

BRIEF FOR LEGISLATIVE COUNCIL

**MANDATORY PROVIDENT FUND SCHEMES ORDINANCE
(CHAPTER 485)**

**MANDATORY PROVIDENT FUND
SCHEMES (AMENDMENT) BILL 2007**

INTRODUCTION

A At the meeting of the Executive Council on 12 June 2007, the Council ADVISED and the Chief Executive ORDERED that the Mandatory Provident Fund Schemes (Amendment) Bill 2007 (“the Bill”), at Annex A, should be introduced into the Legislative Council.

JUSTIFICATIONS

2. The Mandatory Provident Fund (“MPF”) System, designed to be a mandatory, privately managed, fully-funded scheme, was launched in December 2000 for retirement protection for Hong Kong’s working population. As at end March 2007, over 2.3 million employees and self-employed persons had enrolled in the MPF schemes, and the total asset of the MPF constituent funds was over \$200 billion. Given the impact of the MPF System on the community, it is essential that the MPF System should be constantly reviewed to ensure that it continues to serve the needs of the existing and potential scheme members. The present proposed amendments are recommended by Mandatory Provident Fund Schemes Authority (“MPFA”), covering different aspects of the operation of the MPF System.

Major Legislative Proposals

(a) MPF treatment of housing allowance and other housing benefit

3. Under the Mandatory Provident Fund Schemes Ordinance (“MPFSO”), each employee and employer has to contribute 5% of the relevant income as mandatory contributions, subject to the minimum and maximum levels of relevant income. Housing allowance and other housing

benefit are excluded from the definition of “relevant income”. It has come to our attention that some employers have intentionally restructured the remuneration package of their employees by converting a portion of salary and wages to what they claim to be a housing allowance or other housing benefit so as to reduce the amount of relevant income and to evade their responsibilities to pay mandatory contributions in respect of that portion of salary and wages.

4. The primary justification for originally excluding housing allowance from the definition of “relevant income” was that housing allowance could be quite substantial and the exclusion was needed to minimise the potentially significant contribution burden for employees who received housing allowances. Hence, it was recommended that housing allowance and benefit be excluded from relevant income when the legislation was first enacted in August 1995. It was also envisaged at the time that the matter would be unlikely to affect lower-paid employees, probably because they usually were not entitled to housing allowance and benefit. However, in the light of abuses that have developed in recent years, the MPFA has reconsidered the validity of such a basis for exclusion.

5. Conceptually, MPFA is of the view that there is no valid reason to treat housing allowance differently from any other types of allowance or remuneration items. The fact that an allowance is for covering a substantial expenditure item of the employee should not be a determinant in deciding whether that allowance item should be excluded from relevant income. Other types of payment and expense could also be very significant and may even be of an amount greater than housing expense. One may then argue that other types of allowance provided by an employer to an employee should also be excluded from relevant income as any employee’s mandatory contributions thereon would aggravate the contribution burden of the employee. If that rationale for excluding an amount from relevant income was extended to its logical conclusion, we might end up with a situation where mandatory contributions were only payable on an employee’s net savings (i.e. the amount of payments not expended each month) because allowances could be structured to cover all other outgoings. To apply such rationale, mandatory contributions could be substantially reduced in many cases. Hence, the fact that housing expense is expensive in Hong Kong does not appear to fully justify its exclusion from relevant income.

6. Further, if the purpose of the application of the housing allowance exclusion was to alleviate the contribution burden of those employees who have to incur housing expense, this treatment should be extended to all employees incurring housing expense regardless of whether

they are receiving housing allowance from employers. This, however, would be impractical and susceptible to manipulation.

7. We propose to amend the MPFSO by removing the specific housing allowance and benefit exclusion from the definition of “relevant income”. As a result, all remuneration items (including housing allowance/other housing benefit) will be taken into account in determining the relevant income for computation of mandatory contribution purpose.

(b) Improvement of arrears recovery mechanism

8. Sections 132-136 of the Mandatory Provident Fund Schemes (General) Regulation (“General Regulation”) prescribe in detail the procedure for recovering arrears of contribution¹. Concerns have been expressed that the current arrears recovery process is too cumbersome, thus affecting the ability to recover default contribution in a timely manner from employers, especially in cases where an employer enters into bankruptcy or liquidation.

9. At present, an employer is required to pay the mandatory contributions by the contribution day, and if an employer is in default of payment, the trustee would issue a reminder notice to the employer requiring it to settle the default contribution by the end of the 30-day settlement period². There are concerns that some employers may take advantage of the 30-day settlement period to delay payment as long as possible and settle the mandatory contributions with the trustee only towards the end of the 30-day settlement period.

¹ Where an employer fails to pay the mandatory contributions by the contribution day, the approved trustee needs to issue a reminder notice to the employer requiring it to settle the default contributions by the end of the settlement period (i.e. a 30-day statutory period immediately following the contribution day). If the employer fails to do so, the trustee must make a first report of such fact to the MPFA within the immediately following 7 days. The MPFA will then send a notice to the employer imposing a contribution surcharge and requiring rectification within a specified period. Should the employer still fail to rectify, the trustee will make a second report to the MPFA within the immediately following 10 days. If warranted, the MPFA may institute legal action to recover as a debt due to the MPFA from the employer the default contributions and contribution surcharge.

² The purpose of the 30-day settlement period is to allow some time for the trustees to help employers resolve default cases, particularly those caused by inadvertent omissions or other unintentional reasons. During the 30-day period, upon notification by the trustees, the employers can, for example, rectify careless mistakes made in the computation of contributions and make up for differences in the amounts of contributions due to those mistakes. Those cases that can be resolved during the 30-day period do not need to be reported by the trustees to the MPFA and will therefore allow resources of the MPFA to be focused on genuine default cases. This settlement period was useful during initial implementation of the MPF System because many employers were not familiar with the calculation of MPF contributions then. However, the calculation method was simplified in 2002 and, by now, most employers are familiar with it. On the other hand, some employers are taking it for granted that they do not need to contribute until the end of the settlement period since these cases will not be reported to the MPFA.

10. It is unclear whether the MPFA could impose contribution surcharge and institute civil proceedings against an employer to recover the default contribution and contribution surcharge by virtue of section 18 of the MPFSO only after all the recovery procedures have been complied with. There are some cases where the detailed recovery mechanism prescribed in sections 132-136 could not be complied with in full. An example would be an employer who did not enrol employees in an MPF scheme for a period of several years after employment and did not make contributions for those years. Due to the passage of time, the reporting period for each of the monthly contribution periods has already passed, rendering it impossible for the trustee concerned and MPFA to comply with all the recovery steps, hence the uncertainty as to whether the MPFA has the authority to impose contribution surcharge and institute civil proceedings against the defaulting employers in such cases.

11. The General Regulation requires the MPFA to issue a surcharge notice to an employer requiring him to pay the arrears and contribution surcharge to the trustee after receiving from the trustee a first report that the employer has failed to make a contribution. In cases such as those where it is clear that the employer cannot be contacted at the address on record or that employers have already been wound up, issuance of surcharge notices would inevitably lead to wastage of enforcement resources.

12. In view of the concerns and problems with the existing default contribution recovery procedure, we propose to amend the General Regulation to streamline the procedure by removing the settlement period and allowing the MPFA not to issue surcharge notices to employers in specified circumstances, and clarifying the uncertainty in the law to facilitate the recovery of default contribution by the MPFA even if some recovery steps could not be complied with.

Other Legislative Proposals

13. The other legislative proposals could be broadly classified into three categories: (A) to enhance the enforcement of the MPF System; (B) to improve administration and regulation of MPF schemes; and (C) other technical and miscellaneous amendments. The proposals are summarised in the following paragraphs.

(A) Enhance the Enforcement of the MPF System

(a) Greater effectiveness of service of MPF summonses

14. Service of a summons on a body corporate under MPFSO is governed by the Companies Ordinance (Cap. 32) which provides that a summons may be served on a company by leaving it or sending it by post to the registered office of the company. However, the service would not be effective if the registered address of a company is not valid and there is nobody to acknowledge receipt. We propose to provide for an alternative mechanism for the service of summons on the employer's business address so as to increase the chance of successful service of summons.

(b) Expansion of power to require production of records

15. Currently, the MPF legislation does not explicitly confer the MPFA with the power to request production of records from employers and self-employed persons except during on-site inspections. For clarity, we propose to introduce a new provision in the MPFSO to confer on the MPFA an explicit power to request employers or self-employed persons to produce records to the MPFA within a specified period, irrespective of whether during on-site inspections or not, for the purpose of ensuring compliance with the provisions of the MPF legislation. The employer or self-employed person who, without reasonable excuse, fails to comply with the request commits an offence and is liable on summary conviction to a fine.

(c) Extension of the prosecution time bar

16. The time limit for instituting criminal proceedings for an offence under sections 43C and 43E of the MPFSO and section 26 of the Mandatory Provident Fund Schemes (Exemption) Regulation ("Exemption Regulation") is now governed by section 26 of the Magistrates Ordinance (Cap. 227) which is six months after the occurrence of the offence. To facilitate the MPFA to take enforcement action more effectively, we propose to amend the relevant sections to the effect that criminal proceedings may be instituted for an offence under these sections within six months after the offence is discovered by, or comes to the notice of, the MPFA.

