

**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 second meeting on 26 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)(a) and (b)	Members note that the purpose of amending item 7 of Part I of Schedule 1 is to put it beyond doubt that only relevant employees (other than casual employees) who have been employed for a period of less than 60 days would be exempted from the Mandatory Provident Fund Schemes Ordinance (Cap.485). Members are concerned that the proposed item 7(1) could not serve the purpose, as the contribution requirement could still be circumvented. For example:	We are of the view that the proposed item 7 of Part I of Schedule 1 to the MPFSO will achieve the purpose of putting it beyond doubt that only relevant employees (other than casual employees) who have been employed for a period of less than 60 days would be exempted from the MPFSO. Scenario (a) employees will be covered by the proposed item 7(1)(a) and (b). Under section 2 of the MPFSO, 'employee' and 'contract of employment' have the same meaning as in the

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	<p>(a) A relevant employee may be employed by a company for 59 days, and then by its subsidiary company or the same company under a different name for another 59 days; and</p> <p>(b) The relevant employers and employees may break up the contracts so as to avoid being caught by the definition of “continuous contract”.</p> <p><u>On item (a) above</u>, Members note the Administration’s response that the scenarios would be covered by the proposed item 7(1)(a) and (b), having regard to the provisions of section 31K(4) and (5) of the Employment Ordinance (Cap.57) and section 22(8) of the Companies Ordinance (Cap.32). Some Members are not convinced and consider that the legislative intent and provisions of the Employment Ordinance may not cover the employment issues arising from the implementation of the Mandatory Provident Fund</p>	<p>Employment Ordinance and the expression 'employment' shall be construed accordingly. Hence, we do not see any ambiguity in the continuation of the employment under scenario (a).</p> <p>As regards scenario (b): if both the employer and employee connive so that their contract of employment would not be caught by the definition of 'continuous contract' under the Employment Ordinance (EO), then the employee may bear the risk of foregoing other benefits under the EO. If there is dispute as to whether a contract of employment is a continuous contract under the EO, the employer has to prove that it is not a continuous contract.</p> <p>Members may wish to note that the concept of “continuous contract” has been enshrined in the EO and has worked well for the purpose of employee rights and benefits under the EO.</p> <p>The MPF System aims to cover all members of the</p>

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	<p>Schemes, such as the scenarios mentioned at item (a) above.</p> <p><u>On item (b) above</u>, Members note the Administration's response that in accordance with the spirit of "continuous contract" under the Employment Ordinance, separate contracts with the same employer does not necessarily break the continuity of employment. Some Members are concerned that the words "does not necessarily" imply that it may break the continuity of employment.</p>	<p>workforce and the present formula of 'less than 60-day employment period' was thoroughly debated in 1995 when the MPFSO was passed by the Legislative Council.</p>

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

Item no. of Part I of Schedule 1	Members' concern	Response of the Administration
Section 65	<ul style="list-style-type: none"> (a) The drafting of section 65(2)(b)(iii) does not reflect the policy intent that the borrowing period of 7 working days can be extended; (b) The extension of the borrowing period may not satisfy the requirement that “the borrowing is not part of a series of borrowings” under section 65(2)(b)(ii); and (c) The words “and then only if” used in section 65(2)(a) and (d) do not appear in section 3 of Schedule 3 which is virtually identical to section 65(2)(a) and (b). 	<p>For (a) and (b), the Administration considers that the present wording already achieves the policy intent.</p> <p>For (c), we will introduce appropriate amendments to ensure consistency.</p>
Section 5 of Schedule 3	<p>It may not be necessary to require a custodian (or subcustodian) to indemnify the scheme for indirect losses.</p>	<p>We will consider this suggestion of removing the reference to “indirect losses” if the industry can justify why giving the MPFA such a discretionary power cannot address their problem. Please refer to paragraph 3 of our letter dated 12 May 2000 concerning the letter from Clifford Chance.</p>