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Report of the Bills Committee on Mandatory Provident Fund Schemes (Amendment) (No. 2) Bill 2011

Purpose

This paper reports on the deliberations of the Bills Committee on Mandatory Provident Fund Schemes (Amendment) (No. 2) Bill 2011 ("the Bills Committee").

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. At present, the Mandatory Provident Fund Schemes Authority ("MPFA") implements an administrative regulatory regime for MPF intermediaries through its Code of Conduct for MPF Intermediaries. Under this regime, MPFA is the standard-setter and the registration authority. It relies, as far as practicable, on the regulatory efforts made by the Hong Kong Monetary Authority ("HKMA"), the Insurance Authority ("IA") and Securities and Futures Commission ("SFC") (collectively known as frontline regulators ("FRs")) for the supervision of registered MPF intermediaries who are also their own regulatees under the Banking Ordinance (Cap. 155) ("BO"), the Insurance Companies Ordinance (Cap. 41) and the Securities and Futures Ordinance (Cap. 571) ("SFO"). A liaison mechanism between MPFA and the FRs has been put in place since the inception of the MPF System in 2000.

4. In July 2009, the Mandatory Provident Fund Schemes (Amendment) Ordinance 2009 was enacted to amend the MPFSO to provide the statutory basis to introduce the Employee Choice Arrangement ("ECA"), i.e. the arrangement to enable employees to transfer accrued benefits derived from their own mandatory contributions during current employment from a contribution account under an MPF scheme on a lump-sum basis to another MPF scheme of their own choice at least once per calendar year.

5. With rising public expectation towards investor protection and in anticipation of more proactive sales and marketing activities targeted at MPF scheme members upon implementation of the ECA, the Administration considers it prudent to put in place a statutory framework for the regulation of registered MPF intermediaries, to be modelled on the existing administrative registration regime to facilitate implementation of the ECA for the better protection of MPF scheme members.

6. The Administration and MPFA jointly issued a paper entitled "Enhanced Regulation of Mandatory Provident Fund Intermediaries" on 28 March 2011 to commence a public consultation exercise on the relevant legislative proposals, and received a total of 13 written submissions from various organizations. According to the Administration, there was general support for enhancing the regulation of MPF intermediaries before implementation of the ECA and the majority of respondents did not indicate disagreement with the proposal that the statutory regulatory regime be modelled on the existing administrative regulatory arrangements. Those written submissions which commented on the proposals to establish an electronic transfer system ("E-platform") to facilitate the transmission of data on transfer of accrued benefits and to enhance deterrence of default contributions by employers were supportive of these proposals. The Administration and MPFA issued the consultation conclusions on 29 July 2011.¹ MPFA also issued a paper to inform the Labour Advisory Board on the proposals to enhance deterrent against default contributions in August 2011 and did not receive any dissenting views.

The Bill

7. The Administration introduced the Mandatory Provident Fund Schemes (Amendment) (No. 2) Bill 2011 ("the Bill") into the Legislative

¹ LC Paper No. CB(1)2845/10-11(01)

Council on 14 December 2011. The objects of the Bill are to amend the MPFSO to provide for a statutory regulatory regime for MPF intermediaries to facilitate implementation of the ECA and for related matters.

8. The main provisions of the Bill include the following -
- (a) clauses 1 and 29 provide that the Bill and the MPF Schemes (Amendment) Ordinance 2009 (enacted in July 2009 to introduce the ECA) will both come into operation on 1 November 2012;
 - (b) clause 13 adds a new Part IVA on "Sales and Marketing Activities, and Giving of Advice, in relation to Registered Schemes" to the MPFSO. This new Part contains provisions regarding the registration of MPF intermediaries, the making of rules on conduct and other requirements, inspection and investigation, sanctions for non-compliance with a performance requirement etc.;
 - (c) clause 8 empowers MPFA to designate an electronic system for use for the purposes of the MPFSO (i.e. for the transmission of data on transfer of accrued benefits and mandates its use by trustees) and to charge a fee to be payable by the relevant trustees for the use of the electronic system;
 - (d) clause 17 amends section 43B of the MPFSO to create a new offence for an employer's failure to comply with a court order made in civil proceedings for the payment of arrears of mandatory contributions and contribution surcharges, and to provide for a daily penalty for each day on which an offence committed by an employer for failing to make mandatory contributions for an employee continues;
 - (e) clause 14 amends section 35 of the MPFSO to revise the criteria for the appointment of the Chairman of the Mandatory Provident Fund Schemes Appeal Board ("Appeal Board"), and for the appointment to the panel of persons whom the Chief Executive considers suitable for appointment as members of the Appeal Board; and

- (f) Clause 21 contains transitional and saving provisions for the proposed Part IVA of the MPFSO. All the existing MPF intermediaries with valid registration with MPFA immediately before the commencement of the proposed statutory regime may continue to carry on the regulated activities for two years, during which they may apply to MPFA for registration under the proposed statutory regime.

The Bills Committee

9. At the House Committee meeting on 16 December 2011, Members agreed to form a Bills Committee to study the Bill. Under the chairmanship of Hon WONG Ting-kwong, the Bills Committee has held nine meetings. The membership list of the Bills Committee is at **Appendix I**. Relevant business and industry associations, labour unions, and professional organizations and the general public have been invited to give views on the Bill. The Bills Committee received oral representations from 13 deputations and one individual at the meeting on 6 March 2012 and received written submissions from six other organizations and two individuals. A list of the organizations and individuals which/who have submitted views to the Bills Committee is at **Appendix II**.

Deliberations of the Bills Committee

10. The Bills Committee supports the policy objectives of the Bill. The main issues deliberated by the Bills Committee include the following –

- (a) regulatory approach;
- (b) registration of intermediaries and approval of responsible officers ("ROs");
- (c) assignment of FR for intermediaries and ROs;
- (d) conduct and other requirements for registered intermediaries and responsible officers;
- (e) supervision and investigation arrangements;

- (f) disciplinary order for failure to comply with performance requirements;
- (g) handling of complaints;
- (h) avenues for scheme members to seek redress or compensation;
- (i) offence provisions;
- (j) E-platform for transmission of data on transfer of MPF benefits; and
- (k) fees.

The ensuing part of the report summarizes the Bills Committee's deliberations.

Regulatory approach

11. The Bill provides for the continued adoption of the institution-based regulatory approach for the proposed statutory regulatory regime. Under the proposed regulatory regime, MPFA will be the authority to administer the registration of MPF intermediaries, issue guidelines on compliance with statutory requirements applicable to registered MPF intermediaries, and impose disciplinary sanctions, while HKMA, IA and SFC will be given the statutory role as FRs responsible for the supervision and investigation of registered MPF intermediaries whose core business is in banking, insurance and securities respectively.

12. Some Bills Committee members including Hon LI Fung-ying, Hon IP Wai-ming and Hon KAM Nai-wai have expressed concern that the proposed regulatory approach, which involves MPFA and the three FRs, may give rise to inconsistencies in supervision and enforcement standards. They have asked about the delineation of responsibilities between MPFA and the three FRs and the proposed measures for ensuring regulatory consistency and a level playing field.