(B) Improve Administration and Regulation of MPF Scheme

(a) Content requirements of annual benefit statement

17. At present, the General Regulation does not provide any mechanism for adjustments to the content requirements for the Annual Benefit Statement other than through amendments to the General Regulation. To enable the content requirements for the Annual Benefit Statement to be changed in line with market developments in a timely manner, we propose that section 56 of the General Regulation be amended to allow for the addition of further content requirements to Annual Benefit Statement as specified by the MPFA.

(b) Transfer of accrued benefits on cessation of employment

18. The General Regulation requires an employer to notify the trustee of the cessation of employment of an employee within 30 days. Failure of the employer to do so might hinder the trustee to process the transfer of accrued benefits as requested by the employee. We propose to allow the trustee to accept from employee a notice of cessation of employment by statutory declaration where his employer cannot be located or refuses to submit the notice by the prescribed date so that his accrued benefit could still be transferred despite the failure of the employer to notify the cessation of employment.

(c) Withdrawal of accrued benefits of a deceased member

19. In the context of withdrawal of MPF accrued benefits, it is unclear as to whether the Official Administrator, who summarily administers the small estate of a deceased member, could be considered as the “personal representative” of the deceased under section 161 of the General Regulation, and therefore can lodge an application for payment of the deceased’s accrued benefits with the trustee of the scheme. We propose to clarify that the Official Administrator could be considered as a “personal representative” for the purpose.

(d) Claiming of accrued benefits by scheme members

20. At present, a scheme member could withdraw his MPF benefits on the ground of permanent departure from Hong Kong by lodging a claim accompanied by a statutory declaration that he departed, or will depart, from Hong Kong permanently on a specified date; and no mandatory contributions are paid or are required to be paid by or in respect of the member to any MPF

scheme since the specified date. A scheme member with small balance accounts of \$5,000 or less could withdraw his accrued benefits in the MPF scheme³, provided that no mandatory contributions were paid or required to be paid by or in respect of the member to that scheme, or to any other registered scheme during the 12 months immediately preceding the lodgement of a claim for payment of accrued benefits.

21. However, in practice, some employers may have deferred or delayed in making mandatory contributions beyond the specified date (in the permanent departure case) or beyond the date of cessation of employment of the scheme member (in the small balance account case). The scheme members would therefore not be able to claim the accrued benefits until the employer makes the contribution. We propose to revise this arrangement so that claimants will be able to withdraw their accrued benefits even if there are outstanding contributions by the specified date or after cessation of employment.

(e) Unclaimed benefits

22. The MPF legislation is silent on the treatment of accrued benefits that have been claimed and paid by cheque but the cheque remains unrepresented by its expiry date. We propose to amend section 171 of the General Regulation to provide that if the cheque remains unrepresented for a certain period after issuance, and that the trustee is unable to locate the claimant, the benefits are to become unclaimed benefits. The trustee then can trigger the procedures in dealing with the unclaimed benefits. This includes reporting of the information to the MPFA for inclusion in the unclaimed benefits register, which is available for public inspection to enable scheme members to locate their benefits.

23. A trustee is now required to publish newspaper notices to invite the member to lodge a claim if a scheme member who is entitled to be paid accrued benefits cannot be located. If no claim is made after publication of the notices, the benefits may be treated as unclaimed benefits. It is, however, silent on when the trustee should publish such a notice and henceforth the benefits could never become unclaimed benefits even if the trustee could not locate the member for a long time. Besides, publishing newspaper notices is

³ The current legislation allows scheme members with small balance accounts of \$5,000 or less and who have permanently left the workforce to withdraw their accrued benefits. This is because such small balances run the risk of erosion by fees and expenses (in case of flat fees in addition to percentage-based fees). Based on the quarterly statistical returns submitted by the trustees, an amount of \$21 million has been withdrawn from the MPF System on the ground of small balance account since the inception of the MPF System to 31 December 2006.

not an effective means to invite members to take the prescribed action. The cost for publication of the newspaper notices will also be borne by the scheme members.

24. A trustee is also required to publish a notice in newspapers listing the names of those members who have unclaimed benefits as at the end of the yearly financial period of the scheme and report the same to the MPFA within six months after the end of that period. The reporting period may therefore cover cases from six to 18 months and is considered to be too long both for monitoring by the MPFA and for the details of unclaimed benefits to be updated in the register maintained by the MPFA.

25. In addition, the existing law requires the trustee to serve a notice on a scheme member who has attained the retirement age of 65 but has not applied for claiming his accrued benefits. If the member responds to the approved trustee's notice and informs the trustee that he would like to keep the benefits in the scheme, the trustee, when sending the Annual Benefit Statement, needs to request the member to indicate whether he wants to keep the benefits in the scheme in the following financial period and a copy of the statement has to be sent to the member again if he fails to reply. This is burdensome as members have to actively respond to the trustee of their preference on the treatment of their benefits annually.

26. In view of the issues highlighted above, we propose to clarify and streamline the processes by which benefits become "unclaimed benefits" by –

- (i) setting out clearly the timeframe for MPF benefits to become unclaimed benefits (i.e. if the trustee cannot locate the scheme members concerned for six months);
- (ii) removing the requirement for trustees to publish newspaper notices to locate the untraceable members while the MPFA will take steps through advertising and educational material to increase members' awareness of the availability and content of the register maintained by MPFA, and the process for claiming unclaimed benefits;
- (iii) requiring the trustees to report any newly identified unclaimed benefits and those unclaimed benefits that have been claimed by members to the MPFA on a quarterly basis; and

- (iv) requiring the trustees to remind scheme members who have reached retirement age that they can apply for withdrawal of benefits at any time and removing the requirement for the members to actively respond to trustees' requests annually should they decide to keep the accrued benefits in the scheme.

(f) Disclosure of information by the MPFA

27. At present, the MPFA is not allowed to disclose to any person information it has obtained in the exercise and performance of functions except under certain specified circumstances. A review of the relevant provisions suggests that in certain circumstances the restriction may not be in the interest of the information subject or the public.

28. The general public, particularly prospective and existing scheme members, need certain information (e.g. fees and charges of the MPF constituent funds) to help them make investment decisions. The MPFSO at present does not specifically allow the MPFA to compile and disclose any comparative information to assist members for the purpose. Furthermore, on occasions, the MPFA has been requested by some parties (e.g. employees) to release their information to certain parties (e.g. the Labour Tribunal) to facilitate the processing of their cases for different purposes but such requests could not be entertained even if consent from the information subject has been obtained. The MPFA is also not able to disclose information which is already in the public domain (including court proceedings) or disclose information to the Official Receiver or liquidator to facilitate their discharge of duties. We propose to amend the MPFSO to enable the MPFA to disclose information in the above circumstances.

(g) Consent to restructuring of MPF schemes

29. In scheme restructuring, some trustees may encounter difficulties in obtaining consent of scheme members, particularly when there are untraceable members. At present, the trustee will apply to the MPFA for consent by virtue of section 34B of MPFSO. However, the existing legislation is unclear as to whether the consent given by MPFA⁴ overrides the requirements to obtain members' consent and is binding on all parties concerned. We propose to amend the MPFSO to put that beyond doubt.

⁴ Before consent is given to any application for restructuring of MPF schemes, the MPFA is required to be satisfied, amongst other things, that there are proper arrangements in place for transferring the accrued benefits of scheme members into the new schemes and that the interest of scheme members will be adequately protected.

(h) Enrolment and contribution requirements for persons who cease to be exempt from MPF legislation

30. Some persons who are exempt from the MPF legislation may cease to be exempt even though they remain in the same employment or as a self-employed person⁵. We propose to clarify that the MPFSO apply to the person as if his employment has begun on the first day he is no longer an exempt person. Similar arrangements are proposed in respect of exempt person who is a self-employed person.

(i) Serving of membership certificates and participation certificates

31. At present, if the trustees send membership certificates or participation certificates to the scheme members or employers by post, it must be of registered form. Ordinary post is much cheaper than registered post. Besides, ordinary post provides convenience to employees and employers as compared to registered post since they do not have to pick up any undelivered registered mail from the post office. We therefore propose to provide that membership certificates or participation certificates could also be sent by ordinary post to provide convenience to employees and employers and reduce administration cost of the MPF schemes.

(C) Other Technical and Miscellaneous Amendments

32. We propose to make a number of technical amendments to the MPF legislation relating to the appointment of investment manager; minimum credit rating requirement for debt securities; eligibility of sub-custodians; undertakings given by trustees; non-refusal requirement of the trustees; encumbrance of scheme assets; the cancellation of approval of constituent funds and approved pooled investment funds; specification of purposes of public registers established under the MPFSO and rectification of the provisions regarding the eligibility conditions for MPF exemption for ORSO registered schemes (as defined in section 2 of the Exemption Regulation). We also propose to make other miscellaneous amendments to rectify the inconsistencies between the Chinese and English texts of certain provisions and clarify the meaning of some provisions of the MPFSO.

