

For discussion on
9 May 2008

**Bills Committee on
Mandatory Provident Fund Schemes (Amendment) (No.2) Bill 2007**

Administration's Response to the Views of the Bills Committee
at the meeting on 24 April 2008

Purpose

This paper sets out the joint response from the Administration and the Mandatory Provident Fund Schemes Authority ("MPFA") to the views of the Members and Assistant Legal Adviser expressed at the meeting of the Bills Committee on Mandatory Provident Fund Schemes (Amendment) (No.2) Bill 2007 ("the Bill") held on 24 April 2008.

The Administration and MPFA's response

Substantial shareholders of approved MPF trustees

2. We have examined further the meaning of "substantial shareholder" under the proposed section 42A(2) and would agree to Members' suggestion to include, under the definition in respect of a substantial shareholder who is a natural person, an associate of that substantial shareholder by making reference to Schedule 8 of the Mandatory Provident Fund Schemes Ordinance, Cap. 485 ("MPFSO"). We will move necessary Committee Stage Amendments ("CSAs") accordingly.

Controllers of approved MPF trustees

3. On the question of whether it is necessary to align proposed provisions pertaining to the requirements on officers, indirect controllers, substantial shareholders and controllers of a Mandatory Provident Fund ("MPF") trustee with the criteria for determination of a "fit and proper person" under section 129 of the Securities and Futures Ordinance, Cap.

571 (“SFO”), it is noted that the “fit and proper” requirements under the SFO apply to the licensees as well as representatives and responsible officers of the licensed corporation, and the detailed criteria for determining whether a person is “fit and proper” are specified in the “Fit and Proper Guidelines” issued by the Securities and Futures Commission. On the other hand, the proposed sections 42B(3), 42C(3), 42D(5) and 42E(1) in the Bill relate to controllers of an approved MPF trustee, and the factors that are considered by the MPFA in assessing whether a person is considered suitable to be a controller of a MPF trustee is set out under the “Guidelines for Application for Approvals of Trustees” of the MPFA.

4. Annex A sets out a comparison between the relevant criteria/factors to be considered under the “Fit and Proper Guidelines” and the “Guidelines for Application for Approvals of Trustees” respectively. The MPFA considers that they cover essentially similar aspects. Noting that the two Ordinances were enacted at different times and for different purposes, the MPFA does not consider it necessary to make the two provisions identical and hence does not propose to introduce any further changes to the Bill at this stage.

Indirect controller of approved MPF trustees

5. At present, a person in accordance with whose instruction the directors of a company are accustomed to act (“named as “indirect controller” under section 42A of the Bill) falls under the definition of controller under section 2 of the MPFSO. Under sections 16 and 17 of the Mandatory Provident Fund Schemes (General) Regulation, the controller of a corporate applicant for approval as a MPF trustee must satisfy the MPFA that all of its controllers are persons of good reputation and character, etc. Section 42C of the Bill stipulates that MPFA’s consent is required before a person can become an indirect controller of an approved MPF trustee and section 42E empowers the MPFA to, inter alia, raise objection to an existing indirect controller.

6. Some Members queried whether it was appropriate to include a provision in the Bill for approving indirect controllers of approved MPF trustees. It should be noted that there are similar

provisions in the Banking Ordinance¹, Cap.155, which stipulates that the consent of Hong Kong Monetary Authority is required before a person can become an indirect controller of an authorized institution under that Ordinance. The proposed sections 42C and 42E of the Bill seek to enhance the regulation of MPF trustees by ensuring that all existing and new indirect controllers of a MPF trustee satisfy the relevant requirements.

7. It is noted that the meaning of “indirect controller” is essentially the same as “shadow director” under the Companies Ordinance². In this connection, we agree that the term “indirect controller” could be replaced by “shadow director”. We would move necessary CSAs accordingly.

Proposed Committee Stage Amendments

8. The proposed CSAs pursuant to this paper and other textual CSAs are set out at **Annex B**.

Financial Services and the Treasury Bureau
May 2008

¹ Under section 70 of the Banking Ordinance, no person shall become an indirect controller of an authorized institution unless he has served on the Monetary Authority (“MA”) a notice in writing stating that he proposes to become such a controller. The MA could serve a notice of consent or notice of objection on the matter on the person.

² Under the Companies Ordinance, “shadow director” in relation to a company means a person in accordance with whose directions or instructions the directors or a majority of the directors of the company are accustomed to act.

