

**Bills Committee on
Mandatory Provident Fund Schemes (Amendment) Bill 2014**

**The Administration's Response to
Comments raised by Assistant Legal Advisor and
Follow-up Actions Arising from Discussion at
Meeting on 2 December 2014**

Purpose

This paper sets out the Administration's response to the comments raised by the Assistant Legal Advisor of the Bills Committee ("BC") on the draft Committee Stage Amendments ("CSAs") [vide LC Paper No. CB(1)318/14-15(01)] and follow-up actions arising from the discussion at the BC meeting on 2 December 2014.

I. Comments on CSAs

(a) Disclosure of Information (Clauses 11 and 55)

To whom may information be disclosed

2. Clauses 11 and 55 aim to facilitate compliance of international tax reporting obligations by Mandatory Provident Fund ("MPF") trustees and Occupational Retirement Scheme administrators by allowing them to disclose information obtained during the performance of duties under the Mandatory Provident Fund Schemes Ordinance (Cap. 485) ("MPFSO") and the Occupational Retirement Schemes Ordinance (Cap. 426) ("ORSO") to relevant foreign tax authorities. Such disclosure will be limited to foreign tax authorities located outside Hong Kong and exercising or performing functions corresponding to those of the Commissioner of Inland Revenue ("CIR").

3. In other words, even if a person satisfies the criteria specified in the proposed sections 42AAB(1A)(b) and (c) of MPFSO and sections 78A(1A)(b) and (c) of ORSO, the Mandatory Provident Fund Schemes Authority ("MPFA") will not give consent for disclosure of information to that person if he or she is located in Hong Kong, i.e. not meeting the criteria specified in the proposed sections 42AAB(1A)(a) and 78A(1A)(a).

Functions that are exercised or performed by the person concerned

4. The proposed sections 42AAB(1A)(b) and 78A(1A)(b) aim to allow

MPFA to give consent for disclosure of information if the person to which information is to be disclosed exercises or performs tax-related functions that match those of CIR under the Inland Revenue Ordinance (Cap. 112) (“IRO”). Such functions may include administering tax on property, earnings and profits. In preparing the CSAs, we have taken into account the possible scenarios where such person acting on behalf of a foreign authority may not exercise or perform every single function of CIR, or where such person may exercise or perform functions other than tax matters. In other words, such person may not exercise or perform functions that are exactly the same as those of CIR. In view of the above, we have added the words “corresponds to those of” to the proposed sections 42AAB(1A)(b) and 78A(1A)(b).

5. The term “functions” in the proposed sections 42AAB(1A)(b) and 78A(1A)(b) refers to the official functions that correspond to those exercised or performed by CIR. As these provisions require a person to perform those functions of CIR, i.e. the official functions of CIR, it is not necessary to use “official” expressly in the provisions. We would also like to point out that it will not be practicable to view administrative functions in a stand-alone context – as carrying out official functions unavoidably entails administrative functions, it is not feasible to draw a clear-cut line to distinguish which ones are purely administrative in nature. MPFA will not consider whether a person performs administrative functions or not in giving consent for disclosure of information under the proposed sections 42AAB(1A)(b), 42AAB(1A)(c), 78A(1A)(b) and 78A(1A)(c).

Considerations in relation to arrangements for exchange of information under section 49 of IRO

6. The proposed sections 42AAB(1A) and 78A(1A) aim to specify the criteria for MPFA to give consent to MPF trustees or Occupational Retirement Scheme administrators for disclosure of information to foreign tax authorities [i.e. not limited to the United States (“US”)] in order to enhance tax transparency and combat tax evasion by complying with international reporting requirements, whilst the framework for exchange of information (“EoI”) under the Inland Revenue (Exchange of Information Relating to Taxes (United States of America) Order (Cap. 112 sub. leg. CK) (“the Order”) authorises the exchange of information upon request for tax purposes between the competent authorities of the Government of the Hong Kong Special Administrative Region and of the Government of the United States under the Tax Information Exchange Agreement (“TIEA”).