⁵ For example, a person attaining the age of 18 whilst in the same employment/being self-employed; ceasing to be a member of an overseas retirement scheme whilst in the same employment/being self-employed; or ceasing to be a member of an MPF exempted ORSO scheme whilst in the same employment.

Legislative Proposal to be Pursued Separately

33. It was intended that the Bill should cover the proposal to impose criminal and civil liability on employers who fail to make MPF contributions for employees who are not enrolled in a MPF scheme. The proposal aims to address the deficiency of the existing legislation that sanctions could only be imposed on employers who default in MPF contributions for enrolled employees but not for non-enrolled employees. However, as more time is needed to draft the relevant legislative provisions for implementing the proposal, we have taken out the proposal from the Bill in order not to hold up the current legislative exercise. We aim to finalise drafting of the relevant legislative provisions and introduce the amendments as soon as possible.

THE BILL

34. The main provisions of the Bill are:

- (i) Part 8 amends sections 7 and 7C of MPFSO as well as sections 120 and 121 of the General Regulation to clarify when the MPFSO applies to employees and self-employed persons who are no longer exempt from the MPF legislation;
- (ii) Part 10 amends sections 162 and 165 of the General Regulation so that scheme members with small balance account may claim accrued benefits even if the employers have deferred making mandatory contributions beyond the date of cessation of employment of the scheme member;
- (iii) Part 12 amends sections 170 to 172 of the General Regulation and adds new sections to the General Regulation to clarify and streamline the processes for the treatment of accrued benefits where the scheme members could not be located;
- (iv) Part 14 amends section 42 of the MPFSO to provide for additional circumstances under which MPFA could disclose information to other parties;
- (v) Part 15 amends section 163 of the General Regulation so that scheme members may claim the accrued benefits on ground of permanent departure from Hong Kong irrespective of whether mandatory contributions were paid or required to be paid since the date of departure;

- (vi) Part 18 amends sections 43C and 43E of the MPFSO as well as section 26 of the Exemption Regulation to extend the prosecution time limit for instituting proceedings for certain offences;
- (vii) Part 19 amends section 34B of the MPFSO to clarify the effect of the consent given by the MPFA to the restructuring of a MPF registered scheme;
- (viii) Part 25 amends the definition of “relevant income” in section 2 of MPFSO so that housing allowance and other housing benefits will form part of the relevant income of a relevant employee;
- (ix) Part 26 adds new section 19A to the MPFSO to empower the MPFA to require employers and self-employed persons to produce documents; and
- (x) Part 27 amends section 18 of the MPFSO to clarify that the exercise by MPFA of its power to recover arrears under that section is not dependent on compliance with the recovery procedures in the General Regulation. The recovery procedures in the General Regulation are also simplified to speed up the recovery process.

LEGISLATIVE TIMETABLE

35. The legislative timetable will be:

Publication in the Gazette	15 June 2007
First and commencement of the Second Reading Debate	27 June 2007
Resumption of Second Reading debate, committee stage and Third Reading	to be notified

IMPLICATIONS OF THE PROPOSAL

B 36. The proposal has economic and civil service implications as set out at Annex B.

37. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. The Bill will not affect the current binding effect of the MPFSO. It has no financial, staffing, sustainability, productivity or environmental implications.

PUBLIC CONSULTATION

38. The legislative proposals have been thoroughly deliberated by the MPF Schemes Operation Review Committee (“the Review Committee”) and the MPF Schemes Advisory Committee and are supported by them. Both the Review Committee and the Advisory Committee comprise employers’ and employees’ representatives. We briefed the LegCo Panel on Financial Affairs on 12 April 2007 and have informed the Labour Advisory Board of the proposed amendments.

PUBLICITY

39. A press release will be issued and a spokesman will be available to answer media and public enquiries.

BACKGROUND

40. The Review Committee was established by the MPFA in August 2001 for the purpose of conducting comprehensive review of the MPF System and relevant legislation with regard to their operational and administrative aspects. The Review Committee comprises representatives of employer and employee bodies, service providers, professional organizations, Government and MPFA. Based on the advice of the Review Committee, the MPFA has made a number of recommendations on amendments to the MPFSO, the General Regulation and the Exemption Regulation.

ENQUIRIES

41. Enquiries in relation to the Bill should be directed to Ms Jenny Chan, Principal Assistant Secretary for Financial Services and the Treasury (Financial Services)³, at 2527 3909.

Financial Services and the Treasury Bureau
June 2007

**MANDATORY PROVIDENT FUND SCHEMES
(AMENDMENT) BILL 2007**

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A BILL

To

Amend the Mandatory Provident Fund Schemes Ordinance and the subsidiary legislation made under it.

Enacted by the Legislative Council.

PART 1

PRELIMINARY

1. Short title

This Ordinance may be cited as the Mandatory Provident Fund Schemes (Amendment) Ordinance 2007.

2. Commencement

This Ordinance shall come into operation on a day to be appointed by the Secretary for Financial Services and the Treasury by notice published in the Gazette.

PART 2

FORM OF CERTAIN UNDERTAKINGS

Mandatory Provident Fund Schemes (General) Regulation

3. What is continuous financial support for the purposes of this Regulation?

Section 12 of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A) is amended by repealing “gives the Authority a written undertaking by deed or like form,” and substituting “gives a written undertaking to the Authority by deed, or by like form”.

4. Eligibility requirements for company incorporated outside Hong Kong

Section 17(12) is amended by repealing “enter into a written undertaking with the Authority” and substituting “give a written undertaking to the Authority by deed, or by like form acceptable to the Authority,”.

5. Undertaking to comply with requirements and standards

Section 22 is amended by adding “by deed, or by like form acceptable to the Authority,” after “Authority”.

6. Independence of investment manager

Section 46(3)(c) is amended by adding “by deed, or by like form acceptable to the Authority,” after “Authority”.

7. Investment management contract

(1) Section 47(3)(a) is amended by adding “by deed or by like form” after “undertaking”.

(2) Section 47(3)(b) is amended by adding “by deed or by like form” after “undertaking”.

8. Eligibility for appointment as custodian

Section 68(5) is amended by repealing “gives the Authority a written undertaking by deed or like form,” and substituting “gives a written undertaking to the Authority by deed, or by like form”.

9. Custodial agreement

Section 69(2) is amended by repealing “, by deed, give an undertaking to the Authority” and substituting “give a written undertaking to the Authority by deed, or by like form acceptable to the Authority”.

Mandatory Provident Fund Schemes (Exemption) Regulation

10. Minimum standards applicable to trustees, etc. of schemes

Schedule 3 to the Mandatory Provident Fund Schemes (Exemption) Regulation (Cap. 485 sub. leg. B) is amended, in section 7, by adding –

“(3A) An undertaking given to the Authority pursuant to a requirement made under subsection (3)(f) must be by deed, or by like form acceptable to the Authority.”.

PART 3

CREATION OF ENCUMBRANCES BY TEMPORARY CUSTODIANS

Mandatory Provident Fund Schemes (General) Regulation

11. Approved trustee to ensure that scheme assets are not improperly encumbered

Section 65(2)(c) of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A) is amended by repealing “of payment” and substituting “for payment of fees”.

12. Temporary custodian

(1) Section 70(4)(c) is amended by repealing “the circumstances set out in subsection (5) or (6)” and substituting “any of the circumstances set out in subsection (5)”.

(2) Section 70(5) is repealed and the following substituted –

“(5) The circumstances referred to in subsection (4)(c) are as follows –

(a) where the encumbrance is created for the purpose of securing an amount borrowed to enable accrued benefits to be paid to or

in respect of scheme members, but only if –

- (i) the amount borrowed (together with any other borrowings made for the same purpose) does not exceed 10 per cent of the market value of the scheme assets at the time of the borrowing; and
 - (ii) the borrowing is not part of a series of borrowings; and
 - (iii) at the time the borrowing was made, it was unlikely that the period of borrowing would exceed 90 days;
- (b) where the encumbrance is created for the purpose of securing an amount borrowed to settle a transaction relating to the acquisition of scheme assets, but only if –
- (i) the amount borrowed (together with any other borrowings made for the same purpose) does not exceed 10 per cent of the market value of the scheme assets at the time of the borrowing; and
 - (ii) the borrowing is not part of a series of borrowings; and
 - (iii) at the time the borrowing was made, it was unlikely that the period of borrowing would exceed 7 working days; and

- (iv) at the time the decision to enter into the transaction was made, it was unlikely that the borrowing would be necessary;
 - (c) where the encumbrance is created for the purpose of securing a claim for payment of fees for the safe custody or administration of the scheme assets by a central securities depository or a delegate of a custodian;
 - (d) where the encumbrance is created for the purpose of acquiring a financial futures contract pursuant to section 14 of Schedule 1 or a currency forward contract pursuant to section 15 of Schedule 1;
 - (e) where the encumbrance is created by operation of law (whether the law of Hong Kong or of a place outside Hong Kong).”.
- (3) Section 70(6) is repealed.

13. Investment of Scheme Funds

Schedule 1 is amended, within the square brackets at the beginning, by repealing “65 & 118” and substituting “65, 70 & 118”.

14. Contents of custodial agreements

Section 3(c) of Schedule 3 is amended by repealing “of payment” and substituting “for payment of fees”.