Comparison of the matters considered by the Securities and Futures Commission and the Mandatory Provident Fund Schemes Authority under their respective guidelines

<p>Criteria for determination of “fit and proper” requirement under section 129 of the Securities and Futures Ordinance :</p> <p>Matters considered by the Securities and Futures Commission to determine the “fitness and properness” of an individual/corporation to become a licensee or representative or responsible officers of licensed corporation</p>	<p>Matters considered by the Mandatory Provident Fund Schemes Authority in determining the suitability of controller of MPF trustees</p>
<p>Financial status or solvency</p> <ul style="list-style-type: none"> • Whether the individual/corporation: <ul style="list-style-type: none"> (i) is an undischarged bankrupt, is currently subject to bankruptcy proceedings or is a bankrupt who has recently been discharged (in the case of individual); (ii) is subject to receivership, administration, liquidation or other similar proceedings; (iii) has failed to meet any judgment debt; (iv) is unable to meet any financial or capital requirement applicable to it. 	<ul style="list-style-type: none"> • Whether the individual/corporation: <ul style="list-style-type: none"> (i) has ever been adjudicated bankrupt by a court or are currently subject to bankruptcy proceedings or has been a bankrupt who has been discharged (or petition even been presented for winding up in the case of corporation); (ii) is subject to any receivership or has ever entered into an scheme of arrangement or any form of composition with the creditors; and (iii) has failed to meet any judgment debt or other sums of money.

<p>Criteria for determination of “fit and proper” requirement under section 129 of the Securities and Futures Ordinance :</p> <p>Matters considered by the Securities and Futures Commission to determine the “fitness and properness” of an individual/corporation to become a licensee or representative or responsible officers of licensed corporation</p>	<p>Matters considered by the Mandatory Provident Fund Schemes Authority in determining the suitability of controller of MPF trustees</p>
<p>Education or other qualifications or experience having regard to the nature of the functions which the person will perform:</p> <ul style="list-style-type: none"> • Whether the person is equipped with the skills, knowledge and professionalism necessary to perform their duties. The level of knowledge expected varies according to the level of responsibility and the type of regulated activity to be carried out. Persons are generally expected to be able to display an understanding of: <ul style="list-style-type: none"> - the general structure of the regulatory framework that applies to their proposed activities; - the particular legislative provisions, codes, guidelines and exchange rules that apply to the functions that they would perform; - the fiduciary obligations owed to clients and the general obligations owed to their principals or employers; and 	<ul style="list-style-type: none"> • The person is required to provide the following information to the MPFA for determining whether he has the skill, knowledge, experience and qualifications that are, in the opinion of the MPFA, necessary for successful administration of provident fund schemes: <ul style="list-style-type: none"> - professional, academic, technical or other qualifications; - present occupation or employment and occupations and employment during the last 10 years; and - the companies of which the person has been a controller during the past 10 years.

<p>Criteria for determination of “fit and proper” requirement under section 129 of the Securities and Futures Ordinance :</p> <p>Matters considered by the Securities and Futures Commission to determine the “fitness and properness” of an individual/corporation to become a licensee or representative or responsible officers of licensed corporation</p>	<p>Matters considered by the Mandatory Provident Fund Schemes Authority in determining the suitability of controller of MPF trustees</p>
<p>- the financial products they deal in or advise upon and market in which the service is provided.</p>	
<p>Ability to carry on the regulated activity competently, honestly and fairly:</p> <ul style="list-style-type: none"> • Whether the individual: <ul style="list-style-type: none"> (i) has ever been a patient as defined in section 2 of the Mental Health Ordinance to the extent that in the opinion of the SFC, after having taken into account such relevant factors including that of the person’s past raining, experience and qualifications, that person would be unable to carry out the inherent requirements of the regulated activity; and (ii) has evidenced incompetence, negligence or mismanagement, which may be indicated by the person having been disciplined by a professional, trade or regulatory body; or dismissed or requested to resign 	<ul style="list-style-type: none"> • Whether the individual: <ul style="list-style-type: none"> (i) has been found by a court, in accordance with the Mental Health Ordinance to be of unsound mind and incapable of managing his own affairs; and (ii) has ever been dismissed from any office or position, subject to disciplinary proceedings or barred from entry to any profession or occupation • Whether the individual/corporation has been found guilty, whether in Hong Kong or elsewhere, of an offence involving fraud or dishonesty.

