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Legislative Council

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Paper for the House Committee Meeting on 16 December 2011

Legal Service Division Report on Mandatory Provident Fund Schemes (Amendment) (No. 2) Bill 2011

I. SUMMARY

1. **Objects of the Bill** To provide for a statutory regulatory regime for Mandatory Provident Fund (MPF) intermediaries to facilitate the implementation of the Employee Choice Arrangement (ECA) and for related matters.

2. **Comments**
   (a) A proposed Part IVA is to be added to the Mandatory Provident Fund Schemes Ordinance (Cap. 485) (MPFSO) to provide for a statutory regulatory regime for MPF intermediaries.
   (b) The proposed institution-based regulatory regime is in line with the arrangements under the existing administrative regime to ensure regulatory consistency.
   (c) MPFA is to be empowered to designate an electronic system for transfer of accrued benefits and mandates its use by trustees.
   (d) A new offence is created for an employer's failure to comply with a court order made in civil proceedings for the payment of arrears of mandatory contributions or contribution surcharges, and to provide for daily penalty in the case of continued offences under section 43B(1C) and (1E) of MPFSO.
   (e) If the Bill is enacted, the Bill and the MPF Schemes (Amendment) Bill 2009 (enacted in July 2009 to introduce ECA) will both come into operation on 1 November 2012.

3. **Public Consultation** The Administration and MPFA jointly issued a consultation paper on the legislative proposals on 28 March 2011. According to the LegCo Brief, there is general support for enhancing the regulation of MPF intermediaries before the implementation of ECA.

4. **Consultation with LegCo Panel** The Panel on Financial Affairs was consulted on the Administration's legislative proposals at its meeting on 4 April 2011. Members expressed various concerns on the proposals.

5. **Conclusion** In view of the concerns expressed by the Panel and the significance of the proposals to ECA, members may wish to form a Bills Committee to study the Bill in detail.

II. REPORT

Objects of the Bill

To amend the Mandatory Provident Fund Schemes Ordinance (Cap. 485) (MPFSO) to provide for a statutory regulatory regime for Mandatory Provident Fund (MPF) intermediaries to facilitate the implementation of the Employee Choice Arrangement (ECA) and for related matters.

LegCo Brief Reference

2. File Ref.: G6/9/22(2011) Pt. 20 issued by the Financial Services and the Treasury Bureau and dated 6 December 2011.

Date of First Reading

3. 14 December 2011.

Background

4. At present, the Mandatory Provident Fund Schemes Authority (MPFA) operates an administrative registration regime for MPF intermediaries and relies on the regulatory efforts made by the Hong Kong Monetary Authority (HKMA), Insurance Authority (IA) and Securities and Futures Commission (SFC) for the supervision of MPF intermediaries who are their own regulatees under the Banking Ordinance (Cap. 155), the Insurance Companies Ordinance (Cap. 41) and the Securities and Futures Ordinance (Cap. 571) respectively.

5. In July 2009, the Mandatory Provident Fund Schemes (Amendment) Bill 2009 was enacted to amend MPFSO to introduce ECA, i.e. to enable an employee to transfer accrued benefits derived from any mandatory contributions made by the employee in respect of any current employment, or made by the employee or his employer in respect of any former employment or former self-employment, to another account within a MPF scheme.

6. With rising public expectation towards investor protection and in anticipation of more proactive sales and marketing activities targeted at MPF scheme members upon implementation of ECA, the Administration considers it prudent to put in place a statutory framework for the regulation of registered MPF intermediaries, to be modelled on the existing administrative registration regime to facilitate the implementation of ECA for the better protection of MPF scheme members.

Comments

7. The Bill seeks to amend MPFSO to provide for a statutory regulatory regime for MPF intermediaries to facilitate the implementation of ECA and for related matters. A new Part IVA on "Sales and Marketing Activities, and Giving of Advice, in relation to Registered Schemes" is added to MPFSO (new sections 34E to 34ZZK). Under the proposed scheme, MPFA will be the sole authority to administer the registration of MPF intermediaries, issue guidelines on compliance with statutory requirements applicable to registered MPF intermediaries and impose disciplinary sanctions, while HKMA, IA and SFC will be given the statutory role as the frontline regulators (FRs) responsible for the supervision and investigation of registered MPF intermediaries whose core business is in banking, insurance and securities respectively. According to the LegCo Brief, such an institution-based regulatory approach, which follows the arrangements under the existing administrative regime, would enable efficient use of regulatory resources and require minimal adjustment on the part of MPF intermediaries. The main provisions are summarized below.

<u>Prohibition against carrying on regulated activities</u>

8. The new section 34L provides for the prohibition against a person from carrying on "regulated activity"[1] (RA), or holding themselves out as carrying on RA in the course of the person's business or for reward, or taking or using certain related titles. Under the new section 34M, the prohibition does not apply to certain persons, including a person who is registered as a principal intermediary (PI) or as a subsidiary intermediary (SI) attached to a PI.

<u>Investigation concerning contravention of prohibition</u>

9. The new sections 30O and 30P provide for the investigation by MPFA, or at its nomination, by SFC, HKMA or IA, in relation to contravention of the prohibition under the new section 34L.

<u>Registration of intermediaries</u>

10. The new section 34Q requires MPFA to establish and keep a register of PIs and SIs. The new sections 34T to 34W and the new section 34Y provide for the procedures and criteria for the registration of PIs and SIs, the approval of the attachment to PIs, and the approval of responsible officers (RO). The new section 34X empowers MPFA to impose conditions on any registration or approval. The new sections 34Z, 34ZA and 34ZB provide for the assignment of the SFC, MA or IA as the frontline regulator of a PI, SI or RO.