13. The Administration has advised that the proposed regulatory approach would ensure consistency and efficient use of regulatory resources as MPF intermediary activities are incidental to the main lines of business of most MPF intermediaries, who are subject to the supervision of the respective FRs for their main lines of business. There

are various measures to ensure regulatory consistency and a level playing field, including the following –

- (a) The Bill provides that MPFA will be the sole authority to register MPF intermediaries;
- (b) The Bill empowers MPFA to make rules on conduct requirements in consultation with FRs and to issue guidelines on compliance with the proposed statutory requirements;
- (c) The Bill delineates clearly the respective powers and functions of MPFA and FRs; and detailed arrangements will be agreed among them on this basis through the signing of a Memorandum of Understanding ("MoU") between them;
- (d) Under the Bill, the FRs will be responsible for supervision and investigation of relevant registered MPF intermediaries. In misconduct cases, MPFA will be the sole authority to impose disciplinary sanctions, taking into account the information provided by FRs in the course of their investigation and the representation of the intermediaries concerned;
- (e) As provided in the Bill, all appeals against any registration and disciplinary decisions with regard to MPF intermediaries will be handled by a single, statutory and independent body, the Appeal Board;
- (f) MPFA has established a regular liaison mechanism with participation of all FRs to enhance communication among them;
- (g) An independent, non-statutory Process Review Panel will be established to review the enforcement procedures of MPFA and FRs to ensure, among other things, consistent internal process on the exercise of supervision and investigation powers among FRs and within MPFA; and
- (h) MPFA will receive all complaints on MPF sales and marketing activities as a one-stop shop to facilitate the handling of complaints. It will conduct initial processing of

the complaints and assign these complaints to the relevant FRs for investigation.

14. The Bills Committee has sought clarifications on whether an FR can make suggestions in its investigation report submitted to MPFA, and what arrangement will be made if MPFA and an FR disagree on the result of an investigation. The Administration has advised that an FR would investigate and provide MPFA with information on the facts that are relevant to the alleged misconduct in the MPF sales and marketing process. The Bill does not require an FR to make any recommendation to MPFA on disciplinary sanctions to be imposed. MPFA will be the sole authority to make disciplinary decisions. It may require the FR concerned to provide additional information if necessary.

15. Hon KAM Nai-wai has pointed out that in the "Lehman Brothers Incident", HKMA has invoked section 120 of the BO on "official secrecy" to decline releasing investigation details of non-substantiated complaint cases against banks. In this regard, the Bills Committee has sought clarification on whether the three FRs may invoke other legislation to withhold their investigation findings from MPFA.

16. The Administration has advised that broadly speaking, the secrecy provision of an ordinance governs the disclosure of information obtained in the exercise or performance of functions conferred or imposed by, or under the ordinance. Under the Bill, the three FRs will be conferred the function and power to conduct investigations, including the power to obtain information as regards the MPF sales and marketing activities of registered MPF intermediaries assigned to them. Disclosure of information obtained by the FRs and MPFA in the exercise of their functions under the MPFSO will be governed by the MPFSO instead of the other ordinances. On the other hand, if FRs obtained information relevant to MPF sales and marketing activities in the exercise of their functions under their "primary ordinances"², the secrecy provisions under those ordinances will be applicable, which generally provide for the disclosure of information to other regulators (covering MPFA and FRs) in the prescribed circumstances with a view to assisting the recipient to discharge its functions.

² They are the Insurance Companies Ordinance (Cap. 41) in the case of IA; the Banking Ordinance (Cap. 155) in the case of HKMA; and the Securities and Futures Ordinance (Cap. 571) in the case of SFC.

17. As regards the exchange of information among MPFA and FRs, the Administration has advised that a new provision, i.e. proposed section 42AA(1) to the MPFSO, has been included in the Bill to ensure that the FRs may disclose information to MPFA for the purpose of enabling or assisting the latter to perform its intermediary regulatory (including disciplinary) function. This proposed section will also allow disclosure of information from MPFA to FRs and among FRs for the purpose of enabling or assisting the recipient to perform functions under proposed new Part IVA of clause 13. This would help ensure, inter alia, effective and efficient communication among the relevant regulators for the purpose of discharging their functions under the new Part IVA.

Registration of intermediaries and approval of responsible officers (proposed sections 34Q to 34Y of clause 13)

18. In respect of the registration arrangements provided under the Bill, the Bills Committee has sought clarification on the following –

- (a) the relationship among "principal intermediary" ("PI"), "subsidiary intermediary" ("SI") and ROs as defined in the Bill, and whether a person could be a PI, a SI and a RO at the same time; and
- (b) whether the RO of a PI would be responsible for misconduct committed by SIs attached to the PI, and if so, the sanctions that may be imposed on the RO.

19. The Administration has advised that there are three types of regulated persons under the Bill, namely, PIs, SIs and ROs. Generally speaking, PIs are corporations registered under proposed section 34G which carry on a business in regulated MPF activities. In their day-to-day business, PIs employ or engage SIs registered under proposed section 34U to carry on regulated MPF activities for them in the capacity as their employees, agents or representatives. PIs are required to appoint ROs approved under proposed section 34W to supervise their own conduct of regulated activities to ensure that they have established and maintain proper control and procedures, and use their best endeavours to secure observance of the control and procedures by SIs employed or engaged by them.

20. The Administration has further advised that a person cannot be a PI and an SI at the same time, while an RO must be an SI. Proposed section 34ZM sets out the conduct requirements for ROs, namely that an RO

must use his best endeavours to carry out the above-mentioned specified responsibilities in relation to his PI. If the misconduct of SIs employed or engaged by the relevant PI is attributable to the failure of the RO concerned to comply with the said conduct requirements under proposed section 34ZM, MPFA may impose disciplinary sanctions against the RO under proposed section 34ZW (viz. reprimand, fines, revocation or suspension of approval as RO, and disqualification from being approved as an RO for a specified period).

21. Under proposed section 36U of clause 13, a person applying for registration as a SI must be employed by a PI and had the support of the PI for his application. Hon LI Fung-ying has expressed concern that the person may have difficulty in registering as an SI if his relation with the employer (i.e. the PI) is poor, and that the proposed arrangement would create an unnecessary barrier for new entrants to the industry.

22. The Administration has explained that under the proposed statutory regulatory regime, a PI is required to establish an internal control mechanism and the SIs attaching to the PI are subject to the control mechanism. As different PIs would offer different MPF schemes, it is necessary for a PI to ensure that the SIs attached to it understand its MPF schemes before conducting sales and marketing activities. Thus, to ensure effective regulation of SIs, it is necessary for a person to be attached to a PI in order to be eligible to apply for registration as an SI.

23. Regarding the approval of RO, the Bills Committee has sought clarification on the criteria that MPFA will adopt in determining compliance with respect to "sufficient authority" and "sufficient resources and support" in proposed section 34W(3)(b), and whether more concrete criteria will be laid down for the purpose of this provision.

24. The Administration has advised that MPFA will require a PI to certify that the individual to be approved by MPFA as its RO has sufficient authority within the PI and will be provided with sufficient resources and support for carrying out specified responsibilities in relation to the PI. Examples which suggest the person concerned may not have sufficient authority, resources or support include where the proposed RO is a person of junior rank or without any supporting staff for performing the function when the PI has a large number of SIs. MPFA will promulgate frequently asked questions on its expectation as regards ROs for reference by the industry.

25. The Bills Committee has enquired whether existing MPF intermediaries will be required to take any examination for registration under the Bill, and if not, what measures the Administration will take to ensure that they are equipped with the latest knowledge of the MPF system. The Administration has advised that under the transitional arrangements provided in the Bill, existing MPF intermediaries will be subject to the on-going requirement of continuing training but not the entrance examination for registration. Under the proposed statutory regime, registered MPF intermediaries will not be required to seek renewal of their registration, but MPFA may revoke an MPF intermediary's registration if the intermediary cannot fulfill the continuing training requirement. MPFA will review and update the contents of the examination for the registration of MPF intermediaries regularly to reflect the developments in the MPF System.

26. The Bills Committee has sought information on the qualifying examination and the continuing training requirement under the existing and the proposed new regimes, and the support measures to facilitate the smooth transition of existing MPF intermediaries to the statutory regime and the registration of new MPF intermediaries.

