

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

Follow-up to the first meeting on 12 April 2000

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

Item no. of Part I of Schedule 1	Members' concern	Response of the Administration
Item 7(1)	The word "terminated" could mean that the employer has to take certain steps to achieve the termination of employment of the relevant employee	To address members' concern, propose to replace the term " is terminated" with "ceases".
Item 7(1)(a) and (b)	<p>It is not clear as to whether the proposed item 7(1)(a) and (b) would cover the following scenarios:</p> <p>a) A relevant employee employed by a company for 59 days, and then by its first subsidiary company for another 59 days, and then by its second subsidiary company for another 59 days;</p> <p>b) A relevant employee employed by a company for 59 days, and then by the same company under a different name for another 59 days, and then by the same company under another different name for another 59 days.</p>	<p>We consider that both the scenarios would be covered by item 7(1) (a) and (b), the reasons are as follows:</p> <p>a) Section 31K(4) of the Employment Ordinance, Cap. 57 provides that -</p> <p>When an employee of a company is taken into the employment of another company which, at the time when he is taken into its employment, is an associated company of the first-mentioned company, his period of employment at that time shall count as a period of employment with the associated company, and the change of employer shall not break the continuity of the period of employment.</p> <p>Section 31K(5) of the Employment Ordinance defines "associated company" to mean "For the purpose of this section 2 companies shall to taken to be associated companies if one is subsidiary of the other, or</p>

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		<p>both are subsidiaries of a third company, and "associated company" shall be construed accordingly."</p> <p>It follows that in the given example, there is no break of continuity. The contract of employment is a "continuous contract" as the employee would have been employed for a period of 4 or more weeks.</p> <p>b) Section 22(8) of the Companies Ordinance provides that-</p> <p>A change of name by a company under this section does not affect any rights or obligations of the company or render defective any legal proceedings by or against it and any legal proceedings that could have been commenced or continued against it by its former name may be commenced or continued against it by its new name."</p> <p>It follows that the employee would be employed by the same employer throughout the periods stated in the example</p>
Item 7(1)	The relevant employers and employees may break up the contracts so as to avoid being caught by the definition of "continuous contract"	In accordance with the spirit of "continuous contract" of the Employment Ordinance, separate contracts with the same employer does not necessarily break the continuity of employment. By virtue of section 3(2) of the Employment Ordinance, in case of dispute as to whether a contract of employment is a continuous contract, the onus of proving that it is not a continuous contract shall be on the employer. The final decision rests with the court.

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

Section no.	Members' concern	Response of the Administration
Section 2	It is not appropriate to use the word " delegate" to refer to sub-custodian	<p>The term "delegate", in relation to a custodian, is not a new term to describe a subcustodian. It is the term to describe a subcustodian in the existing Mandatory Provident Fund Schemes (General) Regulation (the General Regulation), e.g. in sections 71, 72 and 73.</p> <p>The term "delegate" , where it appears in the General Regulation to refer to sub-custodian, would be in the context that relates to a custodian, e.g. delegate of a custodian. Therefore, we consider that there is no ambiguity and amendment is not necessary.</p>
Sections 2 and 7	The drafting of the proposed section 7(1)(b)(ii) is not in line with the definition of "net assets' in section 2	We appreciate members' concern over whether the proposed amendment to section 7(1)(b)(ii) is consistent with the definition of 'net assets' in section 2. Hence we propose to abdicate the amendment to section 7(1)(b)(ii) and slightly revise the proposed new section 7(2) to qualify how 'net assets' would be determined for the purpose of subsection 1(b)(ii).
New Section 66A, Section 67	<p>It seems unjustified:</p> <p>a) to require the approved trustee to ensure that the rate of interest received for the deposit is <u>reasonable</u> in all the circumstances of the case taking into account the factors mentioned in the proposed new section 66A; and</p> <p>b) to make it a criminal offence for failure to comply with the requirement under the proposed new section 66A</p>	<p>a) We note the points raised by the LegCo members that different banks might offer different interest rates to different customers. Nevertheless, the word "reasonable" is used as an element of several criminal offences including careless driving (i.e. failing to drive in a reasonable manner). In determining whether someone has failed to act "reasonably", a court can examine all of the relevant circumstances. We consider that the proposed provision is necessary to safeguard the interest of the scheme members.</p> <p>b) To address members' concern, we propose to abdicate the proposal to amend section 67, so that failure to comply with the requirement under the proposed new section 66A will not be directly liable to criminal offence.</p>