7. Although the relevant provisions of the Bill [i.e. sections 42AAB(1A) and 78A(1A)] and the Order have the same policy objective of fulfilling Hong Kong’s international obligation in enhancing tax transparency, their legal

frameworks operate differently –

- (a) the Bill allows disclosure of information to overseas authorities meeting the specified criteria, but the Order deals with disclosure of tax information to the competent authority of the US¹ only;
- (b) the Bill allows disclosure of information by financial institutions (i.e. MPF trustees and Occupational Retirement Scheme administrators), but the Order allows disclosure of information by the Inland Revenue Department at the government level; and
- (c) under the Bill, any disclosure of information requires consent from the data subject. However, under the Order, exemption from obtaining consent from the data subject for disclosure of tax information is provided under the Personal Data (Privacy) Ordinance (Cap. 486) (“PDPO”).

That said, the Administration has given due consideration to the interface between MPFSO, ORSO and the Order, the safeguards to protect personal data privacy and confidentiality of information exchanged provided under the Order, as well as PDPO in preparing the CSAs.

(b) Determination of Minimum MPF Benefits [Clause 51 in relation to Schedule 2 to the Mandatory Provident Fund Schemes (Exemption) Regulation (Cap. 485 sub. leg. B) (“Exemption Regulation”)]

8. The definition of “final average monthly relevant income” aims to determine a scheme member’s relevant income per month averaged over a period of time. We propose to add the words “the earliest of” to clause 51(1A) and (1D) before setting out all the four scenarios [(in paragraph (a)(i) to (iv) and paragraph (b)(i) to (iv) under section 1(1) in Schedule 2 to the amended Exemption Regulation] so as to make it clear that in case more than one scenario is applicable, it should be the earliest date that counts when calculating the period for determining the “final average monthly relevant income”. In the rare case that more than one event provided in the definition happened on the same day, that day should be used for the two events in comparing the dates of all events, and in turn for determining the “final average monthly relevant income”.

(c) Proposed Transitional and Savings Provisions (Clause 58)

9. We propose to add transitional and savings provisions [i.e. clauses 58(1)(a) to (c) and 58(2)] in relation to the calculation of “permitted period” for persons

¹ Under the Order, the “competent authority” means the Secretary of the Treasury or its delegate.

who begin employment with an employer (i.e. employees) and become self-employed (i.e. self-employed persons) before commencement of the relevant amended provisions. If an employment or a self-employment begins on or after the commencement date, the proposed method for calculation of “permitted period” should be used instead. This arrangement will give sufficient time for employers and self-employed persons to understand the proposed method for calculation and duly comply with the statutory requirements on enrolment and contributions.

10. In respect of clause 58(3), at present MPFSO and the subsidiary legislation has no provision covering the situation where the contribution day of a self-employed person is a Saturday, a public holiday, a gale warning day or a black rainstorm warning day. Relevant parties have been referring to section 71 of the Interpretation and General Clauses Ordinance (Cap. 1) for determination of the contribution day. The proposed transitional provision [i.e. clause 58(3)] provides that if the contribution day falls on a public holiday, a gale warning day or a black rainstorm warning day, a self-employed person will have to make contributions the next day if it is not a public holiday, a gale warning day or a black rainstorm warning day.

(d) CSAs

11. A copy of the final draft CSAs is set out at **Annex A** for Members’ reference.

II. Follow-up Actions Arising from Discussion on 2 December 2014

12. At the BC meeting, a Member asked for the number of MPF schemes allowing scheme members to withdraw voluntary contributions free-of-charge up to four times a year. Currently, 12 out of 31 MPF schemes with Special Voluntary Contribution arrangement have set a limit of processing up to four requests for withdrawals in a year free-of-charge (a list of these schemes is at **Annex B**). Although MPFA has not requested trustees to provide information on the general withdrawal pattern of scheme members at the moment, it will request trustees to monitor the withdrawal frequency and report to MPFA after the implementation of phased withdrawal to facilitate review of the new arrangements.

13. In addition, the Member also asked for information about the administration costs for processing a request for withdrawal free-of-charge and the subsequent requests for withdrawal. As processing withdrawal requests is only one of many administrative functions of trustees, it is difficult to separate the administration costs incurred for this purpose from others. MPFA could

only provide some general figures – according to an independent consultancy study commissioned by the Authority in 2012, withdrawal-related scheme administration and support comprised around 15% of the total administrative costs (which were estimated at 0.75% of the total value of assets under management at the time).