27. The Administration has advised that currently, an individual is required to pass the MPF intermediaries examination (the qualifying examination) for registration as an MPF intermediary. The syllabus of the qualifying examination covers topics such as the regulatory framework and key features of the MPF System, the functions of MPF trustees, investments of MPF funds, interface arrangements between Occupational Retirement Schemes and the MPF System and Code of Conduct for MPF Intermediaries. As for the future statutory regulatory regime, same as the existing arrangement, an individual will be required to pass the qualifying examination before being eligible to apply for registration as an MPF intermediary. To ensure his MPF knowledge is up-to-date, an individual will be required in future to pass the examination within one year immediately before the date of his application. This examination requirement would not apply in case an individual has been an MPF intermediary within the three years immediately before the date of his application and has not had his last registration revoked due to failure to comply with the Continuing Professional Development ("CPD") requirements.

28. Regarding continuing training requirements, the Administration has advised that at present, a registered MPF intermediary who is an individual is required to fulfil the CPD requirements in order to remain

registered with MPFA. The CPD requirements for each calendar year includes two hours of core training (covering areas such as MPF and related legislation, relevant MPF codes and guidelines, and latest developments in the MPF System) and eight hours of non-core training (covering areas such as financial products, risk management and control). Under the future statutory regulatory regime, a registered MPF intermediary who is an individual will continue to be required to fulfil the CPD requirements. MPFA will be empowered under the proposed legislation to revoke the registration of an MPF intermediary for failure to comply with the CPD requirements.

29. As for the transitional arrangements, the Administration has advised that during and after the transitional period, all pre-existing MPF intermediaries who are individuals will continue to be required to fulfil the CPD requirements, and the requirement to take the qualifying examination for registration would generally not apply to the pre-existing intermediaries when they first apply for registration under the new regime. To facilitate smooth transition of existing MPF intermediaries, and to assist pre-existing and potential MPF intermediaries to familiarize with the ECA and the future statutory regulatory regime, MPFA has established a dedicated team to design training courses before the implementation of the ECA. Since 2011, MPFA has organized train-the-trainer workshops to trainers from the Vocational Training Council, the Hong Kong Securities Institute and the training departments of major corporate intermediaries for their delivery of training courses to the individual MPF intermediaries. The training courses provide practical and up-to-date information on the objectives and operations of the ECA as well as the future statutory regulatory regime and its impact on MPF intermediaries.

Assignment of frontline regulators to intermediaries (proposed section 34Z, 34ZA and 34 ZB of clause 13)

30. Upon registration of a PI, MPFA is required to assign an industry regulator as the FR for the PI, its RO(s) and SIs. In accordance with proposed section 34Z(4), in the usual case, the assignment will be to the industry regulator of the PI. The MPFA will however be given a power to assign a different industry regulator to match with the main line of business of the PI. As the main lines of business for some MPF intermediaries might not be straightforward, Hon Alan LEONG has expressed concern that there may be mismatches between the FRs and MPF intermediaries.

31. The Administration has advised that MPFA will not assign an MPF intermediary to a FR arbitrarily, and will consider relevant factors like the main lines of business of the MPF intermediary concerned. Proposed section 34Z sets out the criteria and procedures for assignment of FRs. To allow for flexibility to handle special cases, the provisions confer a residual power on MPFA so that it can assign a FR to replace the one assigned according to the said criteria to ensure that the intermediary concerned would be subject to the supervision of the regulator of its main line of business. MPFA will exercise the discretion taking into account the information provided by the MPF intermediaries concerned.

32. On Bills Committee members' enquiry as to whether the information on which FRs have been assigned to individual MPF intermediaries will be available for public access, the Administration has advised that employers and scheme members, as well as the general public, can check which FR has been assigned to a registered MPF intermediary by calling the MPFA hotline, viewing the register of intermediaries which will be available at MPFA's website, or visiting any MPFA office.

Conduct and other requirements for intermediaries and responsible officers (proposed sections 34ZL to 34ZP of clause 13)

33. Proposed sections 34ZL to 34ZP of clause 13 stipulate the statutory conduct and other requirements for regulated persons, viz. PIs, SIs, and ROs. According to the Administration, MPFA will issue guidelines on compliance with the statutory requirements for the guidance of regulated persons. Clause 7 amends existing section 6H of the MPFSO to empower MPFA to issue guidelines for the guidance of regulated persons in respect of the statutory requirements under the Bill.

Conduct requirements (proposed sections 34ZL and 34ZM)

34. At the request of the Bills Committee, the Administration has provided a set of the draft Guidelines on Conduct Requirements for Registered Intermediaries ("Guidelines")³ for reference by the Bills Committee. As advised by the Administration, the Guidelines aim at providing guidance in respect of the minimum standards of conduct expected of regulated persons who engage in conducting sales and marketing activities and giving advice in relation to registered schemes.

³ vide LC Paper No. CB(1)1803/11-12(05)

In particular, the Guidelines provide guidance on the circumstances in which MPFA will be satisfied that a regulated person has, or has not, complied with a performance requirement under proposed sections 34ZL and 34ZM for the purposes of proposed section 34ZW of the Bill. The three FRs will also be guided by the Guidelines in performing their supervisory and investigatory functions relating to regulated persons under the MPFSO.

35. The Administration has also advised that the contents of the draft Guidelines are largely drawn from the existing Code of Conduct for MPF Intermediaries, supplemented by reference to the requirements in other financial sectors and practical experience. MPFA has consulted with the three FRs in developing the draft Guidelines. The first exposure draft of the Guidelines has been issued to major industry bodies on 29 March 2012 for comment and it is intended to consult more widely (covering unions and the Consumer Council etc.) upon receiving feedback from the industry. Subject to the comments received and the final shape of the legislation, MPFA will further refine the draft. The target is to issue the Guidelines as early as possible after enactment of the Bill to allow sufficient time for training and development of relevant systems and documentation before commencement of the new statutory regime.

36. Having considered MPFA's plan to include in its Guidelines a provision that registered MPF intermediaries should keep key records, the Administration has taken on board Hon KAM Nai-wai's suggestion of adding a provision in the Bill to require registered MPF intermediaries are required to keep key records regarding their compliance with the statutory conduct requirements. The Administration will move a Committee Stage amendment ("CSA") to this effect. MPFA will provide guidance in this regard to the industry through the Guidelines.

37. The Bills Committee has enquired whether MPF intermediaries may utilize certain means like offering gifts to lure MPF scheme members, and whether an ordinary member of the public, not being an MPF intermediary, offering advice on MPF schemes/products would bear any legal liability. The Administration and MPFA have advised that the Bill targets at advice offered by MPF intermediaries in the course of their business, employment or for reward. It does not cover cases whereby a person offered relevant advice to his friends outside the above-mentioned context. The practice of using gifts to lure MPF scheme members has already been prohibited by MPFA and this will be included in the Guidelines.

38. Hon CHAN Kin-por has pointed out that under the Prevention of Bribery Ordinance (Cap. 201), remuneration disclosure to clients is required for insurance brokers but not for insurance agents. While he appreciates that to tie in with the implementation of the ECA, there will be a need to enhance the transparency regarding the remuneration of insurance agents, he is concerned about the nature and extent of remuneration disclosure required of insurance agents.

39. The Administration and MPFA have responded that they recognize the industry's concern about remuneration disclosure. The guidance in respect of remuneration disclosure to be set out in the Guidelines will be formulated according to the principle that an MPF intermediary should disclose sufficient information to an MPF scheme member to facilitate the latter making an informed decision. MPFA will provide guidance on this aspect through its Guidelines in consultation with the industry.

40. The Bills Committee has examined whether guidelines consisting of a code, standard, rule, specification or provision relating to provident fund schemes or a class of such schemes issued under section 6H of the MPFSO are subsidiary legislation, and whether an express provision should be provided to clarify the same as in sections 95(5), 199(3) or 399(8) of the SFO. The Administration has confirmed that the guidelines made under section 6H of the MPFSO do not have legislative effect and are not subsidiary legislation. The Administration considers that there is no doubt as to the nature of guidelines made under section 6H of the MPFSO. Accordingly, there is no need to add an express provision to state that guidelines issued under section 6H are not subsidiary legislation.

