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BY EMAIL AND BY POST

25 June 2019

Ms. Anki Ng,
For Clerk to Bills Committee,
Legislative Council Complex,
1 Legislative Council Road,
Central,
Hong Kong

Dear Ms. Ng,

Bills Committee on Occupational Retirement Schemes (Amendment) Bill 2019

I refer to my letter to you dated 22 May 2019.

I enclose the Law Society's Submissions on the Occupational Retirement Schemes (Amendment) Bill 2019 for consideration by the Bills Committee.

Yours faithfully,

Eileen Tam
Assistant Director, Practitioners Affairs

Encls.



OCCUPATIONAL RETIREMENT SCHEMES (AMENDMENT) BILL 2019

SUBMISSION

1. The Legislative Council has set up a Bills Committee to scrutinize the Occupational Retirement Schemes (Amendment) Bill 2019 (the ‘Amendment Bill’). The Law Society is invited to provide written submissions on the Bill.
2. It was said that ‘the purpose of the Amendment Bill is to prevent the misuse of Occupational Retirement Schemes (the ‘ORSO’ schemes) as an investment vehicle open to members who are not employees of the relevant employers of the schemes’ⁱ. In principle we have no objection to this policy intent.
3. Some of our members are aware that some ORSO schemes have been misused as a collective investment scheme with open participation. These investment schemes are promoted in an aggressive manner to potential investors under the guise of ORSO schemes. That is contrary to the original policy intent of ORSO, and is not acceptable at all. Furthermore, allowing such misuse of ORSO schemes would compromise the integrity of the regulation of investment products in Hong Kong. It is noted that ORSO schemes are outside the regulatory ambit of the Securities and Futures Ordinance (Cap. 571).
4. As such, we agree that the relevant ordinance and the regulatory regime should be reviewed.

5. As for the specific provision of the Amendment Bill, we set out comments and proposed amendments in a table below.

Relevant section in the Amendment Bill		Heading of relevant section	Comments	Suggestions (if any)
1.	2(1) – definition of “occupational retirement scheme”	Interpretation	<p>We query the justification to limit to schemes that can <u>only</u> admit “<i>eligible persons</i>”?</p> <p>This will have impact on how some of the operative provisions (e.g. section 3) work. It will no longer be unlawful to have a “retirement scheme” provided that at least one member is a non-employee. Is this the intention it seems to remove the original purpose of the 1995 legislation?</p> <p>The issue is, by including new paragraph (c), the definition is in effect saying that if a scheme does not “<i>by its terms limit membership of the scheme to eligible persons</i>”, instead of having the effect of making a scheme not so limited impermissible, it seems to have the effect that such a scheme is not subject to the ORSO at all (and therefore presumably not impermissible).</p>	<p>We suggest to:</p> <p>(a) take out the new proposed paragraph (c) from the definition of “occupational retirement scheme”, and</p> <p>(b) add an operative provision restricting employers from operating an occupational retirement scheme which does not, by its terms, limit membership to eligible persons.</p>

Relevant section in the Amendment Bill		Heading of relevant section	Comments	Suggestions (if any)
2.	2A	Meaning of eligible person	<p>The definition of “<i>member</i>” is deleted and is replaced by a new definition of “<i>eligible person</i>”. “<i>Eligible person</i>” includes “<i>an individual having an interest in the estate of a deceased individual described in subsection (1)</i>”, so this essentially refers to the beneficiary of the deceased person.</p> <p>In section 2A(2) and other parts of the Occupational Retirement Schemes Ordinance (Cap. 426) (the ‘Ordinance’), the word “<i>member</i>” is still being used. Therefore, a definition of “<i>member</i>” may still be required.</p> <p>We consider that just having a definition of “<i>eligible person</i>” may not be sufficient.</p>	<p>(a) We suggest to consider including a new definition of “<i>member</i>” in the Ordinance, which can mean a person who is admitted to participate in an occupational retirement scheme in accordance with the terms of the occupational retirement scheme.</p> <p>(b) We suggest that the words “<i>Subject to subsection 2A(2) and (3), an</i>” should be inserted to replace “<i>An</i>” at the beginning of new section 2A(1).</p>
3.	2B	Interpretation of employment	<p>The new section 2B refers to persons who have been in services for more than 4 years and there will be deemed employment in such scenario. However, it is not clear if these persons are regarded as “<i>eligible persons</i>” or not, and the new section 7(2)(c)(iv) requires the employer to declare that “<i>all members of the scheme are eligible persons</i>”.</p>	<p>We suggest adding “, <i>the definition of “eligible person” in section 2A</i>” immediately before “<i>and of section 3</i>” appearing in section 2B(1).</p>