PART 4

UNDERTAKINGS NOT TO REFUSE APPLICATIONS BY RELEVANT EMPLOYEES AND EMPLOYERS

Mandatory Provident Fund Schemes Ordinance

15. Approval of trustees

Section 20(6)(b) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) is repealed and the following substituted –

“(b) has given a written undertaking to the Authority by deed, or by like form acceptable to the Authority, that the applicant will not, in relation to a registered scheme of which the applicant becomes the approved trustee, refuse –

- (i) an application for membership of the scheme made by or on behalf of a relevant employee of a participating employer, or by or on behalf of a self-employed person who is 18 years of age or over and below retirement age, who –
 - (A) is not precluded by a provision of this Ordinance from being a member of the scheme; and
 - (B) is required by this Ordinance to be a member of a registered scheme;
- (ii) an application for participation in the scheme made by or on behalf of an employer whose employee –
 - (A) is not precluded by a provision of this Ordinance from being a member of the scheme; and
 - (B) is required by this Ordinance to be a member of a registered scheme; or

- (iii) an application for membership of the scheme made only for the purpose of maintaining a preserved account within the scheme by a person who –
 - (A) is not precluded by a provision of this Ordinance from being a member of the scheme; and
 - (B) is required by this Ordinance to be a member of a registered scheme; and”.

16. Application for registration as employer sponsored scheme or master trust scheme

Section 21(8) is repealed and the following substituted –

“(8) The Authority may, as a condition of registering a provident fund scheme under this section, require the applicant to give to the Authority a written undertaking with respect to the administration of the scheme by deed, or by like form acceptable to the Authority, including –

- (a) in the case of an application to register a scheme as an employer sponsored scheme, an undertaking not to refuse –
 - (i) an application for membership of the scheme made by or on behalf of a relevant employee of the participating employer; or
 - (ii) an application for participation in the scheme made by or on behalf of an employer; and
- (b) in the case of an application to register a scheme as a master trust scheme, an undertaking not to refuse –
 - (i) an application for membership of the scheme made by or on behalf of –

- (A) any relevant employee; or
- (B) any self-employed person who is 18 years of age or over and below retirement age; or
- (ii) an application for participation in the scheme made by or on behalf of an employer; or
- (iii) an application for membership of the scheme made by a person only for the purpose of maintaining a preserved account within the scheme.”.

17. Applications for registration of schemes as industry schemes

Section 21A(8) is repealed and the following substituted –

“(8) The Authority may, as a condition of registering a provident fund scheme as an industry scheme, require the applicant to give to the Authority a written undertaking with respect to the administration of the scheme by deed, or by like form acceptable to the Authority, including an undertaking not to refuse –

- (a) an application for membership of the scheme made by or on behalf of –
 - (i) any relevant employee who is employed in the industry concerned; or
 - (ii) any self-employed person who is 18 years of age or over and below retirement age and engaged in the industry concerned; or
- (b) an application for participation in the scheme made by or on behalf of an employer engaged in the industry concerned; or

- (c) an application for membership of the scheme made only for the purpose of maintaining a preserved account within the scheme by a person who was previously engaged in the industry concerned.”.

PART 5

IMPROVEMENT OF CHINESE TEXT

Mandatory Provident Fund Schemes (Exemption) Regulation

18. Mandatory conditions

Schedule 2 to the Mandatory Provident Fund Schemes (Exemption) Regulation (Cap. 485 sub. leg. B) is amended, in section 1(1) –

- (a) in the definition of “years of post-MPF service”, by repealing “(參加強制性公積金計劃後的服務年期)” and substituting “(強制性公積金實施後的服務年期)”;
- (b) in the Chinese text, in the definition of “最低強制性公積金利益”, in paragraph (b), by repealing “參加強制性公積金計劃後的服務年期” and substituting “強制性公積金實施後的服務年期”.

PART 6

REQUIREMENTS TO BE SATISFIED BEFORE ORSO REGISTERED SCHEME TREATED AS RELEVANT ORSO REGISTERED SCHEME

Mandatory Provident Fund Schemes (Exemption) Regulation

19. Certain ORSO registered schemes which are not relevant ORSO registered schemes may be treated as relevant ORSO registered schemes

(1) Section 14(1) of the Mandatory Provident Fund Schemes (Exemption) Regulation (Cap. 485 sub. leg. B) is amended by adding “the Authority is satisfied that” after “but only if”.

(2) Section 14(1)(c) is amended by adding “or will, before or as soon as practicable after the issue of an exemption certificate in respect of the scheme under section 16, be transferred” after “transferred”.

(3) Section 14(2)(d) is amended by adding “or will comprise” after “comprise”.

(4) Section 14 is amended by adding –

“(3) Where the Authority receives an application under this section, the Authority may require the applicant to supply to the Authority such information or documents (including a legal opinion on a matter specified by the Authority) as the Authority may specify and which are reasonably required to enable it to determine the application.”.

PART 7

PURPOSES OF PUBLIC REGISTERS

Mandatory Provident Fund Schemes Ordinance

20. Register of exempt schemes to be kept

Section 5A of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) is amended by adding –

“(2A) The register is to be made available for inspection to enable any member of the public to ascertain whether an exemption has been granted by the Authority in respect of an occupational retirement scheme under section 5.”.

21. Register of approved trustees to be kept

Section 20C is amended by adding –

“(2A) The register is to be made available for inspection to enable any member of the public to ascertain whether a trustee is approved under section 20.”.

22. Register of schemes to be kept

Section 21B is amended by adding –

“(2A) The register is to be made available for inspection to enable any member of the public to ascertain whether a scheme is registered under section 21 or 21A.”.

PART 8

**TIME FROM WHICH MANDATORY PROVIDENT FUND
SCHEMES ORDINANCE APPLIES TO EXEMPT PERSONS ETC.**

Mandatory Provident Fund Schemes Ordinance

**23. Employer to arrange for employees to
become scheme members, etc.**

Section 7 of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) is amended by adding –

“(4) If an employer –

- (a) enters into a contract of employment with an employee who is less than 18 years of age; and
- (b) continues to employ the employee after he becomes a relevant employee upon reaching 18 years of age,

this section applies to the employer and the employee as if the employment had begun on the day on which the employee reached 18 years of age.”.

24. Duty of self-employed person to become scheme member

Section 7C is amended by adding –

“(2A) If a self-employed person to whom this section does not apply by virtue of subsection (6)(a) continues to be self-employed upon reaching 18 years of age, this section applies to the person as if the self-employment had begun on the day on which he reached 18 years of age.”.

Mandatory Provident Fund Schemes (General) Regulation

25. Division heading amended

The heading of Division 1 of Part XI of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A) is amended by adding “*or (b) or 5*” after “(a)”.

26. When sections 7, 7A and 7B of the Ordinance apply to exempted employee

(1) The heading of section 120 is amended by repealing “**sections 7, 7A and 7B of the Ordinance apply**” and substituting “**the Ordinance applies**”.

(2) Section 120 is amended by renumbering it as section 120(1).

(3) Section 120(1) is amended by repealing “after that period, sections 7, 7A and 7B of the Ordinance apply to the employee” and substituting “by the same employer after that period, the Ordinance applies to the employee and his employer”.

(4) Section 120 is amended by adding –

“(2) If a relevant employee who, having been exempted from the Ordinance because of the operation of section 4(3)(b) of the Ordinance, continues to be employed by the same employer after ceasing to be a member of a provident, pension, retirement or superannuation scheme (however described) of a place outside Hong Kong, the Ordinance applies to the employee

and his employer as if the employment had begun on the day on which the employee ceased to be such a member.

(3) If a relevant employee who, having been exempted from the operation of all or any of the provisions of the Ordinance by virtue of an exemption granted under section 5 of the Ordinance, continues to be employed by the same employer after ceasing to be so exempted, the Ordinance applies to the employee and his employer as if the employment had begun on the day on which the employee ceased to be so exempted.”.

27. When section 7C of the Ordinance applies to exempted self-employed person

(1) The heading of section 121 is amended by repealing “**section 7C of**”.

(2) Section 121 is amended by renumbering it as section 121(1).

(3) Section 121(1) is amended by repealing “section 7C of”.

(4) Section 121 is amended by adding –

“(2) If a self-employed person who, having been exempted from the Ordinance because of the operation of section 4(3)(b) of the Ordinance, continues to be self-employed after ceasing to be a member of a provident, pension, retirement or superannuation scheme (however described) of a place outside Hong Kong, the Ordinance applies to the person as if the self-employment had begun on the day on which he ceased to be such a member.”.

PART 9

NOTICE OF CESSATION OF EMPLOYMENT BY EMPLOYEES TO APPROVED TRUSTEES

Mandatory Provident Fund Schemes (General) Regulation

28. Transfer of accrued benefits of member of employer sponsored scheme

(1) Section 145 of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A) is amended by adding –

“(7B) If –

(a) subsection (6) or (7A) is not complied with; and

(b) the approved trustee of the employer sponsored scheme concerned is satisfied that the former employer cannot be located or refuses to comply with subsection (6) or (7A),

the approved trustee may accept a written notice given by the employee concerned as evidence of the employee’s cessation of employment and the date of cessation.