Annual fees and annual returns (proposed sections 34ZN and 34ZO)

41. Under proposed sections 34ZN and 34ZO, a registered intermediary must pay to MPFA for every chargeable period an annual fee of the amount prescribed by the regulations, and deliver to MPFA for every reporting period a return in the specified form. In response to the suggestion of Hon Andrew LEUNG, the Administration has agreed to move CSAs to extend the notice period from "at least 10 days" to "at least 15 working days" under proposed sections 34ZN(5) and 34ZO(4). Following this amendment, MPFA's power to suspend registration due to non-payment of annual fees under proposed section 34ZN(1) and non-submission of annual returns under proposed section 34ZO(1) would not be exercisable unless MPFA has given written notice to the registered MPF intermediaries at least 15 working days before the suspension is to take effect.

Continuing training

42. The Bills Committee notes that the current regulatory system in Hong Kong in respect of financial products is disclosure-based and MPF scheme members will rely heavily on the information provided by MPF intermediaries after the implementation of the ECA. It has examined the mechanism for ensuring that MPF intermediaries has acquired up-to-date and adequate knowledge on the MPF System and MPF products, including whether there will be surprise checks and/or mystery shopper checks by the FRs and whether the intermediaries would be required to attend periodic examinations. Hon CHAN Kin-por has expressed concern that the quality of some training courses for fulfilling the CPD requirements is unsatisfactory at present. He has requested MPFA to review the requirements for attending non-core CPD training and consider stepping up the control over the quality of the training for fulfilling the CPD requirements.

43. The Administration has responded that the following measures will help ensure that MPF intermediaries have up-to-date and adequate knowledge on the MPF system and MPF products -

- (a) Since 2009, MPFA has set up a dedicated team to implement a comprehensive quality assurance system ("QA System") to enhance the training quality of all core-CPD courses for MPF intermediaries;
- (b) Under the QA System, MPFA reviews and approves all core CPD course materials and conducts frequent class visits to ensure that the training is delivered appropriately and the course providers have implemented proper class management measures, e.g. classroom patrols;
- (c) The dedicated team communicates with course providers through sharing sessions and regular meetings with a view to raising training standards through the adoption of best practices, taking into account feedback of course attendees;
- (d) Only trainers who attend train-the-trainers workshops on key subjects (core CPD course) conducted by MPFA may deliver the training for MPF intermediaries. MPFA reviews the focus of these workshops from time to time;

- (e) MPFA has designed comprehensive training course to strengthen MPF intermediaries' understanding of the ECA as well as the proposed statutory regulatory regime. Training materials are distributed to all attendees. So far more than 90% of the registered MPF intermediaries have attended the training course;
- (f) As in the case of the other regulatory regimes for the financial sector and most professional sectors, continued competence of MPF intermediaries would be ensured through continued CPD courses supplemented by effective regulation with powers of the regulators to inspect, investigate, and impose disciplinary sanctions;
- (g) Under the Bill, PIs will have a legal responsibility to put in place control and procedures to ensure that their SIs comply with the conduct requirements. The FRs in their supervision of the PIs will ascertain compliance therewith. "Mystery shopper" will form part of the available supervisory toolbox; and
- (h) MPFA will conduct random spot-checks to verify the accuracy of MPF intermediaries' core CPD training records, and will inspect attendance records.

44. The Administration has also advised that MPFA will review the number of CPD hours required to be completed every year as well as the proportion of CPD hours for core vis-à-vis non-core subjects. MPFA will take into account the practice adopted by the regulators in other financial sectors in its review, and will consult the industry in due course.

Supervision and investigation arrangements (proposed sections 34ZQ to 34ZV of clause 13)

45. The Bills Committee has sought details on the supervisory and investigation arrangements for the proposed regulatory regime, including the regulatory tools to be adopted by the FRs to ascertain compliance and the coordination among MPFA and the FRs in this regard.

46. The Administration has advised that the FRs will formulate their supervision strategies and plans taking into account the actual MPF market operations and activities under the new regime, drawing expertise and experience from intermediary regulation in their own respective

sectors, as well as through liaison with MPFA and the other FRs. As regards regulatory tools, the Administration has pointed out that both HKMA and SFC have been conducting on-site inspections of their own regulatees to ascertain their compliance with applicable legal and regulatory requirements of their respective sectors, including reviewing and assessing the effectiveness of the internal controls and procedures put in place by them to ensure their own compliance and compliance by their agents (in case of regulatees who are corporations). HKMA and SFC also conduct off-site reviews, including analysis of information submitted by their regulatees and data collected on an ad hoc basis as part of their supervisory efforts. Moreover, in addition to following up on investor complaints, both regulators have employed "mystery shopper" as a supplementary supervisory tool on occasions. For the regulation of MPF intermediaries in future, MPFA has established a regular liaison forum with the FRs to enhance inter-regulator communication. They will make use of this liaison forum to consider and analyse relevant industry data and identify emerging trends and developments in the MPF market which may impact on the activities of MPF intermediaries, and share information and practices in relation to supervisory and enforcement activities.

47. Regarding the inspection powers provided under proposed section 34ZR, the Bills Committee has queried whether the inspectors may conduct fishing expedition on personnel records. The Administration has responded that the inspectors prescribed and directed by the FRs will only inspect personnel information relevant to the fulfillment of conduct requirements and whether the person meets the qualification to carry on regulated activities. The inspectors will not inspect irrelevant information such as salaries. Besides, proposed section 34ZQ specifies that the FR directing a prescribed person to conduct inspection must provide the person with a copy of the direction. The inspector is required to produce a copy of the direction to the regulated person concerned before exercising the inspection powers.

Disciplinary order for failure to comply with performance requirements (proposed sections 34ZW to 34ZZA of clause 13)

48. Proposed section 34ZW provides that MPFA may make a disciplinary order against a regulated person if MPFA is satisfied that the regulated person has failed to comply with a performance requirement. The sanctions that may be imposed under a disciplinary order include reprimand, fines, revocation or suspension of registration as PI/SI or approval as RO. Under proposed section 34ZW(6), MPFA may order the

regulated person to pay a pecuniary penalty not exceeding whichever is the greater amount of the following —

- (a) \$10,000,000;
- (b) three times the amount of the profit gained or loss avoided by the regulated person as a result of the failure.

49. The Administration has advised that in determining the pecuniary penalty level under proposed section 34ZW(6), reference has been made to SFO. Some Bills Committee members have expressed concern that the proposed penalty level may be too high. They hold the view that while SFO covers a wide range of offences and the amounts of money involved in such offences are usually large, most of the offences committed by MPF intermediaries under the Bill are merely related to negligence and the amount of money involved would be relatively small. As such, the Bills Committee has requested the Administration to review the pecuniary penalty level under proposed section 34ZW(6).

50. The Administration has responded that the proposed penalty level of \$10 million or three times the amount of the profit gained or loss avoided by the regulated person as a result of the conduct failure are the maximum level that can be imposed. The actual amount of pecuniary penalty would be decided having regard to relevant factors. The MPF intermediary concerned may lodge an appeal against the pecuniary penalty imposed on him. MPFA has given an example of a scenario where an MPF intermediary may be subject to a large pecuniary penalty: an MPF intermediary misled a scheme member who had invested in guaranteed funds into transferring his accrued benefits to another MPF scheme before satisfying guarantee conditions and the scheme member subsequently lost the guaranteed benefits of the original MPF scheme. In practice, pecuniary penalty is generally not the sort of remedy a regulator would primarily resort to. The first recourse would usually be suspension or revocation of registration rather than pecuniary penalty. As such, the Administration considers the proposed penalty level appropriate.

