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18 August 2021

Mr Boris Lam
Clerk to Bills Committee on Mandatory Provident
Fund Schemes (Amendment) Bill 2021
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Dear Mr Lam,

**Mandatory Provident Fund Schemes (Amendment) Bill 2021 (the Bill) –
Submission from the Hong Kong Trustees' Association (HKTA)**

I refer to the submission from the HKTA dated 3 August 2021 to the Bills Committee on the captioned Bill. As requested, we set out below our detailed response to the comments raised therein.

Safe harbour provisions

Proportionate basis

2. HKTA's submission sought clarification on how the Mandatory Provident Fund Schemes Authority (MPFA) would apply the principle of "proportionality" in future enforcement actions (viz. determination of financial penalty and prosecution) in the event of a breach of or non-compliance with the

law by trustee due partly to the failure of the system operator of the designated electronic MPF system (hereafter referred to as “eMPF Platform”).

3. The proposed “safe harbour” provisions under clauses 42, 43 and 97 of the Bill seek to provide (i) statutory defence for a trustee charged with certain offences and (ii) certainty to trustees that financial penalty will not be imposed on a trustee if non-compliance with the statutory requirements is only due to the failure of the system operator to perform the operator’s duties. The inclusion of “safe harbour” provisions does not change the prevailing and well-established procedures of the MPFA to ensure that each and every case of suspected non-compliance is considered thoroughly and impartially by the MPFA.

4. Specifically, when assessing whether a non-compliance is substantiated and the extent of fault attributable to the trustee concerned, the MPFA would take into account all relevant facts and circumstances, including but not limited to the root cause of the breach and the respective involvement of a trustee and the system operator. The trustee in question will be given opportunities to make representations to give its account of the incident and raise any possible defence, where applicable. After assessing all available evidence and if satisfied that there is sufficient evidence to substantiate a non-compliance based on the relevant standard of proof, the MPFA would determine the appropriate enforcement action (e.g. imposing financial penalty or recommending criminal prosecution), taking into account the principles of proportionality and reasonableness. For transparency and accountability, the MPFA will issue guidance to the industry to explain its enforcement policy as appropriate.

Appeal or independent review mechanism

5. As explained above, trustees will be given opportunities to make submissions of their account of incidents and/or give explanations and/or representations during the investigation stage and after the issuance of a Notice of Intention to Impose Financial Penalty (if any). If a trustee disputes the financial penalty imposed by the MPFA, the MPFA may bring the matter before the court under section 45C of the Mandatory Provident Fund Schemes Ordinance (MPFSO) for adjudication.

6. Insofar as the internal procedures and operational guidelines governing the actions/decisions made by the MPFA in its performance of regulatory functions is concerned, the Process Review Panel in relation to the Regulation of MPF Intermediaries will be tasked, upon expansion of its terms of reference in the latter half of this year, to cover non-MPF intermediaries regulatory activities of the MPFA, to review and advise the MPFA on the adequacy and consistency of MPFA's internal procedures and guidelines.

Possible conflict of interests / roles

7. We do not see a conflict of interest on the part of the MPFA to determine the extent of liability between the trustee and the system operator (i.e. the eMPF Platform Company (Company)), as mentioned in page 2 of the HKTA's submission. The eMPF Platform is a public utility to facilitate the performance of MPF scheme administration work. The respective roles and responsibilities of the MPFA, the Company and the trustees to enable or facilitate the proper and efficient operation of the eMPF Platform have been clearly delineated in the Bill and will be supplemented by the Operating Rules.

8. The MPFA's role over the Company would focus on safeguarding system integrity and stability, ensuring effective and efficient development and maintenance of the eMPF Platform by the Company, and taking remedial actions as early as possible when deficiencies are identified. The Government will also have an important role to play in the governance of the Company and the MPFA, including appointment of members and Government representatives to the Board of Directors of the Company and the Management Board of the MPFA, and approval of essential governance, financial and administrative matters of the Company, including the annual budget, work plan, fees and charges, and any change in ownership.

