立法會
Legislative Council

LC Paper No. LS95/07-08

Paper for the House Committee Meeting on 20 June 2008

Legal Service Division Report on Mandatory Provident Fund Schemes (Amendment) Bill 2008

I. SUMMARY

1. **Object of the Bill**	To enable the Mandatory Provident Fund Schemes Authority (MPFA) to pay a special contribution into an account of a member of a provident fund scheme registered under the Mandatory Provident Fund Schemes Ordinance (Cap. 485) and to provide for matters ancillary to that purpose.
2. **Comments**	(a) The amendments do not specify the amount of the special contribution or the criteria of eligibility for the payment of the special contribution, which will be contained in an agreement between the Government and MPFA. (b) It is not clear whether the approved trustees would have the power to deal with the special contribution under the relevant trust deeds and related instruments. (c) The amendments do not seem to provide any remedy for a person who is not paid the special contribution due to any mistake or fault on the part of MPFA.
3. **Public Consultation**	The public has not been consulted on the Bill.
4. **Consultation with LegCo Panel**	The Panel on Financial Affairs was briefed on the legislative proposal at its meeting held on 5 May 2008 and members had in principle no objection to the proposal.
5. **Conclusion**	Members may wish to form a Bills Committee to study the policy and operational aspects of the Bill in detail.

II. REPORT

Objects of the Bill

To amend the Mandatory Provident Fund Schemes Ordinance (Cap. 485) (the Ordinance) to enable the Mandatory Provident Fund Schemes Authority (MPFA) to pay a special contribution into an account of a member of a provident fund scheme registered under the Ordinance and to provide for matters ancillary to that purpose.

LegCo Brief Reference

2. File Ref.: FSB CR G6/90/8C(2008) issued by the Financial Services and the Treasury Bureau and dated 10 June 2008.

Date of First Reading

3. 18 June 2008.

Comments

4. The Bill seeks to put in place the legal framework for the implementation of the proposal announced by the Financial Secretary in the 2008-2009 Budget and during his Budget Concluding Speech on 23 April 2008 to effect a one-off injection of $6,000 into the account of each person who satisfies the following requirements—

(a) being—

- (i) a holder of a Mandatory Provident Fund (MPF) account on 29 February 2008;
- (ii) a holder of an MPF preserved account and having last contributed to an MPF account or being an Occupational Retirement Scheme member during the one year period before 29 February 2008;
- (iii) a member of an MPF-exempted Occupational Retirement Schemes Ordinance (ORSO) defined contribution scheme on 29 February 2008; or
- (iv) a member of an MPF-exempted ORSO defined benefit scheme on 29 February 2008; and

(b) having a monthly income of not more than $10,000.

Neither these criteria nor the amount of the special contribution is provided in the Bill. They will be set out in an agreement to be made between the Government and MPFA.

5. The Bill would empower the MPFA to—

(a) pay a special contribution into the account of each MPF scheme members (proposed new section 19B);

(b) require information or document from an approved trustee of an MPF scheme, a trustee of an MPF-exempted ORSO scheme, an employer and any person whom MPFA believes to have possession or control of any information or document relating to a member of an MPF scheme or MPF-exempted ORSO scheme (proposed new section 19C);

(c) require an approved trustee of an MPF scheme to take such action as MPFA has specified in a written notice (proposed new section 19D); and

(d) recover special contributions paid to ineligible persons' accounts (proposed new section 19E).

6. The Bill seeks to enable the relevant approved trustees of MPF schemes to deal with the special contribution by vesting the special contribution in the members as accrued benefits (proposed new section 19F) under the Ordinance. It is further provided that the proposed new Part IIIA (i.e. the provisions added by clause 4 of the Bill) shall prevail over any governing rules or participation agreement in relation to an MPF scheme if there is any conflict or inconsistency between such rules or agreement and the provisions of Part IIIA (proposed new section 19H). However, since the trust deeds and related instruments of MPF schemes have provided for employer's and employee's contributions only but not special contributions, it is not clear whether the provisions proposed would be adequate to empower the approved trustees to deal with the special contributions.

7. Section 2 of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A) (the Regulation) is amended in respect of the definitions of "contribution account" and "preserved account" so that the special contribution would be covered (Clause 7). Subsections (6), (7) and (8) of section 78 of the Regulation are also amended to provide for the special contribution (Clause 8). Financial penalties are provided for non-compliance with the requirements under the proposed new Part IIIA of the Ordinance (Clause 9).

Public Consultation

8. The public has not been consulted on the Bill.

Consultation with LegCo Panel

9. The Administration briefed the Financial Affairs Panel on the proposed injection and related legislative proposals at the Panel meeting held on 5 May 2008. Members had in principle no objection to the proposals in the Bill. However, members raised the following concerns—

(a) consideration be given to allowing MPF scheme members to withdraw their accrued benefits before the age of 65 under special circumstances so as to provide immediate relief to low-income workers to cope with inflation;

(b) serious consideration be given to the suggestion of expanding the scope of the proposed injection to cover all MPF scheme members holding preserved accounts irrespective of the termination date of their last employment; and

(c) whether the $6,000 injection given to members of MPF-exempted ORSO schemes could be transferred to their ORSO accounts for consolidated management.