Handling of complaints

51. The Bills Committee is concerned that as the proposed regulatory regime involves MPFA and three FRs, when lodging complaints against MPF intermediaries, members of the public may need to approach and deal with different regulators in the process. In this regard, the Bills Committee has examined how complaints against MPF intermediaries'

misconduct would be processed, including the workflow and the demarcation of responsibilities and powers among MPFA and the FRs in the handling alleged cases of misconduct of MPF intermediaries.

52. The Administration and MPFA have advised the following regarding the "one-stop" approach for handling of complaints –

- (a) Under the proposed arrangement, MPFA will receive all complaints against MPF intermediaries. Upon receipt of a complaint, MPFA will first log the case details, acknowledge receipt of the complaint, collect background information from the complainant and make a preliminary assessment on whether the information provided suggests a possible breach of the conduct requirements. If so, MPFA will refer the complaint case, together with the information collected by MPFA, to the relevant FR for follow-up. MPFA will advise the complainant immediately when a complaint has been referred to an FR. The FR will investigate the case and obtain evidence from relevant parties, including the complainant if additional information is considered necessary.
- (b) MPFA will receive regular updates from FRs on the progress of their investigations. FRs will submit information on the case to MPFA for a decision as to whether the complaint is substantiated and disciplinary action is warranted. MPFA will notify the complainant of the outcome of the investigation and its decision on any disciplinary action.
- (c) In case a scheme member lodges a complaint with an FR direct, the FR will forward the complaint to MPFA for initial processing such that MPFA can maintain an oversight of all complaints. Where a complaint concerns, for example, an MPF trustee or an MPF scheme, MPFA will take up the investigation direct as part of its statutory functions under the existing MPFSO.
- (d) MPFA will produce a leaflet detailing the complaint handling procedures through illustrative examples, and make it available to the public via various distribution channels in the run-up to the launch of the ECA. The information will also be conveyed to the public through the MPFA's hotline and website.

53. The Bills Committee has sought clarification on whether MPFA will disclose details of an investigation to the complainant concerned in both substantiated and non-substantiated complaint cases. The Administration has advised that MPFA will inform the complainant in writing of the outcome of the follow-up actions taken in respect of a complaint at the conclusion of an investigation or, where applicable, any resultant enforcement actions. Proposed section 34S under clause 13 requires MPFA to include in the Register of Intermediaries a record of the applicable disciplinary order that has been in force against the registered MPF intermediaries within the last five years. In this connection, the Administration will move CSAs to the Bill to expressly empower MPFA to disclose to the public details of its disciplinary decision against regulated persons under the Bill, the reasons for which the disciplinary decision was made, and any material facts relating to the disciplinary case.

54. The Administration has further advised that in practice, MPFA will disclose the information to the public through press release as well as direct to the complainants concerned. For an unsubstantiated case, MPFA will inform the complainant in writing that the investigation has been completed, the actions that have been taken to investigate the case and the outcome of the investigation. Explanations will be given as to the reasons for not taking further action, or not imposing disciplinary sanction in relation to the complaint, i.e. there was no, insufficient or even contrary evidence to substantiate the complaint. The target time to inform the complainant in writing of the outcome is within 10 working days of the conclusion of the investigation or, where applicable, the final disciplinary action is available.

Avenues for scheme members to seek redress or compensation

55. The Bills Committee has sought information on the avenues available for MPF scheme members who have sustained financial loss that is attributable to the misconduct of MPF intermediaries in their sale and marketing activities to seek redress or compensation.

56. The Administration has advised that in addition to any relevant common law actions open to an MPF scheme member, by virtue of section 108 of the SFO, where a registered MPF intermediary makes any fraudulent representation, reckless misrepresentation or negligent misrepresentation by which a person is induced to acquire an interest in MPF schemes, the registered MPF intermediary shall be liable to pay compensation by way of damages to the other person for any pecuniary

loss that other person has sustained as a result of reliance of the said misrepresentation. This provision will continue to apply under the proposed statutory regime. MPFA's determination that an MPF intermediary has committed misconduct would be of reference to the aggrieved party in considering whether to file claims in accordance with section 108 of the SFO.

57. The Administration has further advised that under proposed section 34ZY of the Bill, if MPFA is satisfied that a registered MPF intermediary has failed to comply with a conduct requirement and intends to make a disciplinary order against him, it may, by agreement with the registered MPF intermediary, take any further action, whether in place of or in addition to any disciplinary order in respect of him, that it considers appropriate in the circumstances. This provision provides a way to facilitate a settlement arrangement.

58. The Bills Committee has also enquired whether the Bill has any provision relating to the financial dispute resolution mechanism which according to the Administration will be launched in 2012. The Administration has advised that upon the commencement of the operation of the Financial Dispute Resolution Centre in mid-2012, the regulatees of HKMA and SFC will be required to participate in the financial resolution mechanism and such requirement will be implemented administratively, for example, through the licensing conditions. As such, an MPF intermediary who is a regulatee of HKMA or SFC will be subject to the mechanism and have to enter into mediation with a complainant at the latter's request. There is no need to specify the financial resolution arrangements in the Bill.

59. Hon KAM Nai-wai is of the view that it may be undesirable to empower the relevant regulators to arrange settlement with the MPF intermediaries who have committed misconduct and the MPF scheme members concerned, as such arrangements would cover up misconduct cases and may not be fair to the MPF scheme members. Hon KAM Nai-wai considers that if an MPF intermediary has been found guilty of misconduct, the regulator concerned should have the power to require the intermediary to make compensation to the MPF scheme members concerned. This is because the mere imposition of disciplinary sanctions against the MPF intermediaries will not actually help the MPF scheme members concerned.

60. The Chairman is however of the view that determinations on compensation should be made by the court, and it is inappropriate for industry regulators to be empowered to make such determinations.

61. The Administration also considered that it is appropriate for the court rather than a regulator to make determinations on claims filed by MPF scheme members for compensation, pointing out that this is already the existing arrangement. With reference to the established regulatory arrangements for financial sectors, the Bill does not contain an empowering provision for regulators to order an MPF intermediary to make compensation to an MPF scheme member. However, there would be incentives for some MPF intermediaries to consider settlement with the MPF scheme members on the issue of compensation, taking into account the potential disciplinary sanctions that MPFA may impose on them.

62. At the request of the Bills Committee, the Administration has provided an example in the legislation of the United Kingdom ("UK"), in which a regulator is empowered to order a person subject to its regulation to make restitution to an aggrieved party. On the other hand, the Administration has advised that MPFA has reviewed the statutory powers of the key regulators including those in Singapore (Singaporean Monetary Authority), Australia (Australian Securities and Investments Commission) and the United States (Securities and Exchange Commission) and is not aware of any of them having the statutory power to order a financial institution to pay compensation in favour of an investor who claims to have suffered loss due to the action of the former. Although in UK, the Financial Services Authority ("FSA") has the statutory power to require a person subject to its regulation to make restitution to a party who claims to have suffered loss due to the action of the former⁴, as far as Administration and MPFA understand, the FSA has never invoked such power.

Committee stage amendments proposed by Hon KAM Nai-wai

63. Hon KAM Nai-wai has put forward his proposed CSAs to clause 20 of the Bill (**Appendix III**) for the Bills Committee's consideration. The proposed CSAs seek to empower MPFA to allow a person who has sustained financial loss that is attributable to the failure of another person to perform a duty, or comply with a requirement or standard, imposed on

⁴ The Administration has provided the Bills Committee with the relevant section of the UK Financial Services and Markets Act 2000 on FSA's power to require restitution, vide LC Paper No. CB(1)1803/11-12(02).

that other person by under proposed new Part IVA to bring proceedings before MPFA to recover from that other person the amount of that loss as damages and make awards as if the proceedings were brought in a court of competent jurisdiction.