Relevant section in the Amendment Bill		Heading of relevant section	Comments	Suggestions (if any)
4.	7(2)(c) - New paragraph (iv)	Exemption	Similar with the issue with the definition of “ <i>occupational retirement scheme</i> ” - if that definition is amended in the way proposed, in fact such scheme failing (A) would not even be subject to registration (also subject to section 85, which as mentioned below does not seem to effectively serve its intended purpose).	See our suggestions re “ <i>occupational retirement scheme</i> ” in item 1 above.
5.	7(5B)	Exemption	Registrar can unilaterally “ <i>impose conditions for exemption of the scheme that the Registrar considers appropriate</i> ”. We consider that the above could lead to removal of exemption certificate under 11(1)(ba).	We suggest to include criteria or framework as to the circumstances in which the Registrar may impose conditions and the types of conditions that the Registrar may impose.
6.	10(1)(b)(ii)	Provision of information relating to exempted schemes	Annual statement of compliance with “ <i>eligible person</i> ” requirement for exempt schemes. This seems to be ‘an overkill’. The new legislation prohibits such persons joining an exempt scheme. We do not see the basis for the Registrar to require the employer to confirm annually that it has complied with this aspect of the law.	

Relevant section in the Amendment Bill		Heading of relevant section	Comments	Suggestions (if any)
7.	18(1) – last line	Registration	Previously the Registrar had to register the scheme if the conditions were satisfied (“ <i>the Registrar shall allow the application</i> ”), the proposed change gives the Registrar the discretion to refuse the application <u>even if</u> all conditions are satisfied (“ <i>the Registrar <u>may</u> allow...</i> ” (emphasis added))	We suggest adding the circumstances in which the Registrar may exercise such discretion to enhance certainty.
8.	18(4A)	Registration	Equivalent to new section 7(5B), but for registered schemes. This gives the Registrar broad powers to “ <i>impose conditions for registration of the scheme that the Registrar considers appropriate</i> ”	We suggest to include criteria or framework as to the circumstances in which the Registrar may impose conditions and the types of conditions that the Registrar may impose.
9.	25(5)	Trusteeship requirement	This codifies the general trust law obligations of a trustee.	For the avoidance of doubt, we ask for a confirmation that the codification of the trustee's obligations is without prejudice to the beneficiaries' right to seek equitable remedies. We note that the MPF (Exemption) Regulation and the MPF legislation also contain similar codified

Relevant section in the Amendment Bill		Heading of relevant section	Comments	Suggestions (if any)
				obligations on the part of the trustee.
10.	30(2)	Annual return and written statement	Requires annual statement relating to “ <i>eligible person</i> ” membership for registered schemes. (As for 10(1)(b)(ii) for exempt schemes).	
11.	33(1A)	Information etc. to be given to Registrar	The new section 33(1A) provides the Registrar with power to require “ <i>a person</i> ” to give “ <i>any information or document (including a legal opinion, or an auditor’s certificate, on a matter specified by the Registrar)</i> ”. Such power seems too wide especially any person can include the insurer, the trustee or the administrator who has no means to verify that all members of the scheme are eligible persons besides relying on the declaration/undertaking of the employer. In addition, legal opinions are subject to legal privilege and the Registrar’s power under this new provision seems to override such protection.	(a) We suggest to limit the obligation of “ <i>a person</i> ” under this section to “ <i>information within his possession or control</i> ”. (b) We suggest to add a provision that any legal opinions provided to the Registrar under this provision cannot be admissible in evidence in courts.
12.	66C(3)	Investigation	This subsection appears redundant, in light of the definition of “ <i>investigator</i> ” and section 66D.	We suggest to consider deleting section 66C(3).
13.	70B	Transfer of benefits	We received different views on this particular section.	

Relevant section in the Amendment Bill	Heading of relevant section	Comments	Suggestions (if any)
		<p>Some members consider that for better employee benefit arrangement purposes, employers' consent to a transfer of benefits seems to make sense.</p> <p>Other members note that the section provides for <u>only</u> transfer benefits between schemes where relevant employers agree. Existing provision in schemes which provide that just the member could trigger a transfer (often with consent of trustee) will now become ineffective.</p> <p>It is not clear why this is included. Schemes do exist which permit a Trustee to effect a transfer of benefits where the member/employee request. Such provision now becomes void. A justification on the above is required.</p>	
14.	78(1)(ca) - re the words " <i>other professional adviser acting or proposing to act in a professional capacity</i> "	Disclosure by Registrar	<p>This seems too wide, particularly since this paragraph is not subject to the limitations set out under paragraph 78(1)(a).</p> <p>(a) We suggest to identify clearly what "<i>other professional adviser acting or proposing to act in a professional capacity</i>" mean. Does that adviser need to have any publicly recognised</p>