9. To avoid any conflict of roles, the MPFA will put in place internal segregation of functions relating to the Company. Under the proposed section 6PA of the MPFSO as added by clause 12 of the Bill, the Director of Audit is empowered to examine the economy, efficiency and effectiveness with which the MPFA and the Company have used the resources in performing their functions.

10. Taken together, the above measures will help prevent possible conflicts of roles, enhance accountability and instil public confidence in the performance of public functions by the MPFA and the Company.

Trustees' duties under section 43 of the MPFSGR

11. Section 43 of the Mandatory Provident Fund Schemes General Regulation (Cap. 485, sub.leg. A) (MPFSGR) stipulates the fundamental duties of approved trustees with respect to the administration of MPF schemes. Among those duties, section 43(a) provides that the trustee must exercise a level of care, skill, diligence and prudence that may reasonably be expected of a prudent person who is acting in a similar capacity and who is familiar with the operation of registered schemes. Section 43(d) provides that the trustee must act in the interest of the scheme members and not in the trustee's own interest.

12. The duties imposed on the trustee under section 43 of the MPFSGR is generic and all-embracing, and will continue to apply after the launch of the eMPF Platform which only deals with scheme administration functions. Given the nature of section 43 of the MPFSGR and the specific "safe harbour" provisions concerning scheme administration work (see paragraph 3 above), it is not appropriate nor necessary to include section 43 of the MPFSGR under the "safe harbour" provisions. In fact, there is already an existing defence of "reasonable excuse" under section 67 of the MPFSGR in the event of trustee's non-compliance of section 43. As mentioned in paragraph 4 above, the MPFA will issue guidance to the industry to explain the MPFA's enforcement policy as appropriate.

Scope of scheme administration

13. Under the proposed new section 19U of the MPFSO, the administration fee charged by trustee must not exceed the amount payable by the trustee to the system operator for the use of the eMPF Platform and/or the provision of scheme administration services to the trustee. The scope of the services and facilities to be provided by the system operator to facilitate trustees' performance of the scheme administration functions has gone through public tender procedures and is based on the Common Standards. As a set of agreed specifications and requirements drawn up jointly by the MPFA and the MPF industry through various in-depth discussions since 2017, the Common

Standards delineate the core and essential scheme administration processes and functions to be centrally delivered and taken up by the eMPF Platform. We consider the current basis of charging administration fee for the use of the eMPF Platform clear and transparent.

Power of the MPFA to determine rate of administration fee

14. Section 19ZB of the MPFSO as newly added by the Bill provides for the power of the MPFA to determine the relevant rate of administration fee for a constituent fund of a registered scheme. The MPFA will exercise this power reasonably, fairly and impartially in accordance with section 19ZB(2), taking into account relevant factors including the applicable guidelines. The MPFA will consult relevant stakeholders, including the HKTA, before finalisation of the guidelines.

Use of fund expense ratio (FER) for corresponding topline fee reduction

15. A key objective of the eMPF Platform project is to achieve cost savings from the enhanced operational efficiency of the MPF System, thereby creating room for fee reduction for the benefit of scheme members. We have therefore proposed statutory requirements in the Bill to the effect that (i) the cost savings, being the difference between the existing scheme administration fees charged by trustees on scheme members and the future administration fees of the eMPF Platform payable by trustees to the system operator, would be passed to scheme members under a “straight pass-on” arrangement; and (ii) the cost savings must be reflected in full at the overall fee level borne by scheme members.

16. The FER is a common practice and benchmark to measure the overall fund expense level borne by scheme members, covering all management fees as well as out-of-pocket expenses (OPE). The FER of each MPF fund is published on the MPFA website, and is commonly used when we refer to the trend of fee reduction in the MPF System. Hence, it would only be reasonable and logical to use the FER as the basis of calculating the corresponding reduction in the overall fees and charges under eMPF Platform in the law (see for example the newly proposed sections 19W, 19Y and 19Z in the Bill), so that scheme members can clearly measure the effective difference and total impact of the cost savings.