**Financial Services and the Treasury Bureau
Mandatory Provident Fund Schemes Authority
December 2014**

Mandatory Provident Fund Schemes (Amendment) Bill 2014

Committee Stage Amendments to be Moved by the Administration

<u>Clause</u>	<u>Amendment Proposed</u>
7	<p>(a) In the proposed section 21BB(6), by deleting “the scheme members’ interests” and substituting “scheme members’ interests”.</p> <p>(b) In the proposed section 21BB(8)(b), in the Chinese text, by deleting “加入” and substituting “包括”.</p>
11	<p>In the proposed section 42AAB, by adding—</p> <p>“(1A) The Authority may give consent only if—</p> <p>(a) the information is to be disclosed to a person located in a place outside Hong Kong;</p> <p>(b) the person exercises or performs in that place functions that correspond to those of the Commissioner of Inland Revenue; and</p> <p>(c) the Authority is satisfied that the disclosure will enable or assist the person to exercise or perform the person’s official functions.”.</p>
22(2)	<p>In the proposed section 31(4), by deleting “beginning on” and substituting “after”.</p>
25	<p>(a) In the proposed section 35B(2), by deleting everything after “if” and substituting—</p>

“—

- (a) the instructions are given in a form specified or approved by the Authority; and
 - (b) 30 days have passed since the member gave those instructions to the approved trustee.”.
- (b) In the proposed section 35B(3), by deleting “12” and substituting “4”.

New

By adding—

“26A. Section 42AA added

Part 4, after section 42—

Add

“42AA. Transitional provision for Part 4—Mandatory Provident Fund Schemes (Amendment) Ordinance 2014

- (1) Section 31(4) applies in relation to an application for membership of, or participation in, a registered scheme with a relevant date that is before the commencement date if, on the commencement date—
 - (a) the period of 30 days from the relevant date has yet to expire; and
 - (b) the applicant has not been given a notice of acceptance under section 31(4) of the pre-amended Regulation.

- (2) In this section—

commencement date (生效日期) means the date on which section 22 of the Mandatory Provident Fund Schemes (Amendment) Ordinance 2014 (of 2014) comes into operation;

pre-amended Regulation (《未修訂規例》) means this Regulation as in force immediately before

the commencement date;

relevant date (有關日期), in relation to an application for membership of, or participation in, a registered scheme, means whichever is the later of the following dates—

- (a) the date on which all the information required for the application is submitted;
- (b) the date on which the applicant agrees to observe and accept the governing rules of the scheme.”.”.

New

By adding—

“27A. Section 67A added

Part 5, after section 67—

Add

“67A. Transitional provision for Part 5—Mandatory Provident Fund Schemes (Amendment) Ordinance 2014

- (1) Subsection (2) applies if—
 - (a) a relevant employee of a participating employer becomes a member of a registered scheme before the commencement date; and
 - (b) on the commencement date—
 - (i) the period of 60 days after the employee becomes such a member has yet to expire; and
 - (ii) the employee has not been given a membership certificate under section 55 of the pre-amended Regulation.
- (2) The employee must be given a notice of

participation that complies with section 31(4A) within the 60-day period.

(3) Subsection (2) does not apply in relation to a casual employee who is a member of an industry scheme.

(4) In this section—

commencement date (生效日期) means the date on which section 27 of the Mandatory Provident Fund Schemes (Amendment) Ordinance 2014 (of 2014) comes into operation;

pre-amended Regulation (《未修訂規例》) means this Regulation as in force immediately before the commencement date.”.”.

49(2) In the proposed item 11B, in the Chinese text, by deleting “核准受託人須遵守就”.

51 By adding before subclause (1)—

“(1A) Schedule 2, section 1(1), definition of *final average monthly relevant income*, paragraph (a), after “immediately preceding”—

Add

“the earliest of the following”.

(1B) Schedule 2, section 1(1), definition of *final average monthly relevant income*, paragraph (a)(iii), after “withdrawal;”—

Add

“or”.

(1C) Schedule 2, section 1(1), definition of *final average monthly relevant income*, after paragraph (a)(iii)—

Add

“(iv) the date on which the trustee of the scheme receives the latest claim lodged by the member under section 6(9A) for which benefits have not been paid;”.

(1D) Schedule 2, section 1(1), definition of *final average monthly relevant income*, paragraph (b), after “whichever is the later, to”—

Add

“the earliest of the following”.

(1E) Schedule 2, section 1(1), definition of *final average monthly relevant income*, paragraph (b)(iii), after “withdrawal;”—

Add

“or”.