Relevant section in the Amendment Bill		Heading of relevant section	Comments	Suggestions (if any)
				or certified qualification? (b) Also, we suggest to limit the disclosure by the restriction in section 78(1)(a) and section 78(1)(eb)(i) to (iii).
15.	78(1)(h)	Disclosure by Registrar	We query whether there should be any further limitation, or qualification, here; where such disclosure would include any specific personal, or company, data.	We suggest to limit this by section 78(1)(a).
16.	78(1A)	Disclosure by Registrar	We suggest the connection between the paragraphs, (a) through (c), be changed so this is only permitted where the requirement in paragraph (a) OR (b) is met; AND also the requirement in paragraph (c) is met. Otherwise, as drafted, such disclosure could occur where such disclosure is neither in the interests of scheme members, nor in the public interest. The same comment applies to section 78(1)(eb).	See our suggestions in the "Comments" section on the left hand side of this column.
17.	85	Schemes falling short of membership requirements	Also see comment on definition of " <i>occupational retirement scheme</i> " in (2) above. This section appears to be an attempt to address the	See our suggestions in item 1 above.

Relevant section in the Amendment Bill	Heading of relevant section	Comments	Suggestions (if any)	
		<p>issue raised re the definition of “<i>occupational retirement scheme</i>” in (2) above. However, it does not successfully accomplish this, because of the circularity of the words “<i>held out as being</i>” - the employer or other person can always argue that it has not “<i>hold the scheme out as being</i>” an occupational retirement scheme, and quite legitimately so, if such scheme necessarily (due to the newly proposed paragraph (c) of that definition) does not in fact meet the definition of an occupational retirement scheme.</p>		
18.	Schedule 1 Part 1 – section 1A	Basic documents for a scheme which is not a participating scheme of a pooling agreement	We query whether it will be easy for auditors to provide this, and whether they should be expected to do so - are they really in a position to provide this statement?	We suggest the MPFA to confirm with the professional bodies of auditors that auditors are in a position to provide the required statement.
19.	Schedule 1 Part 1 – section 3 - Addition of “and (5)”	Basic documents for a scheme which is not a participating scheme of a pooling agreement	<p>We query whether employers are really in a position to confirm compliance with section 25(5).</p> <p>While the Registrar may consider that employers can require back-to-back confirmation from the trustee(s), note that such a back-to-back confirmation cannot effectively protect the employers; if the trustee(s) are found to have failed the obligations under section 25(5), as far as the Registrar is</p>	We suggest to impose this compliance confirmation on the trustee(s) instead.

Relevant section in the Amendment Bill	Heading of relevant section	Comments	Suggestions (if any)
		concerned, it remains the employer's liability that the statement is flawed.	
20.	Schedule 1 Part 2 – new section 2A	Basic documents for a participating scheme of a pooling agreement	Same comment for item 18 above. See our suggestion for item 18 above.

6. Other than the above technical comments on the Amendment Bill, we have two additional observations.

7. The first is on solicitor’s statement. Under the Occupational Retirement Schemes Ordinance (Cap. 426), for new applications for registration for registered scheme, statements from the solicitor (together with the auditor and the relevant employer of an ORSO scheme) are required to confirm that the membership of the scheme complies with the employment-based criterion (see Schedule 1, Part 1 of the Ordinance). The Amendment Bill puts in an additional requirement for the solicitor statement, as underlined below.

"SCHEDULE 1

DOCUMENTS REQUIRED FOR REGISTRATION

PART I

BASIC DOCUMENTS FOR A SCHEME WHICH IS NOT A PARTICIPATING SCHEME OF A POOLING AGREEMENT

1. A statement by a solicitor stating –

(a)(i)...

(ii)...

(iii)...

(b)...

(ba) that the scheme by its terms limit membership of the scheme to eligible persons;"

The Law Society has previously proposed to the Mandatory Provident Fund Authority ("MPFA") various amendments to solicitor's statements, but those proposed amendments were not accepted, without reason. See the Law Society's letter to the MPFA on 29 May 2018.

8. The second is on an assumption apparently adopted in the Amendment Bill that employment under the ORSO scheme refers solely to that canvassed under the Employment Ordinance and that investment is to be confined to Hong Kong vehicles. This approach is unnecessarily restrictive and old-fashioned. It is not conducive to Hong Kong's traditional outward looking stance. These are matters of policy formulation which should merit due attention of the Government, in pursuit of the above policy intent, or in a comprehensive review of the retirement protection regime of HKSARⁱⁱ.

The Law Society of Hong Kong
25 June 2019

ⁱ See para 2 of the LegCo Brief File Ref.: RTS/2/1C dated 3 April 2019

ⁱⁱ Our specialist committee has reviewed various literatures in this matter. See e.g. *OECD Working Papers on Insurance and Private Pension No. 37; Pension Protection Fund Statement of Investment Principles July 2009; Exculpatory Clauses in New Jersey Trusts; New Zealand Trustee Investing: Reflecting On Modern Portfolio Theory And The Ancient Distinction Of Principal And Income*