(7C) The notice referred to in subsection (7B) must be given by way of a statutory declaration in a form approved by the Authority.”.

(2) Section 145(8) is amended by adding “, by the employee’s former employer or by the employee,” after “has been notified”.

29. Transfer of accrued benefits of member of master trust scheme or industry scheme (other than a casual employee who is a member of an industry scheme)

(1) Section 146 is amended by adding –

“(9B) If –

(a) subsection (8) or (9A) is not complied with; and

(b) the approved trustee of the registered scheme concerned is satisfied that the former employer cannot be located or

refuses to comply with subsection (8) or (9A),

the approved trustee may accept a written notice given by the employee concerned as evidence of the employee's cessation of employment and the date of cessation.

(9C) The notice referred to in subsection (9B) must be given by way of a statutory declaration in a form approved by the Authority.”.

(2) Section 146(10) is amended by adding “, by the employee's former employer or by the employee,” after “has been notified”.

30. Financial Penalties

Schedule 4 is amended, in Part II, in item 60 –

- (a) in column 2, by repealing “145(5) and (6), 146(7) and (8)” and substituting “145(5), (6) and (7A), 146(7), (8) and (9A)”;
- (b) in column 3, by repealing “145(5) and (6), 146(7) and (8)” and substituting “145(5), (6) and (7A), 146(7), (8) and (9A)”.

PART 10

CLAIM FOR PAYMENT OF SMALL BALANCE

Mandatory Provident Fund Schemes (General) Regulation

31. Additional classes of persons entitled to be paid accrued benefits

(1) Section 162(2)(a) of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A) is amended by adding “as at the date of the claim for payment of those benefits made by him under section 165” after “scheme”.

- (2) Section 162(2)(b) is repealed and the following substituted –
- “(b) as at the date of the claim, at least 12 months have elapsed since the contribution day in respect of the latest contribution period for which a mandatory contribution is required to be made to that scheme or to any other registered scheme by or in respect of the member; and”.

32. Claim for payment of small balance

- (1) Section 165(2)(b) is repealed and the following substituted –
- “(b) as at the date of the claim, at least 12 months have elapsed since the contribution day in respect of the latest contribution period for which a mandatory contribution is required to be made to that scheme or to any other registered scheme by or in respect of the member; and”.
- (2) Section 165(3)(a) is amended by adding “as at the date of the claim” after “scheme”.
- (3) Section 165(3)(b) is repealed and the following substituted –
- “(b) as at the date of the claim, at least 12 months have elapsed since the contribution day in respect of the latest contribution period for which a mandatory contribution is required to be made to that scheme or to any other registered scheme by or in respect of the member; and”.

PART 11

CANCELLATION OF APPROVAL OF POOLED INVESTMENT FUND OR CONSTITUENT FUND

Mandatory Provident Fund Schemes (General) Regulation

33. What is an approved pooled investment fund for the purposes of this Regulation?

Section 6 of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A) is amended by adding –

“(5) The Authority may on application made by a person specified in the guidelines cancel the approval of a pooled investment fund.

(6) An application under subsection (5) must –

- (a) be in a form approved by the Authority; and
- (b) contain such information, and be accompanied by such documents, as may be specified for the purposes of this section in the guidelines.

(7) The Authority may, by written notice, require an applicant to provide such additional information and documents as are reasonably necessary to enable it to determine the application. If such a requirement is not complied with within a reasonable time specified in the notice, the Authority may reject the application.”.

34. Scheme may consist of a single constituent fund or of separate constituent funds

Section 36 is amended by adding –

“(4) The Authority may on application made by an approved trustee of a registered scheme cancel the approval of a constituent fund of the scheme.

(5) An application under subsection (4) must –

- (a) be in a form approved by the Authority; and
- (b) contain such information, and be accompanied by such documents, as may be specified for the purposes of this section in the guidelines.

(6) The Authority may, by written notice, require an applicant to provide such additional information and documents as are reasonably necessary to enable it to determine the application. If such a requirement is

not complied with within a reasonable time specified in the notice, the Authority may reject the application.

(7) The approval granted in respect of each constituent fund of a registered scheme is taken to be cancelled upon the cancellation of the registration of the scheme.”.

PART 12

CIRCUMSTANCES WHEN ACCRUED BENEFITS BECOME UNCLAIMED BENEFITS

Mandatory Provident Fund Schemes (General) Regulation

35. Sections substituted

Sections 170 and 171 of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A) are repealed and the following substituted –

“170. Duty of approved trustee if scheme member cannot be located

- (1) Subject to subsection (3), if –
- (a) a member of a registered scheme or some other person has become entitled to be paid the member’s accrued benefits but no claim has been lodged with the approved trustee of the scheme for payment of the member’s benefits under this Part; and
 - (b) the trustee becomes aware that the member or other person cannot be located,

the trustee must, as soon as practicable after becoming so aware, take such steps as are specified in the guidelines.

(2) If the trustee cannot locate the member or other person within 6 months after taking the specified steps, the accrued benefits become unclaimed benefits at the end of that period.

(3) This section does not apply in a case where a scheme member of a registered scheme who has reached the retirement age has not lodged a claim with the approved trustee of the scheme for payment of the member's accrued benefits under this Part.

171. Duty of approved trustee if claimant cannot subsequently be located

(1) This section applies where a member of a registered scheme or some other person has lodged a claim with the approved trustee of the scheme for the payment of the member's accrued benefits and the trustee is satisfied that the member or other person is entitled to be paid the accrued benefits.

(2) If the trustee becomes aware that the claimant cannot be located before payment of the scheme member's accrued benefits, the trustee must, as soon as practicable after becoming so aware, take such steps as are specified in the guidelines.

(3) If the trustee cannot locate the claimant within 6 months after taking the specified steps, the accrued benefits become unclaimed benefits at the end of that period.

(4) If –

(a) a cheque has been sent by the trustee to the claimant in payment of the scheme member's accrued benefits but the cheque is not presented for payment within the period specified in the guidelines; and

(b) the trustee is unable to locate the claimant during the period of 6 months after the expiry of the period specified in the guidelines,

the accrued benefits become unclaimed benefits at the end of the 6-month period.”.

36. Approved trustee to notify scheme member of entitlement

(1) The heading of section 172 is repealed and the following substituted –

“Duty of approved trustee to notify scheme member who has reached retirement age of his entitlement”.

(2) Section 172(2) is repealed.

(3) Section 172(3)(a) is amended by repealing “further notice given under subsection (2)” and substituting “notice given under subsection (1)”.

(4) Section 172(4) is repealed and the following substituted –

“(4) If the trustee –

(a) receives a reply to a request contained in a notice given under subsection (1) indicating that the member elects to retain the member’s accrued benefits within the scheme; or

(b) does not receive a reply to the request but is able to locate the member,

the trustee must serve on the member a benefit statement in accordance with section 56.”.

(5) Section 172(5) is repealed and the following substituted –

“(5) The benefit statement must –

(a) include only those particulars listed in section 56(3) that are applicable to the member; and

(b) be accompanied by a notice informing the member that –

(i) the member’s accrued benefits are being retained in the scheme; and

(ii) the member may at any time lodge with the approved trustee of the scheme a claim for payment of the member's accrued benefits in accordance with section 159.”.

(6) Section 172(6) and (7) is repealed.

(7) Section 172(8) is amended by repealing “or (2), or in a benefit statement or a copy of a benefit statement served on the member under this section,”.

(8) Section 172(9), (10), (11) and (12) is repealed.

37. Sections added

The following are added –

“172A. Duty of approved trustee when scheme member whose accrued benefits are retained in a scheme cannot be located

(1) If the approved trustee of a registered scheme becomes aware that a scheme member on whom a benefit statement has been served under section 172(4) cannot be located while the member's accrued benefits are being retained in the scheme, the trustee must, as soon as practicable after becoming so aware, take such steps as are specified in the guidelines.

(2) If the trustee cannot locate the member within 6 months after taking the specified steps, the accrued benefits become unclaimed benefits at the end of that period.

172B. Approved trustee to submit to Authority particulars of scheme members who have unclaimed benefits

(1) The approved trustee of a registered scheme must submit to the Authority a quarterly report containing –

- (a) particulars of scheme members –
 - (i) who have unclaimed benefits in the scheme as at the end of the quarter to which the report relates; and
 - (ii) whose particulars have not previously been provided to the Authority in accordance with this section;
- (b) particulars of scheme members whose unclaimed benefits have been claimed in the quarter to which the report relates; and
- (c) such information relating to the unclaimed benefits as may be specified in the guidelines.

(2) The quarterly report must be submitted within the period, and in the manner, specified in the guidelines.

172C. Register of scheme members who have unclaimed benefits to be kept

(1) The Authority must establish and maintain a register of scheme members of a registered scheme who have unclaimed benefits in the scheme.

(2) The register may be in such form, and contain such information, as the Authority may determine.

(3) The register is to be kept at the head office of the Authority in Hong Kong.

(4) Any member of the public is entitled, without charge, to inspect the register during ordinary business hours of the Authority to ascertain whether he has any unclaimed benefits in the scheme.”.