Conclusion

10. The Legal Service Division has sought clarification from the Administration on some drafting and legal points. The reply of the Administration has just been received and is being studied by the Division. A copy of the letter of the Division and the reply from the Administration are attached for Members' perusal. Members may wish to form a Bills Committee to study the policy and operational aspects of the Bill in detail.

<u>Encl</u>

Prepared by

KAU Kin-wah
Assistant Legal Adviser
Legislative Council Secretariat
19 June 2008

LS/B/22/07-08

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18 June 2008

Mr Kau Kin-wah
Assistant Legal Adviser
Legislative Council
8 Jackson Road
Hong Kong

Dear Mr Kau,

Mandatory Provident Fund Schemes (Amendment) Bill 2008

Thank you for your letter of 13 June 2008. Our response to the points raised in your letter is set out in the note enclosed.

Yours sincerely,

(Ryan Chiu)
for Secretary for Financial Services and the Treasury

Clause 3

Proposed section 19B(1)

The Mandatory Provident Fund Schemes Authority ("MPFA") will operate an administrative scheme to implement the injection exercise on the basis of the eligibility criteria as announced by the Financial Secretary in the 2008-09 Budget and subsequently during the Budget Concluding Speech on 23 April 2008. As set out in Annex B of the LegCo Brief issued on 10 June 2008, the MPFA will put in place administrative arrangements to deal with complaints from any aggrieved persons. The MPFA is working out the details of the implementation procedures for the injection exercise, including the administrative arrangement for handling related complaints, and will make public those procedures later this year. All these procedures and arrangement will be part and parcel of the overall scheme of the injection exercise. The Government will seek funding approval for the injection exercise from the LegCo Finance Committee after the enactment of the Bill.

Nevertheless, there are other aspects of the existing Mandatory Provident Fund Schemes Ordinance ("MPFSO") that require amendments to enable the MPFA to implement the injection exercise. For example, the two main aspects are the legal power of the MPFA to require relevant parties to provide necessary information of members of MPF and MPF-exempted Occupational Retirement Schemes ("ORSO schemes") for the purpose of compiling a list of eligible recipients / accounts and making payment to individual accounts, and an express provision in the law to make it clear that under the Mandatory Provident Fund ("MPF") System, a party (i.e. MPFA) other than employer or employee could also make contribution into the accounts of scheme members.

Proposed section 19D

(a) As mentioned in paragraph 2 of the LegCo Brief, members of ORSO schemes (including both defined contribution and defined benefits schemes) would be eligible for the injection if they satisfy the other criteria, e.g. the income eligibility. Some of these eligible ORSO members may not have any MPF accounts. Paragraph 6 of the LegCo Brief states that the injection for such eligible ORSO scheme members would be made into an MPF preserved account to be opened for each of them to receive the funds. The proposed section 19D(3) is to empower the MPFA to require an approved trustee to set up MPF preserved accounts for these persons so that special contributions can be paid into those accounts.

(b) The references to "the scheme" in the new section 19D(3) and (5) means the "registered scheme" referred to in the new section 19D(1). In the new Part IIIA, where a registered scheme is referred to in a section more than once, "a registered scheme" is used at the first time, and "the scheme" is used in the subsequent provisions. This approach has been adopted consistently in the proposed sections 19B, 19C, 19D, 19E and 19F.

Proposed section 19G

The proposed section 19G is introduced for the avoidance of doubt.

Proposed section 19H

(a) For example, a trust deed of the MPF scheme, which is a "specified instrument", does not allow for contributions from any parties other than the employers and employees. The proposed section 19H is to make it clear that the new statutory provisions in Part IIIA will prevail in such case. The MPFA has informed the trustees of this proposed legislative amendment.

(b) It refers primarily to the articles or memorandum of the trustee, sponsor or any other party to the trust deed.

(c) Under the proposed section 19F, the provisions of the MPFSO shall apply to special contributions in the same way as they apply to mandatory contributions paid in respect of an employee or a self-employed person. As a result, the obligations and liabilities of the trustees as stipulated under the MPFSO for dealing with mandatory contributions shall apply in respect of special contributions made under the new Part IIIA. The purpose of the proposed section 19H is to ensure that the provisions under the new Part IIIA will prevail in case there is any inconsistency between the provisions under the new Part IIIA and the provisions in the specified instruments.

