislation Publication Ordinance (Cap. 614). The Administration agreed to take into account ALA4's suggestion in future legislative exercises.</p>	

Time Marker	Speaker	Subject(s)	Action Required
005250 – 010517	Administration	<p>Briefing by the Administration on its proposed Committee Stage Amendments (CSAs) to the Bill (LC Paper No. CB(1)1835/11-12(01))</p> <p><i>Clause 7 to proposed section 34T of clause 13.</i></p>	
010518 – 010602	Chairman Administration	<p>The Chairman enquired why the phrase "or (2)(a) or (b)" in proposed section 34T(3) of clause 13 was removed. The Administration advised that with the CSA to proposed section 34T(2), applications for approval of attachment and approval were to be made under proposed sections 34V and 34W respectively, instead of proposed sections 34T(2)(a) and (b). Therefore, it was no longer necessary for proposed section 34T(3), which dealt with the manner of submitting applications, to cover proposed sections 34T(2)(a) and (b).</p>	
010603 – 011143	Administration	<p>Briefing by the Administration on its proposed CSAs: <i>proposed section 34U to proposed section 34ZF of clause 13.</i></p>	
011144 – 011516	Mr CHAN Kin-por Administration Chairman	<p>Mr Chan referred to the arrangements set out in the revised proposed section 34ZF(3) (i.e. when a registered subsidiary intermediary ("SI")'s attachment to a principal intermediary ("PI") ceased to have effect, he would lose his registration status as an SI if he had not been attached to any PIs for over 90 days) and enquired:</p> <ul style="list-style-type: none"> (a) whether the industry had been consulted on the arrangements; (b) whether similar arrangements were provided in other legislation; and (c) what the consequence would be if an MPF intermediary did not attach to a new PI within 90 days. <p>The Administration replied as follows:</p> <ul style="list-style-type: none"> (a) reference has been made to the Securities and Futures Ordinance (Cap. 571) ("SFO") in preparing this proposed section. The Administration was not aware of other legislation having similar arrangements; and 	

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		(b) if an MPF intermediary was not attached to a new PI within 90 days, he would have to apply for registration as an SI again and pay a registration fee if one was specified then. However, the MPF intermediary would not need to re-take the qualifying examination if he reapplied within three years.	
011517 – 011709	Administration	Briefing by the Administration on its proposed CSAs: <i>proposed section 34ZK to proposed section 34ZL of clause 13.</i>	
011710 – 011819	Mr CHAN Kin-pro Administration	Mr CHAN remarked that the proposed new section 34ZL(1A) specified a new requirement and enquired whether the industry had been consulted on it. The Administration responded that the arrangements set out in proposed new section 34ZL(1A) were specified in the Draft Guidelines and thus the industry should be aware of the arrangements.	
011820 – 012434	Administration	Briefing by the Administration on its proposed CSAs: <i>proposed section 34ZN to proposed section 34ZZE of clause 13.</i>	
012435 – 012520	Chairman Administration	The Chairman enquired why the word "inspector" was removed in proposed section 34ZZE. The Administration advised that with the CSA to proposed section 34ZZC, a person was no longer compelled to provide information that might incriminate him in the course of an inspection conducted by an inspector. Therefore, it would no longer be necessary for an inspector to remind the person concerned of the limitation on the admissibility in evidence of "self-incriminating" information under proposed section 34ZZE; and thus the removal of the reference to "inspector" in the provision.	
012521 – 013047	Administration	Briefing by the Administration on its proposed CSAs: <i>proposed section 34ZZF of clause 13 to clause 15.</i>	
Break			
014108 – 014302	Mr KAM Nai-wai Chairman Administration	Mr KAM remarked that Mr WONG Sing-chi would move CSAs requiring the disclosure of investigation information by MPFA to complainants. The Chairman remarked that members' CSAs would be discussed later.	

