

**立法會**  
**Legislative Council**

LC Paper No. CB(1)2105/99-00  
(These minutes have been seen  
by the Administration and  
cleared with the Chairman)

Ref : CB1/SS/3/99/1

**Subcommittee on**  
**Mandatory Provident Fund Schemes Ordinance**  
**(Amendment of Schedule 1) Notice 2000 and**  
**Mandatory Provident Fund Schemes (General) (Amendment) Regulation 2000**

**Minutes of the second meeting**  
**held on Wednesday, 26 April 2000, at 8:30 am**  
**in the Chamber of the Legislative Council Building**

**Members present** : Hon Ronald ARCULLI, JP (Chairman)  
Hon HO Sai-chu, SBS, JP  
Hon NG Leung-sing  
Hon CHAN Yuen-han  
Hon Bernard CHAN  
Hon CHAN Kam-lam  
Hon Ambrose LAU Hon-chuen, JP  
Hon Andrew CHENG Kar-foo

**Members absent** : Hon LEE Cheuk-yan  
Hon SIN Chung-kai  
Hon FUNG Chi-kin

**Public officers attending** : **Financial Services Bureau**  
Miss Maureen TO  
Principal Assistant Secretary for Financial Services

**Mandatory Provident Fund Schemes Authority**

Mr Raymond TAM  
Executive Director

**Department of Justice**

Mr Geoffrey FOX  
Senior Assistant Law Draftsman

Miss Shandy LIU  
Senior Government Counsel

**Attendance by invitation : The Bank of Bermuda Limited & Bermuda Trust (Far East) Limited**

Mr Simon P MACLEAN  
Director, Operations

**The Chase Manhattan Bank**

Ms Bonny LANDERS  
North Asia Business Executive, Global Investor Services

Ms Agnes NG  
Vice-President, Sales Manager, Global Investor Services

**Butterfield Trust (Hong Kong) Limited**

Mr Alastair E MURRAY  
Managing Director

**Citibank N.A.**

Mr Anthony GALLIANO  
Head, Asia Pacific Region

Mr Steven YEO  
Regional Counsel, Transaction Services, Asia Pacific

Ms Margaret LAW  
Assistant Vice-President

**HSBC International Trustee Limited**

Mr Philip G DUCKWORTH  
Head, Corporate Trust Services

Mr James WONG  
Senior Manager, Custody and Clearing

**State Street Bank and Trust Company**

Ms Lily Vanessa KWOK  
Assistant Vice-President, Marketing and Sales

**The Northern Trust Company of Hong Kong Limited**

Ms Jackie DRABCZYNSKA  
Vice-President, Relationship Manager

**Standard Chartered Bank**

Ms Katie YIP  
Legal Adviser, Legal and Compliance Department

**Clifford Chance**

Mr Mark SHIPMAN  
Solicitor

**Clerk in attendance :** Miss Salumi CHAN  
Chief Assistant Secretary (1)5

**Staff in attendance :** Mr Jimmy Y T MA, JP  
Legal Adviser

Mr Matthew LOO  
Senior Assistant Secretary (1)7

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**I. Meeting with representatives of a group of custodians/trustees**

(LC Paper No. CB(1)1371/99-00(01) — Submission dated 11 April 2000 from Clifford Chance on behalf of 11 custodians/trustees

LC Paper No. CB(1)1430/99-00(01) — Administration's response to the submission dated 11 April 2000 from Clifford Chance

LC Paper No. CB(1)1430/99-00(02) — Further submission dated 20 April 2000 from Clifford Chance

LC Paper No. CB(1)1430/99-00(03) — Submission dated 21 April 2000 from Baker & McKenzie on behalf of the Association of Global Custodians, an informal coalition of nine US banks)

Meeting with representatives of a group of custodians/trustees

The Chairman welcomed the group of custodians/trustees (the Group) comprising representatives of the Bank of Bermuda Limited & Bermuda Trust (Far East) Limited, Chase Manhattan Bank, Butterfield Trust (Hong Kong) Limited, Citibank N.A., HSBC International Trustee Limited, State Street Bank and Trust Company, Northern Trust Company of Hong Kong Limited and Standard Chartered Bank, and the representative of Clifford Chance to the meeting.