Clause 5

Section 19B(1) of Part IIIA provides that: "The Authority may pay a contribution (referred to in the Part as a "special contribution") into an account of a member of a registered scheme." Given that "mandatory contribution" and "voluntary contribution" are themselves defined in section 2(1) of the MPFSO, the respective meanings of "mandatory contributions", "voluntary contributions" and "special contributions under Part IIIA" in the revised section 21C(2)(b) are sufficiently clear. It is not necessary to add the reference to special contributions under Part IIIA in a new paragraph (ba) in section 21C(2).

Clause 7(2)

(a) and (b) It is not intended that the special contribution should be paid into a separate preserved account which is distinct from preserved account that holds other contributions.

(c) Under an MPF scheme, there are two types of MPF accounts – "preserved account" and "contribution account". As the present definitions of "contribution account" and "preserved account" in section 2 of the General Regulation do not cater for the payment of a special contribution, Clause 7 proposes amendments to them accordingly.

Under the proposed section 19B(2)(a) and (3), the MPFA may direct an approved trustee of a registered scheme to pay a special contribution into a specified "sub-account" of a scheme member's contribution account or preserved account. Section 78 of the General Regulation, inter alia, sets out that an approved trustee must divide a contribution account or a preserved account into different "sub-accounts". Clause 8 proposes to amend section 78(6)(c), (7)(b) and (8)(a) to specify the sub-accounts of a contribution account and a preserved account into which the special contributions should be paid. The proposed amendments to section 78(6)(c), (7)(b) and (8)(a) of the General Regulation tally with the proposed section 19B(3).

Clause 8

There is no need to keep the special contribution separate from other funds. It should be noted that as set out in paragraph 8 of the LegCo Brief, the special contributions will be subject to the same preservation rule and other legislative provisions that apply to employee mandatory contributions in existing MPF accounts.

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Secretary for Financial Services
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(Attn: Mr Ryan CHIU Pit-ming
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By Fax (2528 3345)

13 June 2008

Dear Mr CHIU

Mandatory Provident Fund Schemes (Amendment) Bill 2008

I am scrutinizing the captioned Bill with a view to advising Members of the Legislative Council on its legal and drafting aspects.

My observations on the Bill are set out in the attached schedule for your consideration. I would be grateful if you would let me have the Administration's reply before 18 June 2008, so that it may be taken into account in the Division’s report to the House Committee on 20 June 2008.

Yours sincerely

(KAU Kin-wah)
Assistant Legal Adviser

Encl (2 pages)
cc DoJ (Attn: Michael LAM SALD)
LA
SALA2

Schedule

Clause 4

Proposed section 19B(1)

The obligation of Mandatory Provident Fund Schemes Authority (MPFA) under this sub-clause does not seem to be mandatory. An aggrieved person may not have a cause of action against MPFA if it has failed to pay the special contribution into that person's relevant account or has paid the sum to a wrong person.

Proposed section 19D

(a) The proposed section 19B states that the special contribution is to be paid into an account of a member of a registered scheme. It therefore seems to be contradictory when the proposed section 19D(3) states that an approved trustee may be required to registering a person as a member of the scheme. It is well understood that the policy of the Administration intends to benefit members of an ORSO scheme. However, the present drafting does not seem to achieve the purpose.

(b) Please clarify what is intended to be meant by registering "a person specified in the notice as a member of the scheme" in the proposed section 19D(3), and 19D(5).

Proposed section 19G

Please clarify why this clause is necessary as nothing in any provision whatsoever has howsoever suggested that the special contribution could be set off against or otherwise applied to satisfy any obligation to pay contribution under MPFSO.

Proposed section 19H

(a) Please clarify what provisions of this Part IIIA and in what way such provisions may conflict with the provisions of a specified instrument.

(b) Please clarify whose articles or memorandum is meant in the proposed section 19H(2)(c).

(c) Please clarify whether the relevant trust deeds and related instruments do—

(i) empower the relevant approved trustees or managers to deal with the special contribution (such as investing and payment out) in the same way as the employer or employee's contribution, and

(ii) impose on them the same obligations and liabilities in respect of the special contributions.

Please note that such trust deeds and related instruments did not contemplate that any special contribution would be made.

Clause 5

In view of the possible misunderstanding that "under Part IIIA" may also apply to mandatory and voluntary contributions, please consider adding the reference to special contribution under Part IIIA as a new paragraph (*ba*).

MANDATORY PROVIDENT FUND SCHEMES (GENERAL) REGULATION

Clause 7(2)

(a) Please clarify whether it is the Administration's policy that the special contribution should be paid into a separate preserved account which is distinct from preserved accounts that hold other contributions.

(b) If the answer to (a) is in the affirmative, please consider whether the proposed new definition of "preserved account" should be revised as the current drafting seems to suggest that the different contributions are mixed in such preserved account.

(c) Further, the definition is in respect of "preserved account", but in section 78 such preserved accounts are sub-accounts. Please clarify whether the description should be consistent.

Clause 8

If the Administration's intention is to keep the special contributions separate from other funds, it may be desirable to specify a sub-account for special contributions in a new paragraph under each of subsections (6), (7) and (8).