64. Hon KAM Nai-wai has explained the rationale for his proposed CSA that empowering the regulatory authorities to order financial institutions to pay compensation to investors is instrumental to strengthening the protection of investors. The protection is even more important when the investors concerned are the majority of the employees in Hong Kong and the investments concerned are for their retirement protection. In Hong Kong, although the financial regulatory authorities have the power to impose pecuniary penalty on their regulatees, the fines received are treated as Government revenue and investors cannot obtain any compensation without resorting to court proceedings. Since the outbreak of the financial crisis in 2008, he has received a large number of complaints relating to financial investment products. Many of these complainants have not been able to obtain reasonable compensation because they cannot afford the high costs of instituting legal proceedings in court. He therefore proposes to move CSAs with a view to providing investors with reasonable protection.

65. The Administration has responded that it does not support Hon KAM's proposed CSA. Its position is that, in line with the regulatory arrangements of other comparable jurisdictions, claims for compensation should be considered and determined through court proceedings, and MPFA which is responsible for supervising the MPF intermediaries and conducting the disciplinary process and determining the disciplinary sanction to be imposed (if any) in case of alleged misconduct by any of them should not be given the additional power to order compensation. It should also be noted that the FSA in UK has never invoked such power.

66. Hon CHAN Kin-por has expressed the view that Mr KAM's proposed CSA involves 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 has very far-reaching implications on the entire financial regulatory regime in Hong Kong. It is premature to make such important amendments through Mr KAM's proposed CSAs before all the relevant implications have been carefully considered.

67. Hon Alan LEONG has indicated that he is inclined to support the Administration's view that a person who has sustained financial loss attributable to the misconduct of an MPF intermediary should resort to

legal proceedings to seek redress or compensation. In this connection, he has enquired about the policy intent of the existing section 45G of the MPFSO; 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 would have the effect of obviating the need for the plaintiff to prove liability in the civil proceedings leaving damages to be assessed. He has also asked the Administration for the difference of having and not having the existing section 45G.

68. The Administration has advised that the policy intent of section 45G of the MPFSO is to provide a statutory route for scheme members to obtain damages resulting from a breach of the relevant provisions of the MPFSO or governing rules of a registered scheme. This provision suggests that such a breach could give rise to damages. In other words, in the absence of section 45G, the plaintiff would have to spend more effort on convincing the Court that the breach in question may cause losses to them. Under section 45G(1) of the MPFSO, the plaintiff needs to show that the defendant has contravened the governing rules or failed to comply with the relevant requirements or standards in the MPFSO. In cases where MPFA has taken action in respect of the plaintiff's case (e.g. imposition of a financial penalty, or taking out criminal or civil proceedings), evidence of such action will likely assist the plaintiff in establishing his cause of action under section 45G(1) of the MPFSO. Where no such action has been taken by MPFA, the plaintiff will need to use other means to show the breach.

69. The Administration has also advised that under clause 20 of the Bill, proposed new Part IVA under clause 13 on "Sales and Marketing Activities, and Giving of Advice, in relation to Registered Schemes" is excluded from the application of the existing section 45G of MPFSO, and section 108 of SFO on "Civil liability for inducing others to invest money in certain cases" applies to this new Part of the Bill.

Committee stage amendments proposed by Hon WONG Sing-chi

70. Under proposed section 34ZZ(2), if MPFA forms a preliminary view that it should make a disciplinary order against, or take further action under section 34ZY in respect of a regulated person, MPFA –

- (a) must give the regulated person a notice in writing of the preliminary view and the reasons for it; and

- (b) must give the regulated person an opportunity to make oral or written representations, or both, on the preliminary view and the reasons for it.

The notice must also include —

- (a) particulars of the disciplinary order or further action proposed to be made or taken;
- (b) particulars of the time at which the disciplinary order is proposed to take effect in accordance with section 34ZZ; and
- (c) a statement describing—
 - (i) the right of the regulated person to make representations; and
 - (ii) how and when the regulated person may make representations.

71. Hon WONG Sing-chi has put forward his proposed CSAs (**Appendix IV**) to proposed 34ZZ of clause 13 for the Bills Committee's consideration. The proposed CSAs add a subsection under proposed 34ZZ(2)(a) to stipulate that MPFA must give a copy of the notice to any person who has lodged a complaint to MPFA against the regulated person in relation to the matter that MPFA forms the preliminary view.

72. Hon WONG Sing-chi has explained the rationale for the proposed CSAs that the regulated person, upon receipt of the notice, would have incentive to reach a settlement with the aggrieved party concerned, in the hope that MPFA would reduce the penalty or withdraw the decision to make a disciplinary order. In his experience of handling the complaints relating to the Lehman Brothers-related investment products, he has observed that some complainants, long after they had lodged their complaints, were invited by the regulated persons to consider settlement offers. However, the complainants at that point of time did not have information about the investigation results of their complaints and the intended disciplinary actions to be taken against the regulated persons. His proposed CSAs aim at removing the inequitable situation that while the regulated person is informed of the investigation results concerning his misconduct and the particulars of the disciplinary order MPFA intends to make, the complainant does not have any such information and thus is

being placed in a disadvantaged position in the settlement negotiation process.

73. The Administration has responded that it does not support Hon WONG's proposed CSA, and has pointed out that the procedural requirement stipulated under proposed section 34ZZ is to ensure that the important principle of "due process" is 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 be unfair to the regulated person concerned. The notice provided only a preliminary view of MPFA on the disciplinary sanction to be imposed, and the regulated person concerned can make representations or provide additional evidence which could alter MPFA's view in making a final disciplinary decision. Having considered all relevant factors, the Administration does not consider it appropriate for MPFA to disclose information about its preliminary view on a disciplinary order to persons (including a relevant complainant) other than the regulated person concerned.

74. Hon KAM Nai-wai has opined that since MPFA will take into account any agreement made between the complainant and the MPF intermediary concerned in making a disciplinary decision, MPFA should be empowered to inform the complainant of the details of the investigation prior to making a disciplinary decision in respect of the MPF intermediary. If the complainant is not informed of the details of the investigation before MPFA made a disciplinary decision, the MPF intermediary may take advantage of the complainant's lack of knowledge and may hence reach an agreement to the latter's disadvantage. He therefore supports Mr WONG's proposed CSA.

75. The Administration has responded 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 an aggrieved person in the situation mentioned by Mr KAM would not help the intermediary to secure a more lenient disciplinary sanction (if applicable).

76. Hon CHAN Kin-por has expressed the view that the arrangements to be effected by Mr WONG's proposed CSAs may 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 may be disclosed to the relevant complainants.

Offence provisions

Offences relating to prohibitions (proposed section 34 N of clause 13)

77. Under proposed section 34N(1), a person carrying on or holding out as carrying on regulated activities without registration commits an offence and is liable –

- (a) on conviction on indictment to a fine of \$5,000,000 and to imprisonment for 7 years and, in the case of a continuing offence, to a further fine of \$100,000 for each day on which the offence is continued; or
- (b) on summary conviction to a fine at level 6 and to imprisonment for 2 years and, in the case of a continuing offence, to a further fine of \$10,000 for each day on which the offence is continued.

78. The Chairman and Hon CHAN Kin-por have raised the concern that the above penalty levels may be too high for individuals. Having considered members' views, the Administration has undertaken to move CSAs to adjust the maximum level of penalties applicable to individuals acting as employees, agents or representatives of PIs as follows, which is consistent with the arrangement under section 114 of SFO –

	Proposal under the Bill	Proposed CSA
Maximum level of sanctions applicable to individuals acting as employees, representatives or agents of PIs	On conviction on indictment - a fine of \$5,000,000 and imprisonment for 7 years and, in the case of a continuing offence, a further fine of \$100,000 for each day on which the offence is continued.	On conviction on indictment - a fine of \$1,000,000 and imprisonment for 2 years and, in the case of a continuing offence, a further fine of \$20,000 for each day on which the offence is continued.
	On summary conviction - a fine at level 6 (i.e. \$100,000) and imprisonment for 2 years and, in the case of a continuing offence, a further fine of \$10,000 for each day on which the offence is continued.	On summary conviction - a fine at level 6 (i.e. \$100,000) and imprisonment for 6 months and, in the case of a continuing offence, a further fine of \$2,000 for each day on which the offence is continued.