38. Financial Penalties

Schedule 4 is amended, in Part II, by repealing item 74 and substituting –

“74	172	Duty of approved trustee to notify scheme member who has reached retirement age of his entitlement	10,000	20,000	50,000
74A	172A	Duty of approved trustee when scheme member whose accrued benefits are retained in a scheme cannot be located	10,000	20,000	50,000
74B	172B	Approved trustee to submit to Authority particulars of scheme members who have unclaimed benefits	10,000	20,000	50,000”.

PART 13**APPOINTMENT OF INVESTMENT MANAGER****Mandatory Provident Fund Schemes (General) Regulation**

39. Approved trustee to appoint investment manager

(1) Section 44(2) of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A) is repealed and the following substituted –

“(2) The trustee does not have to comply with subsection (1) in relation to a constituent fund of the scheme if –

(a) the accrued benefits of the constituent fund are invested only in a single approved pooled investment fund, or in a single approved index-tracking collective investment scheme, that is specified in the offering document; or

(b) the trustee has obtained the prior approval of the Authority that compliance with subsection (1) is not required in relation to the fund.”.

(2) Section 44 is amended by adding –

“(6) In subsection (2), “approved index-tracking collective investment scheme” (核准緊貼指數集體投資計劃) means an index-tracking collective investment scheme within the meaning of section 1 of Schedule 1 that is approved by the Authority for the purposes of section 6A of that Schedule.”.

40. Investment of Scheme Funds

Schedule 1 is amended, within the square brackets at the beginning, by adding “44,” after “40,”.

PART 14

DISCLOSURE OF INFORMATION

Mandatory Provident Fund Schemes Ordinance

41. Authority may disclose certain information despite section 41

(1) Section 42(1) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) is amended by adding –

“(ca) disclose the information in such form as the Authority considers appropriate but only if the information has been made available to members of the public by virtue of being disclosed in any circumstances in which, or for any purpose for which, disclosure is not precluded by section 41;”.

(2) Section 42(1)(d) is amended by repealing “or the Financial Reporting Council established by section 6(1) of the Financial Reporting Council Ordinance (Cap. 588)” and substituting “the Financial Reporting Council established by section 6(1) of the Financial Reporting Council Ordinance (Cap. 588), the Official Receiver appointed under the Bankruptcy Ordinance (Cap. 6) or a liquidator appointed under the Companies Ordinance (Cap. 32)”.

(3) Section 42(1)(e)(ii) is amended by repealing the full stop and substituting a semicolon.

(4) Section 42(1) is amended by adding –

“(f) disclose the information with the consent of the person from whom the information was obtained or received and, if the information relates to a different person, with the consent also of the person to whom the information relates;

(g) disclose the information relating to provident fund schemes or constituent funds or approved pooled investment funds, but only if the Authority considers that it could –

- (i) promote understanding by the public of the retirement scheme industry in Hong Kong and of the benefits, risks and liabilities associated with investing in provident fund schemes or occupational retirement schemes;
- (ii) promote understanding by the public of the importance of making informed decisions relating to provident fund schemes or occupational retirement schemes, including, in particular, the importance of making informed decisions when choosing registered schemes or investing contributions or accrued benefits; or
- (iii) secure an appropriate degree of protection for the public by ensuring that they have sufficient information to help them make informed decisions relating to provident fund schemes or occupational retirement schemes, including, in particular, sufficient information to help them make informed decisions when choosing registered schemes or investing contributions or accrued benefits.”.

PART 15

CLAIM FOR PAYMENT OF ACCRUED BENEFITS ON GROUND OF PERMANENT DEPARTURE

Mandatory Provident Fund Schemes (General) Regulation

42. Claim for payment on ground of permanent departure from Hong Kong

(1) Section 163(2)(a) of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A) is repealed and the following substituted –

“(a) a statutory declaration by the claimant that the claimant departed, or will depart, from Hong Kong permanently on a specified date; and”.

(2) Section 163(5) is amended by repealing “and the amount paid” and substituting “, the amount paid and such information as may be specified by the Authority”.

(3) Section 163 is amended by adding –

“(5A) For the avoidance of doubt, subsection (4) or (5) does not apply in relation to the payment of an outstanding contribution or contribution surcharge under section 169.”.

(4) Section 163(7) is amended by repealing “(5)” and substituting “(5A)”.

PART 16

MEMBERSHIP CERTIFICATES AND PARTICIPATION CERTIFICATES

Mandatory Provident Fund Schemes (General) Regulation

43. How notices etc. are to be served, etc. for purposes of the Ordinance

Section 206(3) of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A) is repealed and the following substituted –

“(3) Subsection (2) does not apply in relation to a document given under section 55 or 124.”.

PART 17

MEANING OF “PERSONAL REPRESENTATIVE”

Mandatory Provident Fund Schemes Ordinance

44. Interpretation

Section 2(1) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) is amended by adding –

““personal representative” (遺產代理人) means –

- (a) a personal representative within the meaning of section 2 of the Probate and Administration Ordinance (Cap. 10); or
- (b) where the Official Administrator gets in and administers an estate in a summary manner under section 15 of that Ordinance, the Official Administrator;”.

45. Withdrawal of accrued benefits

Section 15(5) is repealed.

PART 18

EXTENSION OF PROSECUTION TIME LIMIT

Mandatory Provident Fund Schemes Ordinance

46. Offences by employers

Section 43B(4) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) is amended, in the English text, by repealing “instigated” and substituting “instituted”.

47. Offences by self-employed persons

Section 43C is amended by adding –

“(3) Notwithstanding section 26 of the Magistrates Ordinance (Cap. 227), proceedings may be instituted for an offence against this section within 6 months after the offence is discovered by, or comes to the

notice of, the Authority.”.

48. Offence to make false or misleading statement

- (1) Section 43E is amended by renumbering it as section 43E(1).
- (2) Section 43E is amended by adding –
 - “(2) Notwithstanding section 26 of the Magistrates Ordinance (Cap. 227), proceedings may be instituted for an offence against this section within 6 months after the offence is discovered by, or comes to the notice of, the Authority.”.

Mandatory Provident Fund Schemes (Exemption) Regulation

49. Offences

- (1) Section 26 of the Mandatory Provident Fund Schemes (Exemption) Regulation (Cap. 485 sub. leg. B) is amended by renumbering it as section 26(1).
- (2) Section 26 is amended by adding –
 - “(2) Notwithstanding section 26 of the Magistrates Ordinance (Cap. 227), proceedings may be instituted for an offence against subsection (1)(a) consisting of a failure to comply with section 4(1) or 15(1) within 6 months after the offence is discovered by, or comes to the notice of, the Authority.”.

PART 19

RESTRUCTURING OF REGISTERED SCHEMES

Mandatory Provident Fund Schemes Ordinance

50. Power to restructure registered schemes

- (1) The heading of section 34B of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) is repealed and the following substituted –

“Authority may consent to restructuring of registered schemes”.

(2) Section 34B(1) is amended by repealing everything after “scheme or schemes, as the case may be” and substituting a full stop.

(3) Section 34B is amended by adding –

“(9) The restructuring of a registered scheme or registered schemes that is carried out with the consent of the Authority under this section is, notwithstanding any provision of this Ordinance or the governing rules of the scheme or schemes, binding on the approved trustee or trustees of the scheme or schemes, all participating employers and scheme members in the scheme or schemes and all other parties bound by the governing rules of the scheme or schemes.

(10) The Authority’s consent to the restructuring of a registered scheme or registered schemes does not affect the right of a participating employer or scheme member in the scheme or any of the schemes to elect to have the accrued benefits of the member transferred under Part XII of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A).

(11) In this section, a reference to a restructuring of a registered scheme or registered schemes is a reference to any arrangement under which the members of the scheme or schemes, or the accrued benefits of the members of the scheme or schemes, are transferred to another registered scheme or other registered schemes.”.

PART 20

SERVICE OF SUMMONS

Mandatory Provident Fund Schemes Ordinance

51. Section added

The Mandatory Provident Fund Schemes Ordinance (Cap. 485) is amended by adding –

“47C. Service of summons

Notwithstanding section 8 of the Magistrates Ordinance (Cap. 227) and without limiting the generality of section 338 or 356 of the Companies Ordinance (Cap. 32), a summons relating to an offence against this Ordinance that is alleged to have been committed by any employer may be served on the employer by leaving it at, or sending it by post to, any place at which the employer carries on business.”.

Mandatory Provident Fund Schemes (General) Regulation**52. How notices etc. are to be served, etc. for purposes of the Ordinance**

Section 206 of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A) is amended by adding –

“(5) This section does not apply to summonses.”.

PART 21**INVESTMENT OF CAPITAL PRESERVATION FUND****Mandatory Provident Fund Schemes (General) Regulation****53. Provisions relating to capital preservation fund**

Section 37(2)(a)(iii) of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A) is amended by repealing “short term”.

PART 22

PARTICULARS IN SCHEME MEMBER'S BENEFIT STATEMENT

Mandatory Provident Fund Schemes (General) Regulation

54. Approved trustee to provide scheme members with annual benefit statements

Section 56(3) of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A) is amended by adding –

“(fa) contain such information as may be specified by the Authority; and”.