(1F) Schedule 2, section 1(1), definition of *final average monthly relevant income*, after paragraph (b)(iii)—

Add

“(iv) the date on which the trustee of the scheme receives the latest claim lodged by the member under section 6(9A) for which benefits have not been paid;”.

(1G) Schedule 2, section 1(1), definition of *minimum MPF benefits*, paragraph (a), after “accrued”—

Add

“and held”.

(1H) Schedule 2, section 1(1), definition of *years of post-MPF service*—

Repeal

“or the relevant date, whichever is the later, to”

Substitute

“, the relevant date or (if the member was previously paid any benefits under section 6(9A)) the date on which the trustee of the scheme received the claim lodged by the

member for which benefits were last paid under that section, whichever is the latest, to the earliest of the following”.

- (1I) Schedule 2, section 1(1), definition of *years of post-MPF service*, paragraph (c)—

Repeal

“withdrawal.”

Substitute

“withdrawal; or”.

- (1J) Schedule 2, section 1(1), definition of *years of post-MPF service*, after paragraph (c)—

Add

“(d) the date on which the trustee of the scheme receives the latest claim lodged by the member under section 6(9A) for which benefits have not been paid.”.

- (1K) Schedule 2, section 1(2), after “accrued”—

Add

“and held”.

- (1L) Schedule 2, section 2(2), after “accrued”—

Add

“and held”.”.

55

- (a) In the proposed section 78A, by adding—

“(1A) The Registrar may give consent only if—

- (a) the information is to be disclosed to a person located in a place outside Hong Kong;
- (b) the person exercises or performs in that place functions that correspond to those of the Commissioner of Inland Revenue; and
- (c) the Registrar is satisfied that the disclosure will

enable or assist the person to exercise or perform the person's official functions.”.

- (b) By deleting the proposed section 78A(3).

New

By adding—

“Part 8

Transitional and Savings

58. Transitional and savings

- (1) If the date on which a person begins employment with an employer falls before the commencement date, the following provisions apply in relation to that employment—
 - (a) section 7AA of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) as in force immediately before the commencement date;
 - (b) section 122 of the pre-amended Regulation;
 - (c) section 1 of the pre-amended Notice.
- (2) If the date on which a person becomes self-employed falls before the commencement date, section 2 of the pre-amended Notice applies in relation to that self-employment.
- (3) If—
 - (a) the last day of the period prescribed in section 131 of the pre-amended Regulation in relation to a self-employed person falls on or after the commencement date; and
 - (b) that last day is a day specified in subsection (4),the next following day that is not a day so

specified is the contribution day for the self-employed person.

- (4) The day specified for subsection (3) is—
- (a) a Saturday;
 - (b) a public holiday; or
 - (c) a gale warning day or black rainstorm warning day as defined by section 71(2) of the Interpretation and General Clauses Ordinance (Cap. 1).
- (5) In this section—

commencement date (生效日期) means the date on which section 4 of the Mandatory Provident Fund Schemes (Amendment) Ordinance 2014 (of 2014) comes into operation;

pre-amended Notice (《未修訂公告》) means the Mandatory Provident Fund Schemes (Specification of Permitted Periods) Notice (Cap. 485 sub. leg. F) as in force immediately before the commencement date;

pre-amended Regulation (《未修訂規例》) means the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A) as in force immediately before the commencement date.”.

**Financial Services and the Treasury Bureau
Mandatory Provident Fund Schemes Authority
December 2014**

**List of Mandatory Provident Fund Schemes that
Process Scheme Members' Request for
Withdrawal of Special Voluntary Contributions Free-of-charge
Four Times a Year**

1	AIA MPF - Basic Value Choice
2	AIA MPF - Prime Value Choice
3	BCOM Joyful Retirement MPF Scheme
4	INVESCO Strategic MPF Scheme
5	China Life MPF Master Trust Scheme
6	Fidelity Retirement Master Trust
7	Haitong MPF Retirement Fund (formerly known as Taifook MPF Master Trust)
8	FWD MPF Master Trust Basic Scheme
9	FWD MPF Master Trust Comprehensive Scheme
10	Manulife Global Select (MPF) Scheme
11	Principal MPF Scheme Series 800
12	Sun Life Rainbow MPF Scheme

**Mandatory Provident Fund Schemes Authority
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