Other changes in relation to subsidiary intermediary (proposed section 34ZI of clause 13)

79. Under proposed section 34ZI, an SI must send a written notice to MPFA for a change in his name, address, any contact details, as well as any acquisition, cessation or suspension of Type B regulatee status within 7 working days after such a change occurs. Failure to do so without reasonable excuse is an offence liable to a fine at level 5 (i.e. \$50,000).

80. Hon CHAN Kin-por has queried the reasonableness of the offence provision particularly in respect of a failure to report a change in address or contact details within seven working days.

81. The Administration has responded that the reporting requirements are necessary for MPFA to exercise effective regulation under the proposed regime, to keep an updated register of intermediaries for public inspection and maintain effective communication with an SI directly. A similar requirement exists under section 135 of SFO which requires a licensed representative to give notice in writing to SFC of any changes specified, including changes in the basic information (e.g. name, contact information), status of authorization to carry on a regulated activity and relevant information in respect of the licensed representative within 7 business days of the change. A person who, without reasonable excuse, contravenes the provision is subject to the same level of sanction, i.e. on conviction to a fine at level 5.

Offences relating to sections 34P, 34ZR and 34ZU (proposed section 34ZZC of clause 13)

82. Proposed section 34ZZC provides for offences relating to investigation of contravention of the prohibitions under the Bill, and inspection and investigation concerning failure to comply with the performance requirements under the Bill. According to the Administration, the offence provisions under proposed section 34ZZC are modeled on similar provisions in the SFO.

83. Bills Committee members have raised the concern that there may be grey areas in the offences specified in proposed section 34ZZC, and have enquired about the scenario that would warrant imprisonment for seven years as provided under proposed section 34ZZC(10)(a).

84. The Administration has made the following points -
- (a) similar sanctions are provided in SFO and the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615);
 - (b) an offence referred to in proposed section 34ZZC(10)(a) involves intent to defraud, which is a serious crime;
 - (c) the imprisonment term of seven years provided under proposed section 34ZZC(10)(a) is the maximum penalty that can be imposed whilst the actual imprisonment term will be determined by the court having considered the relevant facts and evidence in respect of each case; and
 - (d) a scenario that may be considered as involving a serious crime leading to imprisonment is as follows: an FR exercises its investigation power by requiring an MPF intermediary to provide certain documents but the MPF intermediary concerned prepares forged documents to mislead the FR with intent to defraud.

85. The Bills Committee has urged the Administration and MPFA to provide sufficient education and publicity so that the industry and the public would not contravene the law inadvertently. The Administration has assured members that MPFA will step up its publicity and education for the industry on the requirements and sanctions under the Bill before the launch of the ECA.

E-platform for transmission of data on transfer of MPF benefits (clauses 8 and 28)

86. As the volume of transfers of accrued benefits after the implementation of ECA may rise significantly, and in order to promote accuracy and security for transfers, and to reduce processing time, MPFA will establish an E-platform to facilitate the transmission of data on transfers of accrued benefits and mandate its use by trustees. Clause 8 of the Bill empowers MPFA to designate a mandatory E-platform and provides for associated matters.

87. The Bills Committee has asked about the development and operating costs of the E-platform, and whether MPF trustees will be charged for the costs. Hon LEE Cheuk-yan has expressed concern about

the impact of the E-platform on the fees chargeable by MPF trustees on MPF scheme members, and has asked whether the Administration/MPFA has discussed the issue with the industry.

88. The Administration and MPFA have advised that the development cost of the E-platform will be borne by MPFA. To facilitate the smooth implementation of ECA, MPFA will not charge MPF trustees for the operation costs related to E-platform in the initial stage of implementation of ECA. The determination of the fee level in future would be subject to approval of the relevant subsidiary legislation by LegCo. MPF trustees currently conduct the exchange of data on transfer of accrued benefits among MPF schemes through postage of the transfer forms and relevant documents. According to MPFA's initial assessment, the fee payable by MPF trustees in future to support the on-going operation of the E-platform will not be higher than the existing cost incurred by them under existing practice. Thus the fee for the use of E-platform will not result in an increase in the administration fee chargeable by MPF trustees on MPF scheme members. The enabling legislation for ECA (i.e. the Mandatory Provident Fund Schemes (Amendment) Ordinance 2009) has already specified that, other than necessary transaction costs, MPF trustees must not charge any fee for handling transfer of accrued benefits on MPF scheme members.

89. MPFA has further advised that after the passage of the Mandatory Provident Fund Schemes (Amendment) Bill 2009, which is the enabling legislation for implementation of the ECA, there has already been a trend of downward adjustment in the fees charged by MPF trustees. It is anticipated that the increased competition among MPF trustees after the implementation of ECA would induce them to further lower their fees.

Fees

90. The Bills Committee notes that while MPFA is empowered under the Bill to charge registration fees (proposed section 34T, 34U, 34V and 34W of clause 13) and an annual fee (proposed 34ZN of clause 13) on MPF intermediaries, MPFA has indicated its plan not to charge any registration fee or annual fee in the initial stage of the implementation of ECA so as to facilitate smooth transition. Clause 27(2) amends Schedule 1 to the Mandatory Provident Fund Schemes (Fees) Regulation (Cap. 485C) ("Fees Regulation") to state the amount of the various fees chargeable by MPFA under proposed sections 34T, 34U, 34V, 34W and 34ZN, and the amount is invariably specified as "Nil" for all the fees items. In future, changes to the level of fees will be introduced by way of

subsidiary legislation subject to the approval of LegCo under the negative vetting procedure, and the level of fees will be determined based on the cost-recovery principle.

91. Some members including Hon LI Fung-ying, Hon IP Kwok-him and Hon IP Wai-ming have expressed concern that if the proposed fees in the Bill are waived in the initial stage of the new regulatory regime, there may be controversies when the Administration/MPFA subsequently introduce subsidiary legislation to charge the fees. The present drafting of the Bill also does not adequately reflect the policy intent that the fee waiver is only a temporary arrangement. Hon IP Wai-ming has expressed the view that the fees should form part of the operating costs of the MPF intermediaries and it is not appropriate for MPFA, which is partly funded by public money, to subsidize such costs.

92. In view of members' concerns and queries, the Bills Committee has requested the Administration/MPFA to -

- (a) review the appropriateness of waiving the fees proposed under clause 27(2) at the initial stage of the implementation of the new regulatory regime, taking into account members' views expressed at the meeting;
- (b) consider the suggestion of replacing the word "Nil" with "\$0" under the "Amount" column in respect of the fees items proposed under clause 27(2) and clause 28 (fee payable for use of the E-platform); and
- (c) clarify whether the policy of charging fees based on the cost-recovery principle is reflected in the existing MPFSO and the Bill.

93. The Administration has advised that under the existing administrative arrangement for the regulation of MPF intermediaries, MPFA is not empowered to, and consequently has not, charged regulated persons any relevant fees or charges. During the consultation process when the Bill was being developed, different industry participants raised concerns about the impact of fees under the statutory regime in conjunction with other costs of implementing the new regime. Whilst the statutory regime is built on the existing administrative arrangements, it is accepted that the industry would incur some other initial, transitional, costs in moving to the new regime. In light of this, and to minimize transitional impacts and costs on existing intermediaries and also in order

to allow some time for an assessment of the actual costs involved in handling applications, MPFA considered it appropriate not to charge application or annual fees during the initial period. This position was made public in mid-2011, including when the Administration and MPFA issued the response to the comments of consultation to the LegCo Panel on Financial Affairs.