PART 23

PERSONS ELIGIBLE TO BE DELEGATE OF CUSTODIAN

Mandatory Provident Fund Schemes Ordinance

55. Interpretation

Section 2(1) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) is amended by adding –

““subsidiary” (附屬公司) has the meaning assigned to it by section 2(4), (5) and (6) of the Companies Ordinance (Cap. 32);”.

56. Associates and related companies

(1) The heading of Schedule 8 is amended by repealing “RELATED” and substituting “ASSOCIATED”.

(2) The heading of Part 3 of Schedule 8 is amended by repealing “RELATED” and substituting “ASSOCIATED”.

(3) Part 3 of Schedule 8 is amended by repealing section 19.

Mandatory Provident Fund Schemes (General) Regulation

57. Eligibility of delegate of custodian

(1) Section 71(1)(c) of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A) is repealed and the following substituted –

“(c) is an overseas bank or overseas trust company that is a subsidiary or related company of an entity described in subsection (1A).”.

(2) Section 71 is amended by adding –

“(1A) The entity referred to in subsection (1)(c) is an approved overseas bank, an approved overseas trust company, an authorized financial institution or a registered trust company incorporated in Hong Kong, that –

(a) has a paid up capital of not less than US\$200,000,000 or an equivalent amount in another currency; and

(b) satisfies a minimum credit rating set by the Authority based on a credit rating determined by an approved credit rating agency.”.

(3) Section 71 is amended by adding –

“(4) For the purposes of subsection (1)(c), a company is a related company of another company if both are subsidiaries of a third company.”.

58. Qualifications for auditor

Section 98(9) is amended by repealing “related company” and substituting “associated company”.

PART 24

NO TRANSFER OF ACCRUED BENEFITS IF CONTRIBUTIONS OR CONTRIBUTION SURCHARGES OUTSTANDING

Mandatory Provident Fund Schemes (General) Regulation

59. Accrued benefits not to be transferred if contributions outstanding

(1) The heading of section 156 of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A) is amended by adding “**or contribution surcharges**” after “**contributions**”.

(2) Section 156(1) is amended by repealing “are due” and substituting “or contribution surcharges or both (“outstanding sums”) are due for payment”.

(3) Section 156(1)(a) is amended by repealing “given its written consent” and substituting “, by written notice, given its consent”.

(4) Section 156(1)(b) is amended by repealing “outstanding contributions and contribution surcharges” and substituting “outstanding sums”.

(5) Section 156(1)(c) is amended by repealing “outstanding contributions and contribution surcharges” and substituting “outstanding sums”.

(6) Section 156(1)(d) is amended –

(a) by repealing “outstanding contributions and contribution surcharges” and substituting “outstanding sums”;

(b) by repealing “outstanding contributions and surcharges” and substituting “outstanding sums”.

(7) Section 156(2) is amended –

(a) by repealing “outstanding contributions and contribution surcharges” and substituting “outstanding sums as”;

(b) by repealing “outstanding contributions and contribution surcharge” and substituting “outstanding sums”.

PART 25

DEFINITION OF RELEVANT INCOME

Mandatory Provident Fund Schemes Ordinance

60. Interpretation

Section 2(1) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) is amended, in paragraph (a) of the definition of “relevant income”, by repealing “(other than a housing allowance or other housing benefit)”.

PART 26

POWER OF AUTHORITY TO REQUIRE PRODUCTION OF RECORDS

Mandatory Provident Fund Schemes Ordinance

61. Section added

The Mandatory Provident Fund Schemes Ordinance (Cap. 485) is amended by adding immediately after section 19 –

“19A. Power of Authority to require production of records

(1) The Authority may, for the purpose of ensuring compliance with the provisions of this Ordinance but for no other purpose, by notice in writing served on an employer, a self-employed person or any other person, require him to produce for inspection within such period as may be specified in the notice any record that is required to be kept under this Ordinance or is otherwise in his possession or under his control.

(2) The Authority may make copies of all or any part of the records produced by a person pursuant to a notice served under subsection (1).”.

PART 27

RECOVERY OF ARREARS

Mandatory Provident Fund Schemes Ordinance

62. Interpretation

Section 2(1) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) is amended by adding –

““arrears” (欠款) means a mandatory contribution that is due for payment to the Authority under section 18;”.

63. Recovery of mandatory contributions that are in arrears

(1) The heading of section 18 is repealed and the following substituted –

“Recovery of arrears and contribution surcharges”.

(2) Section 18(1) is repealed and the following substituted –

“(1) If a mandatory contribution is not paid by the contribution day as defined in section 2 of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A), it becomes due for payment to the Authority on the expiry of that day.”.

(3) Section 18(2) is amended by repealing “is in arrears” and substituting “becomes due for payment to the Authority”.

(4) Section 18(3) is amended by repealing “a mandatory contribution that is in arrears” and substituting “any arrears”.

(5) Section 18(4) is amended by repealing “a mandatory contribution that is in arrears” and substituting “the arrears”.

(6) Section 18(5) is repealed and the following substituted –

“(5) The Authority must pay any arrears or contribution surcharge paid to or recovered by the Authority –

- (a) to the approved trustee of a registered scheme in which the employer participates; or
 - (b) where the employer is not participating in any registered scheme, to the approved trustee of a registered scheme nominated by the employee; or
 - (c) where the employer is not participating in any registered scheme and the employee has not nominated a registered scheme, to the approved trustee of a registered scheme that the Authority considers appropriate.”.
- (7) Section 18 is amended by adding –
 - “(6A) For the purposes of this section, the regulations may –
 - (a) prescribe the duties of approved trustees in relation to mandatory contributions, arrears and contribution surcharges received by them, including the duty to verify the calculation of any of these sums and the duty to credit these sums to specified accounts; or
 - (b) prescribe the requirements to be complied with in relation to the recovery of arrears and contribution surcharges.
 - (6B) For the avoidance of doubt –
 - (a) a person’s liability to pay a contribution surcharge under subsection (2); or

(b) the exercise by the Authority of its power to recover any arrears or contribution surcharge under subsection (3),

is not dependent on the compliance by the approved trustee or any other person with any regulation made for the purposes of this section.”.

Mandatory Provident Fund Schemes (General) Regulation

64. Interpretation

Section 2 of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A) is amended by repealing the definition of “arrears”.

65. Definitions

(1) Section 119 is amended, in the definition of “defaulter”, by repealing “is in arrears with the payment of a mandatory contribution or part of such a contribution” and substituting “fails to pay a mandatory contribution or part of a mandatory contribution by the contribution day”.

(2) Section 119 is amended, in the English text, in the definition of “self-employed person”, by repealing the semicolon and substituting a full stop.

(3) Section 119 is amended by repealing the definition of “settlement period”.

66. Approved trustee to check calculations of mandatory contributions

Section 132(3) is repealed.

67. Approved trustee to notify defaulters of failure to pay contributions

Section 133 is repealed.

68. Contribution surcharge for, and report on, failure to pay contributions

(1) The heading of section 134 is repealed and the following substituted –

“Rate of contribution surcharge”.

(2) Section 134(1), (2) and (3) is repealed.

69. Approved trustee to inform Authority of non-payment or discrepancy of mandatory contribution

(1) The heading of section 135 is amended by repealing **“non-payment or discrepancy of”** and substituting **“failure to pay”**.

(2) Section 135(1) is repealed and the following substituted –

“(1) If a participating employer or self-employed person fails to pay a mandatory contribution in full to the approved trustee of the registered scheme concerned by the contribution day, the trustee must, by written notice given within 10 days after the contribution day, inform the Authority.”.

(3) Section 135(2)(e) is amended by repealing the full stop and substituting a semicolon.

(4) Section 135(2) is amended by adding –

“(f) such other information as may be specified by the Authority.”.

(5) Section 135 is amended by adding –

“(3) The approved trustee of an industry scheme is not required to comply with this section in relation to a casual employee who is a member of the scheme if the employee’s employer and the trustee have agreed that the contribution day in relation to the mandatory contribution payable by the employer in respect of the employee is the working day mentioned in paragraph (b)(ii) of the definition of “contribution day” in section 122(1).”.

70. Section added

The following is added –

“135A. Approved trustee to take actions required by Authority

An approved trustee of a registered scheme must take such action as may be reasonably required by the Authority in connection with the recovery of arrears or a contribution surcharge.”.

71. Authority to give notice to defaulter and approved trustee to inform Authority of non-payment

(1) Section 136(1) is amended by repealing everything before “serve on” and substituting –

“(1) Except in the circumstances specified in subsection (1A), the Authority must, as soon as practicable after receiving a notice given under section 135 by an approved trustee,”.

(2) Section 136(1)(a) is repealed and the following substituted –

“(a) to pay the arrears and the contribution surcharge payable on the arrears to the approved trustee of the registered scheme concerned within the period specified in the notice;”.