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[1] According to the new section 34F, a person carries on "regulated activity" if the person (a) invites or induces, or attempts to invite or induce, another person to make a material decision; or (b) give regulated advice.

Change in status or circumstances after registration or approval

11. The new sections 34ZC to 34ZK provide for the consequences of any change in status or circumstances to a person after being registered as a PI or SI, being approved as attached to a PI, or being approved as a RO.

Conduct and other requirements

12. MPFA will be empowered to make rules on conduct and other requirements for PIs, SIs and ROs in consultation with FRs. The new sections 34ZL and 34ZM set out the conduct requirements. The new sections 34ZN, 34ZO and 34ZP set out the requirements to pay annual fees, deliver annual returns and complete continuing training respectively.

Inspection and investigation

13. FRs will be responsible for supervision and investigation of the relevant registered MPF intermediaries. The new sections 34ZQ to 34ZV provide for the inspection and investigation by a frontline regulator in relation to compliance by a PI, SI or RO with the conduct requirements and with the registration or approval conditions.

Disciplinary order

14. MPFA will be the sole authority to impose disciplinary sanctions, taking into account the information obtained by FRs in the course of their investigation and the representation of the MPF intermediaries concerned. The new sections 34ZW and 34ZZA provide for MPFA's powers to make any disciplinary order (i.e. reprimand, civil fines, suspension of registration, and/or revocation of registration) against a PI, SI or RO who fails to comply with a conduct requirement or a registration or approval condition, or who is convicted of an offence under MPFSO or its subsidiary legislation. The new section 34ZY provides that MPFA may take further action in respect of the PI, SI or RO.

Designation of electronic system

15. The new section 6KA empowers MPFA to designate an electronic system for use for the purposes of MPFSO (i.e. for transfer of accrued benefits and mandates its use by trustees) and charge a fee to be payable by the relevant trustees for the use of the electronic system.

Offences by employers

16. Clause 17 amends section 43B of MPFSO to create a new offence for an employer's failure to comply with a court order made in civil proceedings

for the payment of arrears of mandatory contributions and contribution surcharges, and to provide for a daily penalty for each day on which an offence committed by an employer for failing to make mandatory contributions for an employee continues. The proposed maximum penalty for such offence is a fine of $350,000 and imprisonment for three years, and in the case of a continuing offence, a daily penalty of $500 for each day on which the offence continues.

Appeal Board

17. Under the existing section 35 of MPFSO, any appeals against any registration and disciplinary decisions with regard to MPF intermediaries is to be handled by the Mandatory Provident Fund Schemes Appeal Board (Appeal Board). Clause 14 amends section 35 of MPFSO to revise the criteria for the appointment of the Chairman of the Appeal Board, and for the appointment to the panel of persons whom the Chief Executive considers suitable for appointment as members of the Appeal Board.

Transitional arrangements

18. Clause 21 contains transitional and saving provisions for the proposed Part IVA to MPFSO. All the existing MPF intermediaries with valid registration with MPFA immediately before the commencement of the proposed statutory regime may continue to carry on RA for two years during which they may apply to MPFA for registration under the proposed statutory regime. These existing MPF intermediaries will be required to observe the relevant requirements, and subject to disciplinary sanctions, in the same way as a newly registered MPF intermediary under the proposed statutory regime.

Commencement

19. If the Bill is enacted, the Bill and the MPF Schemes (Amendment) Bill 2009 (enacted in July 2009 to introduce ECA) will both come into operation on 1 November 2012.

Public Consultation

20. The Administration and MPFA jointly issued a consultation paper entitled "Enhanced Regulation of MPF Intermediaries" on 28 March 2011 on the legislative proposals. The public, the industry, the stakeholders and the Consumer Council were also consulted on such proposals. According to the LegCo Brief, there is general support for enhancing the regulation of MPF intermediaries before the implementation of ECA, and the majority of respondents did not indicate disagreement with the proposal that the statutory regulatory regime be modelled on the existing administrative regulatory arrangements.

Consultation with LegCo Panel

21. The Panel on Financial Affairs discussed on 4 April 2011 the legislative proposals. The following concerns were raised by Panel members during the discussion –

(a) whether, apart from frontline staff, the senior staff and directors of MPF corporations would be held liable for malpractices in MPF sales and marketing activities;

(b) whether and how consistency in regulatory standard and a level-playing field could be ensured under the proposed regulatory approach which involved three FRs;

(c) whether the assessment of the risk tolerance level of MPF scheme members by MPF intermediaries would be a mandatory requirement, and whether any mechanism would be available for resolution of disputes between MPF scheme members and MPF intermediaries;

(d) whether the costs for the development and operation of the proposed E-platform for transfer of MPF benefits would result in an increase in the administration fee charged by MPF trustees on MPF scheme members; and

(e) what measures would be taken to reduce the fees charged by MPF trustees and intermediaries on MPF scheme members.

22. The Administration provided an information paper (LC Paper No. CB(1)2845/10-11(01)) to the Panel on Financial Affairs in late July 2011 to report on the consultation feedback and conclusions on the legislative proposals.

Conclusion

23. The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. In view of the concerns expressed by members of the Panel on Financial Affairs and the significance of the proposal to ECA, members may wish to form a Bills Committee to scrutinize the Bill in detail.

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