<p>Criteria for determination of “fit and proper” requirement under section 129 of the Securities and Futures Ordinance :</p> <p>Matters considered by the Securities and Futures Commission to determine the “fitness and properness” of an individual/corporation to become a licensee or representative or responsible officers of licensed corporation</p>	<p>Matters considered by the Mandatory Provident Fund Schemes Authority in determining the suitability of controller of MPF trustees</p>
<p>from any position or office for negligence, incompetence or mismanagement.</p> <ul style="list-style-type: none"> • In the case of corporation, whether it has non-executive directors, key personnel, substantial shareholders or other controllers who fail to meet the Fit and Proper Guidelines other than that on competence to perform regulated activities; or has failed to demonstrate it is competent to perform the regulated activities (unless such requirements are otherwise applicable). 	
<p>Reputation, character, reliability and financial integrity</p> <ul style="list-style-type: none"> • Whether the individual has been: <ul style="list-style-type: none"> (i) found by a court or other competent authority for fraud, dishonesty or misfeasance; (ii) convicted of a criminal offence or is the subject of unresolved criminal charges which are of direct 	<ul style="list-style-type: none"> • Whether the individual/corporation has been: <ul style="list-style-type: none"> (i) found guilty, whether in Hong Kong or elsewhere, of an offence involving fraud or dishonesty; (ii) a party to any civil litigation; (iii) convicted of any offence or are the subject of

<p>Criteria for determination of “fit and proper” requirement under section 129 of the Securities and Futures Ordinance :</p> <p>Matters considered by the Securities and Futures Commission to determine the “fitness and properness” of an individual/corporation to become a licensee or representative or responsible officers of licensed corporation</p>	<p>Matters considered by the Mandatory Provident Fund Schemes Authority in determining the suitability of controller of MPF trustees</p>
<p>relevance to fitness and properness;</p> <p>(iii) censured, disciplined or disqualified by any professional or regulatory body in relation to any trade, business or profession;</p> <p>(iv) refused or restricted from the right to carry on any trade, business or profession for which a specific licence, registration or other authorization is required by law;</p> <p>(v) disqualified by a court of competent jurisdiction from being a director;</p> <p>(vi) found culpable of market misconduct by the Market Misconduct Tribunal, or failed to abide by any codes and guidelines promulgated by the SFC, other regulators or any relevant exchanges in Hong Kong or overseas (if applicable);</p>	<p>unresolved charges;</p> <p>(iv) refused the right or restricted in the right to carry on any trade, business or profession for which a specific licence, registration or other authority is required by law;</p> <p>(v) disqualified, censured or disciplined by any professional body or by any regulatory body; and</p> <p>(vi) as a controller, ever been concerned with a body corporate, partnership or unincorporated institution which was:</p> <p>(A) wound up (other than voluntary dissolution), adjudicated bankrupt by a court or was otherwise insolvent or had a receiver or administrator appointed; or</p>

<p>Criteria for determination of “fit and proper” requirement under section 129 of the Securities and Futures Ordinance :</p> <p>Matters considered by the Securities and Futures Commission to determine the “fitness and properness” of an individual/corporation to become a licensee or representative or responsible officers of licensed corporation</p>	<p>Matters considered by the Mandatory Provident Fund Schemes Authority in determining the suitability of controller of MPF trustees</p>
<p>(vii) a party to a scheme of arrangement or entered into any form of compromise with a creditor involving a considerable amount;</p> <p>(viii) a director, substantial shareholder, or involved in the management, of a corporation or business that:</p> <p>(A) was wound up (otherwise than by a solvent member’s voluntary dissolution) or was otherwise insolvent or had a receiver or administrator appointed, however described;</p> <p>(B) was found guilty of fraud;</p> <p>(C) has not met all obligations to clients, compensation funds established for the protection of investors, or inter-member guarantee funds;</p> <p>(D) has been found to have committed the acts described in (i), (ii), (iii), (iv) or (vi) above.</p>	<p>(B) the subject of any investigation by inspector, the police, or by any professional body, association, disciplinary tribunal or inspector appointed under any enactment, or by any other regulatory body in relation to any of its business.</p>

<p>Criteria for determination of “fit and proper” requirement under section 129 of the Securities and Futures Ordinance :</p> <p>Matters considered by the Securities and Futures Commission to determine the “fitness and properness” of an individual/corporation to become a licensee or representative or responsible officers of licensed corporation</p>	<p>Matters considered by the Mandatory Provident Fund Schemes Authority in determining the suitability of controller of MPF trustees</p>
<ul style="list-style-type: none"> • In the case of corporation, whether it was found to be of poor reputation or reliability, or lacking in financial integrity. Similar considerations will be given to events described in (i) to (iv) and (vi) to (viii) above and whether it has been served with a winding up petition. 	