94. The Administration has further advised that MPFA shares the concerns expressed by Bills Committee members that the waiving of fees for the time being should not be seen as an intention to waive them permanently. In fact, when discussing this issue with the industry, MPFA has made it clear that fees would be imposed after the initial period. Taking into account members' views, the Administration has advised that the Secretary for Financial Services and the Treasury ("the Secretary") will reiterate in his speech for resumption of Second Reading debate on the Bill that the waiving of these fees is only a temporary relief measure and MPFA would review and propose appropriate fees for operation of the MPF intermediary regime on a cost-recovery basis after the initial stage of implementation of the statutory regime.

95. On the suggestion of replacing the word "Nil" with "\$0" under clauses 27(2) and 28, the Administration has responded that the use of the word "Nil" in this context tallies with the existing items 5 and 6 to Schedule 1 to the Fees Regulation, and existing items 3 and 4(a) of Schedule 3 to the Fees Regulation, where a "Nil" fee is also payable. The scope of the long title of the Bill is also not wide enough to cover amendments to the said existing items as they deal with fees relating to MPF schemes and trustees. On this basis, for consistency reasons, the word "Nil" (instead of "\$0") should be used in clauses 27(2) and 28 as well.

96. Regarding the policy of charging fees based on the cost-recovery principle, the Administration has advised that section 46 of the MPFSO provides that the Chief Executive in Council may make regulations to prescribe fees, including fees for the granting of approvals for the purpose of the MPFSO. It does not stipulate explicitly that such fees should be determined based on the cost-recovery principle. This notwithstanding, such is a well-established principle of the Administration and will be adopted as and when fees are to be charged under the statutory regime.

Commencement (clauses 1 and 29)

97. Clauses 1 and 29 provide that if the Bill is passed, the newly enacted Amendment Ordinance and the MPF Schemes (Amendment) Ordinance 2009 (enacted in July 2009 to introduce the ECA) will both come into operation on 1 November 2012.

98. The Bills Committee has enquired whether sufficient support measures will be in place when the proposed regulatory regime and the ECA commence operation on 1 November 2012, as provided under clauses 1 and 29 of the Bill. The Administration has advised that -

- (a) MPFA, in conjunction with the Administration, have commenced the relevant preparatory work since the passage of the Mandatory Provident Fund Schemes (Amendment) Bill 2009;
- (b) MPFA has liaised with MPA trustees on relevant preparatory work for the launch of ECA;
- (c) The E-platform would be ready for operation when the ECA was launched on 1 November 2012;
- (d) Relevant publicity work would be conducted; and
- (e) MPFA had been conducting "train-the-trainer" programmes to enable MPF intermediates to possess adequate knowledge in relation to ECA. MPFA would launch another round of training for MPF intermediaries after passage of the Bill by the Legislative Council.

99. On the Bills Committee's concern as to whether adequate education will be provided for MPF scheme members and MPF intermediaries to prepare them for the implementation of ECA, the Administration has advised that MPFA has been providing relevant public education. MPFA will conduct a new round of education and publicity in the summer of 2012 to prepare for the planned implementation of ECA on 1 November 2012. MPFA has further advised that education will be provided to MPF intermediaries so that they will be well aware of the relevant requirements on them. Besides, the public will be informed of the details of ECA so that they could make informed decisions on MPF investment. MPFA will utilize a number of strategies in the provision of education. For instance, it will organize seminars and disseminate relevant information through its website and publicity materials. MPF

intermediaries will also be asked to direct MPF scheme members to refer to materials/information provided by MPFA. In addition, MPFA will ensure that relevant documents such as forms for ECA will contain key information to facilitate members of the public to make informed decisions.

Committee Stage amendments

100. In addition to the proposed CSAs as mentioned in the above paragraphs, the Administration also proposes to make some other CSAs for the sake of consistency, to better reflect the original policy intention, or to enhance the readability of the provisions in the Bill. The Bills Committee agrees to the CSAs to be moved by the Administration as set out in Appendix VI to the report of the Bills Committee submitted to the House Committee (LC Paper No. CB(1)1956/11-12). Subsequent to the consideration of the report by the House Committee on 25 May 2012, the Administration has informed the Bills Committee that it will move two additional CSAs, which are textual amendments, and the relevant information has been circulated to Members vide LC Paper No. CB(1)2020/11-12 on 30 May 2012.

101. The Bills Committee will not move any CSA to the Bill.

Recommendation

102. The Bills Committee supports the resumption of the Second Reading debate on the Bill. The Administration has indicated its intention to give notice for resumption of the Second Reading debate on the Bill on 6 June 2012.

Consultation with the House Committee

103. The House Committee was consulted on 25 May 2012 and supported the recommendation of the Bills Committee in paragraph 102.

Council Business Division 1
Legislative Council Secretariat
31 May 2012

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

Membership list

Chairman Hon WONG Ting-kwong, BBS, JP

Members Hon LEE Cheuk-yan
Hon LEUNG Yiu-chung
Hon LI Fung-ying, SBS, JP
Hon Tommy CHEUNG Yu-yan, 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 Sing-chi
Hon WONG Kwok-kin, BBS
Hon IP Wai-ming, MH
Hon IP Kwok-him, GBS, JP
Hon Alan LEONG Kah-kit, SC

(Total: 14 Members)

Clerk Ms Anita SIT

Legal Adviser Miss Carrie WONG

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

**List of organizations and individuals which/who have submitted views to
the Bills Committee**

1. Asian Consultancy on Tobacco Control
- *2. The Chinese Manufacturers' Association of Hong Kong
- *3. Clear the Air
4. Democratic Alliance for the Betterment and Progress of Hong Kong
5. The Federation of Hong Kong and Kowloon Labour Unions
- *6. General Agents & Managers Association of Hong Kong
7. Mr HO Man-kit, Raymond, Sai Kung District Council member
- *8. The Hong Kong Association of Banks
9. The Hong Kong Chinese Importers' & Exporters' Association
10. The Hong Kong Confederation of Insurance Brokers
11. Hong Kong Confederation of Trade Unions
- *12. The Hong Kong Federation of Insurers
13. The Hong Kong Federation of Trade Unions
- *14. Hong Kong Investment Funds Association
15. The Hong Kong Retirement Schemes Association
16. Hong Kong Trustees' Association Limited
- *17. Mr LAM, a member of the public
18. The Law Society of Hong Kong
19. The Life Underwriters Association of Hong Kong
20. Professional Insurance Brokers Association
21. World Lung Foundation
- *22. Mr YEUNG Wai-sing, MH, Eastern District Council member

* *submitted written views only*



民主黨立法會議員辦事處
Democratic Party Legislative Councillors' Office

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

Committee Stage

Amendments to be moved by the Honourable KAM Nai-wai

Clause

Amendment Proposed

20

By deleting clause 20 and substituting –

"20. Section 45G amended (right to bring civil proceedings to recover financial loss)

After section 45G(1) –

Add

"(1A) Despite subsection (1), if a person who has sustained financial loss that is attributable to the failure of another person to perform a duty, or to comply with a requirement or standard, imposed on that other person by or under Part IVA, the Authority may allow the person to bring proceedings before the



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of that loss as damages and make awards as if the proceedings were brought in a court of competent jurisdiction."



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

Committee Stage

Amendments to be moved by the Honourable Wong Sing-chi

Clause

Amendment Proposed

13

After the proposed section 34ZZ(2)(a) –

Add

"(aa) must give a copy of the notice to any person who has lodged a complaint to the Authority against the regulated person in relation to the matter that the Authority forms the preliminary view; and".