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014303 – 015204	Administration	Briefing by the Administration on its proposed CSAs: <i>clause 15 to clause 27.</i>	
015205 – 015258	Chairman Administration	The Chairman remarked that the Administration should provide written explanations for its proposed CSAs to the Bills Committee.	The Administration to take action as per paragraph 3 of the minutes.
015259 – 020137	Mr KAM Nai-wai Administration Chairman	Mr KAM briefed members on the CSAs he intended to move and the CSAs Mr WONG Sing-chi intended to move. ((LC Papers Nos. CB(1)1858/11-12(01) and CB(1)1858/11-12 (02)).	
020138 – 021557	Chairman Administration	<p>The Administration said that it did not support the CSAs proposed by Mr KAM Nai-wai and Mr WONG Sing-chi, and explained as follows:</p> <p>(a) regarding Mr KAM's CSAs, although the United Kingdom had a piece of legislation that empowered the Financial Services Authority ("FSA") to order a person subject to its regulation to pay compensation to an aggrieved party, it was the understanding of MPFA that FSA had never invoked such power. The Administration added that regulators in other comparable jurisdictions did not have such power and that the issue of compensation should be pursued in the court; and</p> <p>(b) regarding Mr WONG's CSAs, the procedural requirement stipulated under proposed section 34ZZ was to ensure that the important principle of "due process" was followed in the course of the disciplinary proceedings. Disclosing details of MPFA's preliminary view on a disciplinary order to a third party would disrupt the integrity of the disciplinary proceedings and would be unfair to the regulated person concerned.</p> <p>Mr KAM remarked that if a complainant was not informed of MPFA's preliminary view on a disciplinary order, the complainant would be put in a disadvantaged position when negotiating a settlement agreement with the MPF intermediary concerned. The complainant could be asked to</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>sign an undertaking to maintain confidentiality of MPFA's preliminary view on a disciplinary order.</p> <p>The Chairman made the following remarks:</p> <ul style="list-style-type: none">(a) he understood that Mr WONG's CSA aimed at protecting the interests of MPF scheme members; and(b) it was possible that the final decision of MPFA would lead to more severe disciplinary sanctions on an MPF intermediary. The complainant might suffer loss if he had reached a settlement with the MPF intermediary based on his knowledge of MPFA's preliminary view on a disciplinary order and it turned out that MPFA's final decision was that the MPF intermediary had committed more serious misconduct. <p>Mr KAM replied as follows:</p> <ul style="list-style-type: none">(a) The aim of Mr WONG's CSAs was to ensure that both the complainant and the MPF intermediary would be on equal footing in regard to information availability; and(b) MPFA's preliminary view on a disciplinary order would usually be made after a lengthy investigation. <p>The Administration clarified that MPFA would take into account all relevant factors before deciding a disciplinary sanction (if any) and hence the fact that an MPF intermediary might take advantage of the complainant's lack of information in reaching settlement agreement would not help him secure a lighter disciplinary sanction (if applicable).</p> <p>Mr KAM enquired about:</p> <ul style="list-style-type: none">(a) whether it was likely that the preliminary view and final decision of MPFA on a disciplinary order would differ substantially;(b) the procedure for MPFA to make a preliminary view on its disciplinary order; and	

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		<p>(c) the number of complaint cases where the disciplinary sanction made following the final decision of MPFA was more severe than that made following MPFA's preliminary view on a disciplinary order.</p> <p>The Chairman pointed out that the regulators might investigate matters not raised by complainants. The Administration agreed with the Chairman's remark.</p>	
021558 – 021822	Mr CHAN Kin-por	<p>Mr CHAN made the following comments:</p> <p>(a) Mr KAM's proposed CSAs involved a very broad issue, i.e. whether a regulatory authority should be given the power to order regulated persons to pay compensation to investors. The issue had very far-reaching implications on the entire financial regulatory regime in Hong Kong. It was premature to make such important amendments through Mr KAM's proposed CSA before all the relevant implications had been carefully considered; and</p> <p>(b) the arrangements to be effected by Mr WONG's proposed CSAs might not be fair to the regulated person concerned. He however would accept that after the completion of the disciplinary proceedings, details about the investigation findings and disciplinary actions taken might be disclosed to the relevant complainants.</p>	
021823 – 022120	Chairman Mr KAM Nai-wai Mr Alan LEONG	<p>The Chairman concurred with Mr CHAN Kin-por and suggested revising the term "preliminary" to "final" (最終) in Mr WONG's proposed CSA.</p> <p>Mr KAM responded as follows:</p> <p>(a) the aim of Mr WONG's proposed CSAs was to address the issue that an MPF intermediary might exploit the complainant's lack of information to reach a settlement agreement in his favour before the final decision was made;</p> <p>(b) upon the making of MPFA's final decision, the MPF intermediary concerned would have no incentive to negotiate a settlement</p>	

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		<p>agreement with the complainant as such agreement would not be able to reduce the disciplinary sanction imposed on him; and</p> <p>(c) MPFA's preliminary view on a disciplinary order would usually be made after a lengthy investigation.</p> <p>Mr LEONG remarked that he was inclined to support the Administration's view that a person who had sustained financial loss attributable to the misconduct of an MPF intermediary should resort to legal proceedings to seek redress or compensation.</p>	
022121 – 023123	Mr Alan LEONG DoJ Administration Chairman	<p>Mr LEONG enquired about the policy intent of the existing section 45G of the MPFSO. In other words, if a person had been found guilty of misconduct and an aggrieved person wished to bring legal proceedings against the person under the existing section 45G, whether that provision would have the effect of obviating the need for the plaintiff to prove liability in the civil proceedings leaving damages to be assessed. Mr LEONG also asked the Administration to explain the difference of having and not having the existing section 45G.</p> <p>The Chairman remarked that Mr KAM Nai-wai and Mr WONG Sing-chi might move their CSAs in their own names.</p>	The Administration to take action as per paragraph 3 of the minutes.
023124 – 023214	Administration	<p>Briefing by the Administration on LC Paper No. CB(1)1803/11-12(05).</p> <p>The Chairman remarked that the final version of the "Draft Guidelines" should be provided to LegCo Members.</p>	
023215 – 023319	Chairman	Legislative timetable	
023320 – 023351	Chairman ALA4	The Chairman remarked that ALA4 would review the English version of the CSAs proposed by the Administration and liaise with the Administration as necessary.	

Time Marker	Speaker	Subject(s)	Action Required
023352 – 023443	Chairman Administration	The Chairman remarked that the Bills Committee had completed the scrutiny of the Bill and no further meeting would be required.	

Council Business Division 1
Legislative Council Secretariat
16 August 2012