

**For discussion on
4 June 2018**

**Legislative Council Panel on Financial Affairs
Proposed Amendments to the
Occupational Retirement Schemes Ordinance (Cap.426)**

PURPOSE

This paper briefs Members on the key legislative proposals to update the Occupational Retirement Schemes Ordinance (Cap. 426) (“ORSO”) to enhance the power of the Registrar of Occupational Retirement Schemes (“the Registrar”)¹ to ensure that schemes regulated under the ORSO are bona fide employment-based retirement schemes and improve the governance of occupational retirement schemes.

BACKGROUND

2. The ORSO came into force on 15 October 1993. The objective of the legislation is to establish a registration system² for occupational retirement schemes voluntarily established by employers, to ensure that such schemes are properly regulated, and to provide greater certainty that retirement scheme benefits of these schemes promised to employees will be paid when they fall due. The ORSO however does not compel employers to set up occupational retirement schemes.

3. “Occupational retirement scheme” (“ORSO scheme”) under the ORSO refers to a scheme, not being an insurance policy providing benefits only upon death or disability, that has or is capable of having effect in relation to employment so as to provide benefits, in the form of pensions, allowances, gratuities or other payments, payable on termination of service, death or retirement, to or in respect of persons

¹ The Registrar is the Mandatory Provident Fund Schemes Authority (the “MPFA”).

² Coupled with the granting of exemption certificates upon meeting certain criteria as set out in paragraph 4 below.

gainfully employed (whether in Hong Kong or elsewhere) under a contract of service in any employment.

4. Employers who operate ORSO schemes that fall under the ambit of the ORSO are required to apply to the Registrar for registration or exemption of their schemes. An employer who provides an ORSO scheme for his employees is called “relevant employer”³ under the ORSO. The relevant employer of an ORSO scheme may apply to the Registrar for exemption certificate under the ORSO (“**an exempted scheme**”) if the scheme is either –

- (a) an offshore scheme registered or approved by an overseas authority performing functions which are generally analogous to those of the Registrar; or
- (b) a scheme which has not more than 10% or 50 of the scheme’s members, whichever is less, who are Hong Kong Permanent Identity Card holders.

If the scheme is not able to meet the above exemption criteria (a) or (b), the relevant employer of the scheme will need to apply for registration of his scheme (“**a registered scheme**”). As such, there are two types of ORSO schemes regulated under the ORSO, namely, registered schemes and exempted schemes.

5. Compared with the criteria for exemption set out in paragraph 4 above, the ORSO sets out relatively stringent application requirements for registration of an ORSO scheme. In applying for registration of his scheme, the relevant employer must comply with the relevant requirements under the ORSO to enable the Registrar to determine the application, including the submission of a statement by the relevant employer to confirm his compliance with the trusteeship requirements for a trust-based scheme, a solicitor’s statement on certain legal aspects of the scheme, an auditor’s statement reporting on certain accounting aspects of the scheme, and, where applicable, an actuarial certificate reporting his findings in an actuarial review of the scheme.

³ According to section 2(1) of the ORSO, a relevant employer means, in relation to an occupational retirement scheme, the employer who provides the employment which entitles or enables the employee to be a member of the scheme.

6. Registered schemes are subject to a range of statutory on-going requirements under the ORSO while exempted schemes are not. Registered schemes must comply with the statutory requirements in relation to assets (e.g. assets of the scheme must be separate from the relevant employer's assets), trusteeship (e.g. there must be at least one independent trustee who must not be the relevant employer himself if the scheme is governed by a trust), investment (e.g. not more than 10% of the assets of the scheme should consist of restricted investments, such as security issued by the relevant employer, as defined under the ORSO), funding (e.g. the scheme should be fully-funded, and any shortfall between the assets and liability must be made good within the prescribed period under the ORSO), and other requirements related to audit and actuarial review and disclosure of information to employees. Exempted schemes are not subject to the aforementioned statutory requirements in relation to assets, trusteeship and investment but are still required to comply with the requirements in relation to providing information to the Registrar, notifying the Registrar of certain changes of the schemes and payment of periodic exemption fees. Relevant employers may engage an "administrator"⁴ to perform the management work of their schemes and scheme assets such as accounts and records keeping and meeting the statutory requirements under the ORSO.

7. Apart from the above, the ORSO provides the Registrar with more intervening powers in the case of registered schemes. For example, the grounds for the Registrar to withdraw the exemption certificate of an exempted scheme are much more limited when compared to those available for cancelling the registration of a registered scheme.

8. In connection with the launch of the MPF System on 1 December 2000, ORSO schemes may also be classified into two types according to their MPF exemption status, i.e. those schemes with MPF exemption granted by the MPFA and those without (commonly known as "**MPF-exempted ORSO scheme**" and "**non-MPF exempted ORSO scheme**" respectively)⁵. Employers and members of **MPF-exempted**

⁴ According to section 2(1) of the ORSO, an administrator means the trustee, insurer or person who is principally responsible for the management of the scheme and its assets, etc., as the case may be.