**Further proposed Committee Stage Amendments
of the Mandatory Provident Fund Schemes (Amendment) (No.2) Bill 2007**

Committee Stage Amendment (contents at appendix)	Clause (relevant section in bracket)	Remarks
1	3 (section 43B of the Mandatory Provident Fund Schemes Ordinance (“MPFSO”))	<ul style="list-style-type: none"> • To align the drafting style with the proposed section 43BA(4A).
2	5 (section 7AA) 11 (section 43B of the MPFSO)	<ul style="list-style-type: none"> • To align the drafting of the proposed section 7AA(2), (3) and (6A) with that of the existing section 7A(1), (2) and (8) to better reflect that it is the obligation of the employer to (i) make the employer mandatory contribution using his own fund, (ii) to make the employee mandatory contribution through deduction from the employee’s relevant income and (iii) to pay the contributions to the MPFA. • To make minor textual amendments to the proposed section 7AA(4), (5) and (6) necessitated by the redrafting of the proposed section 7AA(2) and (3).

Committee Stage Amendment (contents at appendix)	Clause (relevant section in bracket)	Remarks
		<ul style="list-style-type: none"> To make amendment to the penalty sections under section 43B necessitated by the proposed section 7AA(2), (3) and (6A).
3	10 (section 18 of the MPFSO)	<ul style="list-style-type: none"> To amend the heading to reflect its most update version as the section heading has been amended by the Mandatory Provident Fund Schemes (Amendment) Ordinance 2008. To clarify that section 18 applies to the recovery of arrears under the proposed section 7AE.
4	17 (section 78 of the Mandatory Provident Fund Schemes (General) Regulation) (“General Regulation”))	<ul style="list-style-type: none"> To rectify a typing error.
5	20 (section 134 of the General Regulation)	<ul style="list-style-type: none"> To amend the heading to reflect its most update version as the section heading has been amended by the Mandatory Provident Fund Schemes (Amendment) Ordinance 2008. To remove the section altogether as the remaining subsection (4) would be repealed after the commencement of the Mandatory

Committee Stage Amendment (contents at appendix)	Clause (relevant section in bracket)	Remarks
		Provident Fund Schemes (Amendment) (No.2) Bill 2007.
6	22 (section 156 of the General Regulation)	<ul style="list-style-type: none"> To amend the heading to reflect its most update version as the section heading has been amended by the Mandatory Provident Fund Schemes (Amendment) Ordinance 2008.
7	24A (new) (section 2) 25 (section 20A of MPFSO) 31 (sections 42D and 42F)	<ul style="list-style-type: none"> In response to the view of the Assistant Legal Adviser, to amend the definition of “controller” so that a natural person who controls at least 15 percent of the voting shares of the company together with his associate will be regarded as a controller under the MPFSO.
8	31(sections 42A, 42C and 42E) 32 (Schedule 4 of the General Regulation)	<ul style="list-style-type: none"> To amend the reference to “indirect controller” to “shadow director” in response to the view of the Bills Committee.

MANDATORY PROVIDENT FUND SCHEMES
(AMENDMENT) (NO. 2) BILL 2007

COMMITTEE STAGE

Amendments to be moved by the Secretary for Financial Services and the Treasury

<u>Committee Stage Amendment</u>	<u>Clause</u>	<u>Amendment proposed</u>
1	3(1)	<p>In the proposed section 43B(1), in the English text –</p> <p style="padding-left: 40px;">(a) by deleting “, and” and substituting “and,”;</p> <p style="padding-left: 40px;">(b) by adding “to” before “a daily penalty”.</p>
2	5	<p>In the proposed section 7AA, by deleting subsections (2) and (3) and substituting –</p> <p style="padding-left: 40px;">“(2) The employer must, in the case referred to in subsection (1)(a), for each contribution period ending on or after that commencement during which the employee is not such a member –</p> <p style="padding-left: 80px;">(a) from the employer’s own funds, contribute to a registered scheme that is to be determined in accordance with section 7AC the amount determined in accordance with subsection (4); and</p>

<u>Committee Stage Amendment</u>	<u>Clause</u>	<u>Amendment proposed</u>
		<p>(b) subject to subsection (6), deduct from the employee's relevant income for that period as a contribution by the employee to that scheme the amount determined in accordance with subsection (4).</p>
		<p>(3) The employer must, in the case referred to in subsection (1)(b), for each contribution period ending after the date the employee becomes a relevant employee during which the employee is not such a member –</p>
		<p>(a) from the employer's own funds, contribute to a registered scheme that is to be determined in accordance with section 7AC the amount determined in accordance with subsection (4); and</p>
		<p>(b) subject to subsection (6), deduct from the employee's relevant income for that period as a contribution by the employee to that scheme</p>

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Stage
Amendment

Clause

Amendment proposed

the amount determined in accordance with subsection (4).”.