2. At the Chairman's invitation, Mr Steven YEO, speaker of the Group, briefed members on the Group's views on the Mandatory Provident Fund Schemes (General) (Amendment) Regulation 2000 (the Amendment Regulation). The main points of his presentation were summarized as follows:

- (a) On permitted encumbrance of scheme assets, the Group considered that the periods of permitted borrowing were too restrictive and that flexibility should be provided to cater for situations beyond the control of custodians/subcustodians. The Group proposed to replace "7 working days" in section 65(2)(b)(iii) of the General Regulation by "30 days" and that the same amendment be made to section 3(b)(iv) of Schedule 3 of the General Regulation;
- (b) The Group considered that the application of the requirements for a custodial agreement set out in Schedule 3 to a subcustodial agreement would not add any material benefit to scheme members, but would result in a difficult, time-consuming and costly process to renegotiate new subcustodial agreements with each of their subcustodians for compliance with Schedule 3. The Group therefore requested the disapplication of Schedule 3 to subcustodial agreements;

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- (c) Under section 5 of Schedule 3, a custodian (or subcustodian) was required to indemnify the scheme for any losses incurred directly or indirectly by scheme members that were attributable to fraudulent, dishonest or negligent acts or omissions committed by the custodian (or subcustodian) or their employees. The Group was concerned that the coverage of indirect losses in section 5 of Schedule 3 would subject the custodians and subcustodians to unlimited liability; and
- (d) The Group noted that section 1(b) of Schedule 3 required scheme assets to be administered and dealt with as trust property of the scheme, or if those assets were located in a place where no law of trusts was in force, to be administered and dealt with as if such a law were in force in that place. The Group considered that the stipulation of such a provision in an agreement would likely lead to uncertainty and disputes concerning how a law that did not exist could be construed as to be in existence.

3. On permitted encumbrance of scheme assets, Mr CHAN Kam-lam sought clarification on the rationale for the Group's proposal to extend the period of borrowing to 30 days. Mr Anthony GALLIANO, Head of the Asia Pacific Region of Citibank N.A., advised that according to an analysis conducted by the Group, 30 days should be sufficient in most cases to cover instances which were due to errors beyond the control of approved trustees. Whilst appreciating the concern of the Group, the Chairman and Mr CHAN Kam-lam pointed out that the longer the period of borrowing, the risk associated with it would be greater. They therefore suggested the Group to reconsider the number of days required. The Group agreed to provide a written response.

4. In response to the Chairman's enquiry, Mr Steven YEO advised that the requirement upon the custodians/subcustodians to indemnify for indirect losses was contrary to prevailing practices in the major overseas financial markets. The Chairman requested the Administration to clarify whether it was the legislative intent to require a custodian or subcustodian to indemnify the scheme for indirect losses and whether reference to "indirect losses" was made in the principal ordinance.

5. In response to the questions from the Chairman and Mr CHAN Kam-lam on treatment of scheme assets as trust property, Mr Steven YEO advised that no trust law was in force in a number of countries, such as those in continental Europe.

Submission from Baker & Mckenzie

6. The Chairman drew members' attention to a submission from Baker & Mckenzie on behalf of the Association of Global Custodians, an informal coalition of nine banks in the United States. Members agreed to consider the submission when the Administration's response was available.

(*Post-meeting note* : The Administration's response was circulated to members vide LC Paper No. CB(1)1569/99-00(04) on 12 May 2000.)

## II. Meeting with the Administration

(LC Paper No. CB(1)1430/99-00(04) — Administration's response to members' points of concern raised at the first meeting on 12 April 2000)

### Administration's response to members' points of concern raised at the first meeting

7. At the Chairman's invitation, Principal Assistant Secretary for Financial Services (PASFS) briefed members on the Administration's response to members' points of concern raised at the first meeting on 12 April 2000.

