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By Fax (2529 1663)  
5 April 2012

Miss Emmy WONG  
Principal Assistant Secretary for Financial Services and  
the Treasury (Financial Services)  
Financial Services and the Treasury Bureau  
24/F, Central Government Offices  
2 Tim Mei Avenue, Admiralty  
Hong Kong

Dear Miss WONG,

### **Mandatory Provident Fund Schemes (Amendment) (No. 2) Bill 2011**

I refer to my telephone conversation with you earlier during which I was enquired for the basis of saying that if an instrument is not a subsidiary legislation, it should be so stated expressly in the principal ordinance.

Please note from the "Report of the Subcommittee to Study Issues Relating to the Power of the Legislative Council to Amend Subsidiary Legislation"<sup>1</sup> that –

- (a) "it is important to determine whether a rule or an instrument is subsidiary legislation because apart from a few exceptions (e.g. section 3 of FOO and section 3 of UNSO), when a piece of subsidiary legislation is identified as such, it is subject either to negative vetting under section 34 or positive vetting under section 35 of Cap. 1" (paragraph 4.15 of the Report refers);

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<sup>1</sup> The Report can be downloaded from our website at <http://www.legco.gov.hk/yr11-12/english/hc/papers/hc0210cb2-975-e.pdf>.

- (b) "whether or not an instrument is subsidiary legislation should be considered in the light of the legislative framework set up by the primary legislation under which the instrument is to be made. While it may not always be easy to apply the criteria in discerning whether an instrument has legislative effect, in many instances, it will be obvious from the nature and contents of the instrument whether this is the case. Moreover, the legislative intent in treating the instrument in question as subsidiary legislation or otherwise would be a highly relevant factor. Since October 1999, the Administration has adopted the approach whereby in cases where there may be doubt as to the nature of an instrument to be made pursuant to an ordinance, an express provision would be included in the primary legislation indicating whether or not the instrument is subsidiary legislation, in order to clarify the position" (paragraph 4.18 of the Report refers);
- (c) the Subcommittee has made a recommendation that "in the absence of a statutory definition of the expression "legislative effect", there is difficulty in determining whether an instrument has legislative effect and therefore is subsidiary legislation. In view of this difficulty, the Administration's approach since October 1999 of including in the legislation an express provision declaring or clarifying the character of the instrument in cases of doubt (paragraph 4.18 above refers) should continue" (paragraph 5.3(a) of the Report refers).

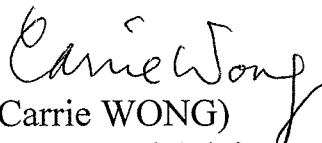
When the Secretary of Justice attended the Legislative Council meeting on 1 March 2012, he said he agreed with paragraph 5.3(a) of the Report –

"President, first of all, apart from Dr Margaret NG, I also wish to extend my thanks to the Legislative Council Secretariat and the Legal Adviser of the Legislative Council for their extensive research and work conducted prior to the compilation of this report. As Dr Margaret NG has said, the report touches on various issues of legal consideration that are extremely important. As I mentioned earlier, the report can facilitate the forging of consensus between the Legislative Council and the executive authorities. A case in point is the mutual agreement set out in part (a) of paragraph 5.3 under the report's recommendations, that is, since October 1999, the Administration has adopted the approach whereby in cases where there may be doubt as to the nature of an instrument to be made pursuant to an ordinance, an express provision would be included in the primary legislation declaring or clarifying the

character of the instrument as to whether or not it is subsidiary legislation. If the Administration's view is accepted by the Legislative Council, the express provision in the enacted ordinance can be deemed to illustrate the legislative intent of the character of the said instrument. Both the Administration and the Subcommittee consider this a good practice which should be continued. I think this is a good example of how the both sides can come to consensus."

A copy of the relevant Hansard (at p. 6832-6833) can be downloaded from our website at <http://www.legco.gov.hk/yr11-12/english/counmtg/hansard/cm0301a-translate-e.pdf>.

Yours sincerely,

  
(Carrie WONG)  
Assistant Legal Adviser

c.c. Clerk to Bills Committee