In the proposed section 7AA(4), by deleting “subsection (3)(a) and (b), the amount to be paid by an employer” and substituting “subsections (2) and (3), the amount to be contributed by an employer, or to be deducted from an employee’s relevant income,”.

In the proposed section 7AA(5), by deleting “the purposes of subsection (3)(a) and (b)” and substituting “those purposes”.

In the proposed section 7AA(6)(a) and (b), by deleting “subsection (3)(b)” and substituting “subsection (2)(b) or (3)(b)”.

In the proposed section 7AA, by adding –

“(6A) An employer must ensure that contributions required to be made in accordance with this section in respect of an employee of the employer are paid to the Authority on or before the contribution day.”.

11 By deleting the proposed section 43B(1D).

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Amendment

Clause

Amendment proposed

In the proposed section 43B(1E), by deleting “section 7AA(6)” and substituting “section 7AA(2), (3) or (6)”.

By adding after the proposed section 43B(1E) –

“(1F) An employer who, without reasonable excuse, fails to comply with section 7AA(6A) commits an offence and is –

- (a) in the case where he has deducted any amount from the employee’s relevant income for the contribution period concerned as the employee’s contribution and the total amount of contribution paid in respect of the employee to the Authority for that contribution period is less than the amount so deducted, liable on conviction to a fine of \$450,000 and to imprisonment for 4 years; and
- (b) in any other case, liable on conviction to a fine of \$350,000 and to

<u>Committee Stage Amendment</u>	<u>Clause</u>	<u>Amendment proposed</u>
		imprisonment for 3 years.”.
3	10	In the heading, by deleting “ mandatory contributions that are in arrears ” and substituting “ arrears and contribution surcharges ”.
	10(2)	By deleting everything after “amended” and substituting “by adding “under subsection (1) or section 7AE” after “due for payment to the Authority”.”.
4	17(5)	In the proposed section 78(6)(c)(i), in the English text, by deleting “members” and substituting “member’s”.
5	20	By deleting the clause and substituting – <p style="text-align: center;">“20. Rate of contribution surcharge</p> <p style="text-align: center;">Section 134 is repealed.”.</p>
6	22	In the heading, by adding “ or contribution surcharges ” after “ contributions ”.
7	New	By adding immediately before clause 25 – <p style="text-align: center;">“24A. Interpretation</p> <p style="text-align: center;">Section 2(1) of the Mandatory Provident Fund Schemes Ordinance (Cap.</p>

<u>Committee Stage Amendment</u>	<u>Clause</u>	<u>Amendment proposed</u>
		485) is amended – <ul style="list-style-type: none"> (a) in the definition of “associate”, by adding “a natural person referred to in paragraph (d) of the definition of “controller”,” after “in relation to”; (b) in the definition of “controller”, in paragraph (d), by repealing “, a close relative, partner or” and substituting “an associate, a close relative or an”.”.
	25(1)	By deleting “of the Mandatory Provident Fund Schemes Ordinance (Cap. 485)”.
	31	In the proposed section 42D(8)(a), by deleting “close relative, partner” and substituting “associate, close relative”.
	31	In the proposed section 42F(4)(a), by deleting “close relative, partner” and substituting “associate, close relative”.
8	31	In the proposed section 42A(2), in the definition of “indirect controller”, by deleting ““indirect controller”

<u>Committee Stage Amendment</u>	<u>Clause</u>	<u>Amendment proposed</u>
		(間接控權人)” and substituting ““shadow director” (幕後董事)”.
	31	In the proposed section 42C, in the heading, by deleting “ indirect controllers ” and substituting “ shadow directors ”.
	31	In the proposed section 42C(1) and (5), by deleting “an indirect controller” wherever it appears and substituting “a shadow director”.
	31	In the proposed section 42C(4) – (a) by deleting “an indirect controller” and substituting “a shadow director”; (b) by deleting “or indirect controller” and substituting “or shadow director”.
	31	In the proposed section 42E(9) – (a) by deleting “an indirect controller” and substituting “a shadow director”; (b) by deleting “the indirect controller” and substituting “the shadow director”.
	32(b)	In the proposed item 12E in Part II of Schedule 4, by deleting “indirect controller” and substituting “shadow director”.

<u>Committee Stage Amendment</u>	<u>Clause</u>	<u>Amendment proposed</u>
	32(b)	In the proposed item 12F in Part II of Schedule 4, by deleting “Indirect controller” and substituting “Shadow director”.
	32(b)	In the proposed item 12M in Part II of Schedule 4, by deleting “Indirect controller” and substituting “Shadow director”.