⁵ When the MPF System was about to launch on 1 December 2000, registered schemes and exempted schemes under the ORSO may apply to the MPFA for MPF exemption pursuant to the Mandatory

ORSO schemes are exempt from MPF requirements. If an **MPF exempted ORSO scheme** has open membership (i.e. it continues to admit new employees of the relevant employer as members), a new employee of the relevant employer of the scheme can choose between joining that ORSO scheme or an MPF scheme. **Non-MPF exempted ORSO schemes** can be provided by relevant employers for their employees as top-up schemes in addition to MPF schemes, or retained by employers for keeping the benefits of their employees accrued before the launch of the MPF System for continued investment. As at 31 March 2018, the number of ORSO schemes is as follows:

Scheme type	Number of schemes		
	<u>With</u> MPF exemption	<u>Without</u> MPF exemption	Total
Registered schemes	3 149	563	3 712
Exempted schemes	209	401	610
Total	3 358	964	4 322

PROBLEM

9. Recently, it has come to the attention of the Registrar that some entities might have misused registered or exempted schemes for non-retirement purposes such as marketing such schemes to investors who are not employees of the relevant employer. Such schemes do not fall within the ambit of the ORSO under our original policy intent. Such misuse of registered and exempted schemes would compromise the integrity of the regulation of investment products in Hong Kong.

10. To ensure that only bona fide occupational retirement schemes are registered or exempted under the ORSO, we need to update the legislation by –

Provident Fund Schemes (Exemption) Regulation (Cap. 485B). The MPFA may issue an MPF exemption certificate to the relevant employers of the schemes if the MPFA is satisfied that the relevant application criteria under that Regulation are satisfied. MPF exempted ORSO schemes are also subject to the additional statutory requirements (e.g. trusteeship requirements) under that Regulation.

- (a) explicitly spelling out the requirement that all registered and exempted schemes must meet the employment-based criterion (see paragraph 12 below) on an on-going basis and not accepting application for exemption upon commencement of the proposed legislative amendments;
- (b) setting out the conditions to ensure that only bona fide transfer-in payments are allowed;
- (c) enhancing the Registrar's enforcement powers to ensure compliance of registered and exempted schemes with the statutory requirements;
- (d) empowering the Registrar to rely upon the express statutory provisions of the ORSO to cancel the registration of a scheme or withdraw the exemption certificate granted to a scheme if it no longer meets the employment-based criterion; and
- (e) allowing the Registrar to apply for a court order to freeze scheme assets upon its intention to issue a proposal to cancel the registration of a scheme, so as to protect the interests of scheme members.

11. In addition, we also take the opportunity to make technical amendments to update the wording of some provisions of the ORSO, streamline the procedures for withdrawal of an exemption certificate granted to or cancellation of registration of a scheme, provide the Registrar with adequate immunity protection and tally the duties required for trustees of registered schemes without MPF exemption with those for trustees of registered schemes with MPF exemption for better protection of members of such schemes.

LEGISLATIVE PROPOSALS

Ensuring that registered and exempted schemes are employment-based

12. The policy intention of the ORSO has all along been that registered and exempted schemes should be employment-based schemes. To be considered as an employment-based scheme, apart from the employees (whether past or present) of the relevant employer of an ORSO scheme, the membership may include –

- (a) individuals who are transferred from one ORSO scheme to another ORSO scheme upon bona fide business transactions between the relevant employers of two ORSO schemes. These individuals, being ex-employees of the relevant employer of the transferor scheme, may not become the employees of the relevant employer of the transferee scheme, depending on the actual agreement of the business transactions between the relevant employers of the two schemes. Such transfer can enable these individuals (e.g. retired pensioners) to continue receiving pensions though under the transferee scheme; and
- (b) the beneficiaries of deceased members.

13. To ensure that the abovementioned employment-based criterion will be complied with on an on-going basis, we propose to make legislative amendments to require—

- (a) for registered and exempted schemes: the relevant employers to file with the Registrar an annual statement stating that the employment-based criterion is met;
- (b) for new applications for registration: the relevant employers to submit –
 - (i) a statement that the employment-based criterion is met;
 - (ii) a solicitor statement stating that the scheme terms provide that the membership of the scheme is limited to employees, transferred individuals and the beneficiaries of deceased members as required under the employment-based criterion; and
 - (iii) an auditor statement stating whether in his opinion the membership requirements reflecting the employment-based criterion have been complied with, in all material respects, on a specified date.