17. Whilst OPE entails a certain degree of uncertainty and is sometimes beyond trustees' control, we expect that any financial burden on the trustees due to an unexpected increase in OPE could be offset by the expected and gradual drop in total OPE following automation and digitalization of scheme administration functions performed by the eMPF Platform (e.g. reduced expenses on publication or printing of reports) and the general growth in the assets under management (AUM).

Operating Rules and Subscription Agreement

18. The Operating Rules and the Subscription Agreement to be prepared by the system operator are important documents for the smooth operation of the eMPF Platform. As these documents concern the detailed terms and conditions for the mandatory use of the eMPF Platform, the industry's input would provide useful reference in their preparation. The process of formulating the Operating Rules and drafting the Subscription Agreement by the system operator is expected to commence in the second half of this year. The system operator and the MPFA (being the approving authority of the Operating Rules) plan to engage the industry in around the first half of 2022 on these documents.

Bundled administration/custodian/trustee fees

19. We note that under the current disclosure practices and different business models amongst trustees, the administration fee of some MPF schemes (accounting for a quarter of the total AUM) is bundled with custodian fee and trustee fee. For those cases where the relevant administration fee of the constituent fund is not readily ascertainable from the offering documents and if it is justified to do so, the MPFA may exercise the power conferred by the proposed section 19ZB mentioned in paragraph 14 above to determine the relevant rate of administration. The determination, if any, will be made with reference to factors and circumstances that are relevant, fair and reasonable, including but not limited to industry average figures of custodian/ trustee fee available from published information.

Opt-in model (section 206 of the MPFSGR)

20. It has been the policy objective to work towards achieving a paperless MPF experience through the eMPF Platform. To this end, we have proposed

amendments to section 2 of the MPFSO and section 206 of the MPFSGR to allow documents to be provided or given via the eMPF Platform.

21. Regarding the industry's suggestion to adopt an "opt-out" model for the use of the eMPF Platform, we have examined the proposal with the industry prior to finalizing the legislative proposals in the Bill. To cater for the need of the less tech-savvy scheme members and participating employers and ensure a smooth transition to the eMPF Platform, we consider it more appropriate to adopt an incremental approach and encourage "opt-in" for the use of the eMPF Platform with suitable incentives. The process of "opt-in" will indeed be simple and direct. Upon registration and enrolment on the online portal, users including scheme members and participating employers would be invited to accept e-communication as part of the terms and conditions of registration on the eMPF Platform. The design of the front-end of the eMPF Platform (website or mobile Apps) will be user-friendly with functions to promote digital take-up. Assistance will also be provided to facilitate the use of eMPF Platform by scheme members and participating employers. For example, the eMPF Platform contractor will maintain service centers to provide in-person support for the first onboarding and use of the eMPF Platform, and is required to achieve a target digital take-up rate of 90% at the end of five years after operation of the eMPF Platform. There will also be measures to increase public awareness of the eMPF Platform and boost digital take-up rate, e.g. territory-wide publicity and promotion campaigns targeting employers of different sizes and MPF scheme members. The MPFA will keep the situation under review, taking into account the users' technical readiness and different options to maximize digitalization.

Yours sincerely,



(Miss Cheryl Chow)

for Secretary for Financial Services and the Treasury

c.c. Hong Kong Trustees' Association Limited

(Attn: Ms LAU Ka-shi)

Mandatory Provident Fund Schemes Authority

(Attn: Ms Gabriella YEE, Executive Director (Policy))

Department of Justice

(Attn: Ms Frances HUI, Senior Assistant Law Draftsman

Mr Michael CHOI, Senior Government Counsel (Acting))