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CB(1)1720/11-12(01)
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來函檔號 YOUR REF:

26 April 2012

Clerk to Bills Committee
(Attn: Ms Anita Sit)
Legislative Council Complex,
1 Legislative Council Road,
Hong Kong

Dear Ms Sit,

**Bills Committee on Mandatory Provident Fund Schemes
(Amendment) (No.2) 2011**

Follow-up to meeting on 15 March 2012 – Item 9

Further to my letter of 20 April and 23 April, please find the response of the Administration to item 9 on the list of follow-up actions arising from the discussion at the meeting on 15 March 2012 at the Annex.

Yours sincerely,

Frederick

(Frederick Yu)
for Secretary for Financial Services and the Treasury

**Bills Committee on
Mandatory Provident Fund Schemes (Amendment) (No. 2) Bill 2011**

**List of follow-up actions arising from the discussion
at the meeting on 15 March 2012**

**Items 9: Whether guidelines issued under section 6H of the
Mandatory Provident Fund Schemes Ordinance (Cap. 485)
("MPFSO") are subsidiary legislation**

"Subsidiary legislation" is defined in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) ("IGCO") to mean "any proclamation, rule, regulation, order, resolution, notice, rule of court, bylaw or other instrument made under or by virtue of any Ordinance and having legislative effect". The issue is whether a guideline is an instrument having "legislative effect".

2. The term "legislative effect" is not defined in IGCO. However, certain criteria are relevant in determining whether an instrument has legislative effect, i.e.-

- (a) whether the instrument extends or amends existing legislation, or alters the common law;
- (b) whether the instrument has general application to the public or a class of public, as opposed to individuals;
- (c) whether the instrument formulates general rules of conduct, usually of prospective application, as opposed to applying those rules to particular cases;
- (d) whether the measure is legally binding, as opposed to providing guidance only;
- (e) whether the instrument is subject to parliamentary control; and
- (f) whether the legislative intent is to treat the instrument as subsidiary legislation.

3. Under section 6H of MPFSO, guidelines may be issued for the

guidance of specific entities such as approved trustees and service providers; and may consist of a code, standard, rule relating particularly to provident fund schemes or a class of such schemes. On the other hand, a person does not incur a civil or criminal liability only because the person has contravened such guidelines (see section 6H(6) of MPFSO). In fact, it is not necessary for such guidelines (or any amendment or revocation) to be published in the Gazette (see section 6H(4) of MPFSO).

4. In view of the nature and contents of such guidelines, the Department of Justice advised that such guidelines do not have legislative effect and are not subsidiary legislation, and there is no doubt as to the nature of guidelines made under section 6H of MPFSO. Accordingly, there is no need to add an express provision in that section to state that guidelines are not subsidiary legislation.

Financial Services and the Treasury Bureau
Department of Justice
26 April 2012