### *Mandatory Provident Fund Schemes Ordinance (Amendment of Schedule 1) Notice 2000*

8. Members noted the Administration's response but were still concerned that the proposed item 7(1) of Part I of Schedule 1 might not achieve its purpose as the contribution requirement could still be circumvented. Miss CHAN Yuen-han reiterated her view expressed at the first meeting that the Administration should review the Employment Ordinance (EO) (Cap, 57) to address the various employment issues that might arise from the implementation of the Mandatory Provident Fund (MPF) system. Mr Andrew CHENG shared Miss CHAN's views. He also reiterated his view expressed at the first meeting that the Administration should consider improving the drafting of the proposed item 7(1), for example, by adding a subitem (c) to the effect that a relevant employee who had been employed by a company for more than a certain number of days in total within a year would not be exempted from the Mandatory Provident Fund Schemes Ordinance.

9. Miss CHAN Yuen-han and Mr Andrew CHENG requested the Financial Services Bureau to review with the Education and Manpower Bureau (EMB) whether the provisions of EO could cover the employment issues arising from the implementation of the MPF system, and the need to refine the definition of "continuous contract" under EO to address a situation where the relevant employer and employee broke up the contract so as to avoid being caught by the definition. Mr CHENG suggested the Administration to make reference to the provisions relating to severance payments and long service payments under Parts VA and VB of EO.

10. At the request of members, PASFS undertook to invite representatives of EMB to the next meeting.

### *Mandatory Provident Fund Schemes (General) (Amendment) Regulation 2000*

11. Members were pleased to note that the Administration had agreed to abdicate

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its proposal to amend section 67 of the General Regulation, so that failure to comply with the requirement under the proposed new section 66A would not be liable to criminal offence.

Clause-by-clause examination of the Mandatory Provident Fund Schemes (General) (Amendment) Regulation 2000

*Section 65 of the General Regulation*

12. On permitted encumbrance of scheme assets, the Chairman invited the Administration to respond to the Group's concern about the period of borrowing stipulated in section 65 of the General Regulation. Executive Director/Mandatory Provident Fund Schemes Authority (ED/MPFA) advised that the borrowing period of 7 working days was adopted from the relevant legislation in Australia and that the borrowing period could be extended for reasons beyond the control of the custodians/subcustodians. The Chairman pointed out that the drafting of section 65(2)(b)(iii) did not reflect the policy intent. He also considered that the extension of the borrowing period might not satisfy the requirement that "the borrowing is not part of a series of borrowings" under section 65(2)(b)(ii). In response, ED/MPFA undertook to discuss the issue with the Group, and to revise the drafting of section 65 and make consequential amendments to Schedule 3.

13. The Chairman also noted that the phrase "and then only if" used in section 65(2)(a) and (b) did not appear in section 3 of Schedule 3 which was virtually identical to section 65(2)(a) and (b). In response, Senior Assistant Law Draftsman undertook to introduce appropriate amendments to ensure that the provisions of the two sections were consistent.

*Section 68 of the General Regulation*

14. Members noted the Administration's proposed amendments to section 68 of the General Regulation.

*(Post-meeting note : The Administration's response to address members' points of concern raised at the meeting was circulated to members vide LC Paper No. CB(1)1569/99-00(01) on 13 May 2000.)*

**III. Any other business**

Arrangements for the third meeting

15. Members agreed that the third meeting of the Subcommittee be held on Tuesday, 16 May 2000 at 2:30 pm. Representatives of the Administration and the Group would be invited to attend the meeting.

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*(Post-meeting note : As directed by the Chairman, the starting time of the third meeting of the Subcommittee scheduled for 16 May 2000 was changed to 4:30 pm.)*

16. There being no other business, the meeting ended at 10:35 am.

Legislative Council Secretariat  
25 September 2000