14. As explained in paragraph 4 above, the current threshold for being qualified as an exempted scheme is comparatively low, making it relatively easy to obtain the exempted scheme status. Furthermore, exempted schemes are only subject to minimal ongoing regulatory requirements. These factors may render exempted schemes susceptible to misuse by certain entities for non-retirement purposes, for example as a general investment vehicle. To strengthen regulatory control in the interest of scheme members, we therefore propose not to accept any new applications for exemption after commencement of the legislative amendments. This proposal is believed to be in line with the trend to advocate better protection of scheme members by way of enhanced regulation on retirement schemes. For existing exempted schemes, we propose to allow them to continue to operate so as to minimise disruptions to the existing arrangements between the relevant employers of these schemes and their scheme members. To enhance the protection of members of the existing exempted schemes, we propose to impose on relevant employers of these schemes new requirements on return filings and submission of statements on on-going compliance with the employment-based criterion upon commencement of the legislative amendments.

Ensuring only bona fide transfer-in payments are allowed

15. At present, relevant employers of registered schemes are already required to submit annual returns to the Registrar for ensuring that the schemes are properly managed and funded. To minimise the chance of registered and exempted schemes being misused or abused for holding monies of unknown source, we propose to require that scheme administrators will only be permitted to accept a transfer of benefits from another scheme in respect of a member of the scheme which meets specified conditions, including –

- (a) the benefits to be transferred are held in an account in the sole name of the member of the receiving scheme; and
- (b) the benefits to be transferred are solely attributable to the former employment of the member of the receiving scheme with the relevant employer of the transferring scheme, etc.

Enhancing the Registrar’s inspection, investigation and enforcement powers

16. We propose to enhance the powers of the Registrar by empowering it to –

- (a) require any person to provide information and assistance to the Registrar for carrying out its functions under the ORSO;
- (b) enter non-domestic premises for inspection; and
- (c) take enforcement actions such as requiring specified persons⁶ to produce records relevant to the matters under investigation, or to attend before the investigator and answer questions relating to the matters under investigation within a specified time and at a specified place.

17. The above enforcement powers are on par with those given to the MPFA under the Mandatory Provident Fund Schemes Ordinance (Cap. 485) (“MPFSO”) for regulating MPF schemes.

Empowering the Registrar to cancel the registration or withdraw the exemption certificates of schemes

18. At present, a range of express statutory grounds on which the Registrar may withdraw the exemption certificate or cancel the registration of a scheme are set out in sections 11 and 42 of the ORSO respectively. Such grounds under section 11 include failure to comply with the exemption criteria set out in paragraph 4 above while those under section 42 include non-compliance with the account and record keeping requirements or funding requirements. We propose to include non-compliance with the employment-based criterion as an express statutory ground under the ORSO for withdrawal of an exemption certificate and cancellation of registration of a scheme.

⁶ A specified person refers to a person whom the investigator has reasonable cause to believe to be in possession of any record or document that may contain information relevant to any matter under investigation.

Allowing the Registrar to apply for a court order to freeze scheme assets in anticipation of a proposal to cancel the registration of a scheme

19. Under the existing ORSO, the Registrar may apply to the court for an order to freeze the assets of a scheme only after the Registrar issues a proposal to cancel the registration of a scheme, leaving risk behind for the assets to be transferred out from the scheme before the court order is granted. We propose to refine the wording to allow the Registrar to apply to the court for an order to freeze the assets of a registered scheme once the Registrar *intends* to issue a proposal to cancel the registration of a scheme.

Other technical amendments

20. Apart from updating the wording of some provisions of the ORSO, other technical amendments include but are not limited to –

- i. removing the need for the Registrar to publish in newspapers its proposal to cancel the registration or withdraw the exemption certificate of a scheme;
- ii. modelling on section 42B(1) of the MPFSO, conferring immunity protection in performing any function of the ORSO on the MPFA, its directors and employees. Currently, such immunity protection is conferred on public officers and person appointed under section 36(2) of the ORSO to conduct an inquiry as regards a registered scheme; and
- iii. specifying clearly that trustees of registered schemes without MPF exemption are required to perform the duties including exercising appropriate care, skill, diligence and prudence with respect to the administration of a scheme. Such duties are the same as those currently applicable to the trustees of registered schemes with MPF exemption.

IMPLICATIONS

21. When formulating the legislative proposals, we are mindful that the improvements will not inadvertently exclude bona fide employment-based retirement schemes set up by employers who have staff of mixed employment arrangements, nor increase compliance costs unreasonably. We envisage that the additional administrative work for employers or administrators arising from the proposed new reporting requirements for continuous compliance with the employment-based criterion will be minimal.

CONSULTATION

22. The MPFA, acting as the Registrar, has consulted relevant employers, administrators, industry bodies and professional bodies on the major proposed amendments. Their views have been incorporated in refining the amendments.

NEXT STEPS

23. After considering Members' views, we will finalise the implementation arrangement with a view to introducing an amendment bill into LegCo in the 2018-19 legislative session.

**Financial Services and the Treasury Bureau
Mandatory Provident Fund Schemes Authority
28 May 2018**