(3) Section 136 is amended by adding –

“(1A) The circumstances referred to in subsection (1) are –

(a) the Authority is reasonably satisfied that the defaulter cannot be located;

(b) the Authority is reasonably satisfied that the defaulter has paid all of the arrears and contribution surcharges payable on the arrears to the approved trustee;

- (c) the Authority is reasonably satisfied that the defaulter has paid part of the arrears and contribution surcharges to the approved trustee and that the outstanding arrears and contribution surcharges are irrecoverable;
- (d) the Authority is reasonably satisfied that all of the arrears and contribution surcharges are irrecoverable;
- (e) the Authority is reasonably satisfied that there has not actually been a default; or
- (f) service of a notice under subsection (1) is not reasonably practicable in all the circumstances of the case.”.

72. Financial Penalties

- (1) Schedule 4 is amended, in Part I, by adding –

“2A	18(2)	Requirement to	\$5,000 or 10 per cent
		pay contribution	of the amount to be
		surcharge	paid, whichever is the
			greater”.
- (2) Schedule 4 is amended, in Part II, by repealing items 50 and 51.
- (3) Schedule 4 is amended, in Part II, in item 52, in column 3, by repealing “non-payment or discrepancy of” and substituting “failure to pay”.
- (4) Schedule 4 is amended, in Part II, by adding –

“52A	135A	Approved	10,000	20,000	50,000”.
		trustee to			
		take actions			
		required by			
		Authority			

Explanatory Memorandum

The purpose of this Bill is to amend the Mandatory Provident Fund Schemes Ordinance (Cap. 485) (“the Ordinance”), the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A) (“the General Regulation”) and the Mandatory Provident Fund Schemes (Exemption) Regulation (Cap. 485 sub. leg. B) (“the Exemption Regulation”) to implement the proposals of the Mandatory Provident Fund Schemes Authority (“the Authority”).

2. The Bill is divided into 27 Parts.
3. Part 1 contains preliminary provisions providing for the short title and the commencement of the Bill when enacted.
4. Part 2 amends sections 17, 22, 46, 47 and 69 of the General Regulation and Schedule 3 to the Exemption Regulation to provide that undertakings required under those sections can be given by deed or by some other acceptable form.
5. Part 3 amends section 70 of the General Regulation to set out the circumstances in which a temporary custodian may encumber scheme assets.
6. Part 4 amends sections 20, 21 and 21A of the Ordinance to revise the contents of the undertakings that prospective trustees and approved trustees applying for registration of a provident fund scheme as an employer sponsored scheme, a master trust scheme or an industry scheme are to provide to the Authority under those sections.
7. Part 5 amends section 1(1) of Schedule 2 to the Exemption Regulation to amend the Chinese equivalent of the term “years of post-MPF service”.
8. Part 6 amends section 14 of the Exemption Regulation to revise one of the requirements that has to be satisfied before the Authority may issue a certificate stating that an ORSO registered scheme is to be treated as a relevant ORSO registered scheme. The existing requirement is that the members and assets of the ORSO registered scheme must have been transferred to the scheme from 1 or

more relevant ORSO registered schemes. The proposed amendment allows a certificate to be issued where the members and assets are to be transferred after an exemption certificate has been issued in respect of the scheme under section 16 of the Exemption Regulation.

9. Part 7 amends sections 5A, 20C and 21B of the Ordinance to specify the purposes of the registers that are required to be kept under those sections.

10. Part 8 amends sections 7 and 7C of the Ordinance and sections 120 and 121 of the General Regulation to clarify when the provisions of the Ordinance apply to persons who are no longer exempt from the Ordinance.

11. Part 9 amends sections 145 and 146 of the General Regulation to provide that approved trustees of registered schemes may, in specified circumstances, accept a notice given by an employee as evidence of the employee's cessation of employment.

12. Part 10 amends sections 162 and 165 of the General Regulation which deal with claims for payment of small balances. The existing requirement that no mandatory contribution were paid or were required to be paid by or in respect of the claimant during the 12 months immediately preceding the lodgement of the claim is to be relaxed. The new requirement is that as at the date of the claim, at least 12 months have elapsed since the contribution day in respect of the latest contribution period for which a mandatory contribution is required to be made.

13. Part 11 amends sections 6 and 36 of the General Regulation to expressly empower the Authority to cancel the approval of a pooled investment fund or a constituent fund of a registered scheme.

14. Part 12 amends sections 170, 171 and 172 of the General Regulation, which set out the duties of approved trustees in different circumstances where scheme members are entitled to be paid his accrued benefits but cannot be located. The relationship among the three existing sections is clarified and the procedures under section 172 for locating and ascertaining the intention of scheme members are simplified. This Part also adds new sections 172A, 172B and 172C to the General Regulation. Section 172A deals with the situation

where a scheme member whose accrued benefits are retained in a registered scheme cannot be located. Section 172B requires approved trustees to submit quarterly reports to the Authority to provide particulars of scheme members who have unclaimed benefits in the schemes. Section 172C is a reproduction of the existing section 172(11) and (12).

15. Part 13 amends section 44 of the General Regulation, which provides that an investment manager must be appointed to manage the investment of the funds of the scheme, to specify the situations where the appointment of an investment manager is not required.

16. Part 14 amends section 42 of the Ordinance which deals with disclosure of information obtained by the Authority under the Ordinance. After the amendment, the Authority may disclose information to the Official Receiver or a liquidator appointed under the Companies Ordinance (Cap. 32) and may disclose information that has already been made available to members of the public. Disclosure is also allowed if consent of the information provider has been obtained or if the disclosure is made for the purpose of promoting public understanding of the retirement scheme industry.

17. Part 15 amends section 163 of the General Regulation to revise the contents of the statutory declaration that is required to be provided by a claimant in support of his claim for payment of accrued benefits on the ground that he has departed from Hong Kong permanently.

18. Part 16 amends section 206 of the General Regulation so that membership certificates given under section 55 of the General Regulation and participation certificates given under section 124 of the General Regulation can be sent by ordinary post instead of registered post.

19. Part 17 amends section 2(1) of the Ordinance to add a definition of “personal representative”. The term is defined to include the Official Administrator where he gets in and administers an estate in a summary manner under section 15 of the Probate and Administration Ordinance (Cap. 10).

20. Part 18 amends sections 43C and 43E of the Ordinance and section 26 of the Exemption Regulation to extend the time limit for instituting proceedings under those sections.

21. Part 19 amends section 34B of the Ordinance to clarify the effect of the restructuring of a registered scheme that is carried out with the consent of the Authority under that section.

22. Part 20 amends the Ordinance to provide that a summons relating to an offence alleged to have been committed by an employer may be served on him by leaving it at, or sending it by post to, his business address.

23. Part 21 amends section 37 of the General Regulation which provides that a capital preservation fund may be invested in debt securities with a remaining maturity period of 1 year or less and that satisfy the minimum short term credit rating set by the Authority. The amendment allows the Authority to specify both the long term and the short term credit ratings applicable to such debt securities.

24. Part 22 amends section 56(3) of the General Regulation to provide that a scheme member's benefit statement must contain, in addition to other particulars specified under that section, such information as may be specified by the Authority.

25. Part 23 amends section 71 of the General Regulation which provides that an overseas bank or overseas trust company which is a wholly-owned subsidiary of a specified entity is eligible to be a delegate of a custodian of scheme assets. After the amendment, an overseas bank or overseas trust company that is a subsidiary or related company of a specified entity is eligible to be such a delegate.

26. Part 24 amends section 156 of the General Regulation which provides that if contributions are due for payment to the Authority, the accrued benefits of the member concerned must not be transferred despite the member's election. The amendment clarifies that, apart from the above-mentioned situation, where only contribution surcharges are due for payment to the Authority or both

contributions and contribution surcharges are due for payment to the Authority, the transfer must not be made.

27. Part 25 amends the definition of “relevant income” in section 2(1) of the Ordinance so that any housing allowance or other housing benefit expressed in monetary terms will form part of the relevant income of an employee.

28. Part 26 adds a new section 19A to the Ordinance to expressly empower the Authority to require employers, self-employed persons or other persons to produce records for inspection.

29. Part 27 amends section 18 of the Ordinance to clarify that the liability to pay a contribution surcharge and the exercise by the Authority of its power to recover arrears and contribution surcharges by proceedings are not dependent on the compliance with the regulations relating to recovery of arrears. The procedures for recovery of arrears set out in sections 132 to 136 of the General Regulation are also simplified so as to speed up the arrears recovery process. The English text of section 136(1)(a) is amended to correct a minor error.

Economic implications

The proposal to remove the exclusion of the housing allowance from the definition of the “relevant income” for Mandatory Provident Fund (“MPF”) contributions would lead to an increase in contributions from some employers and employees. Yet such increases in contributions are not expected to be significant, given the relatively small number of employees who are entitled to housing allowance but with their income (excluding housing allowance) below the current maximum relevant income level for MPF contributions, i.e. \$20,000 per month. The other legislative proposals are mainly technical amendments to enhance the enforcement and improve the operation of the MPF system and thus are not expected to have any substantial impacts on the labour market as well as the economy at large.

Civil service implications

2. The proposal will not have any additional financial implications for the Government as an employer and the number of affected staff will be minimal. As for those officers who are eligible for housing allowance/benefits and are members of the Civil Service Provident Fund Scheme, the amount of Government contributions in respect of these officers should already have exceeded any revised mandatory contribution as a result of the change in definition of “relevant income” under the current proposal.