

**立法會**  
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**Paper for the House Committee Meeting  
on 26 April 2019**

**Legal Service Division Report on  
Occupational Retirement Schemes (Amendment) Bill 2019**

**I. SUMMARY**

- 1. The Bill**

The Bill seeks to amend the Occupational Retirement Schemes Ordinance (Cap. 426) to:

  - (a) ensure that occupational retirement schemes under Cap. 426 are genuinely based on employment;
  - (b) enhance the enforcement powers of the Registrar of Occupational Retirement Schemes under Cap. 426; and
  - (c) provide for related or technical amendments.
  
- 2. Public consultation**

According to the Administration, the Mandatory Provident Fund Schemes Authority has consulted relevant employers, employer associations, scheme administrators, industry bodies and professional bodies on major proposed amendments. The parties consulted agreed with the need to enhance the regulatory regime under Cap. 426 and were supportive of the proposals in general.
  
- 3. Consultation with LegCo Panel**

The Panel on Financial Affairs was consulted on 4 June 2018 and members had no objection to the introduction of the Bill.
  
- 4. Conclusion**

In view of the changes proposed by the Bill to the regulation of occupational retirement schemes in Hong Kong, Members may wish to form a Bills Committee to study the Bill in detail.

## II. REPORT

The date of First Reading of the Bill is 17 April 2019. Members may refer to the Legislative Council ("LegCo") Brief (File Ref.: RTS/2/1C) issued by the Financial Services and the Treasury Bureau on 3 April 2019 for further details.

### Object of the Bill

2. The Bill seeks to amend the Occupational Retirement Schemes Ordinance (Cap. 426) to:

- (a) ensure that occupational retirement schemes ("OR schemes")<sup>1</sup> under Cap. 426 are genuinely based on employment;
- (b) enhance the enforcement powers of the Mandatory Provident Fund Schemes Authority being the Registrar of Occupational Retirement Schemes ("Registrar") under Cap. 426; and
- (c) provide for related matters.

### Background

3. Cap. 426 establishes a registration system for certain OR schemes. Employers who operate OR schemes are required by Cap. 426 to apply to the Registrar for registration of their schemes ("Registered Schemes"). Under section 7 of Cap. 426, the Registrar may on an application in writing issue an exemption certificate in respect of an OR scheme if the Registrar is satisfied that any of the specified exemption criteria<sup>2</sup> applies ("Exempted Schemes"). While Registered Schemes are subject to various funding, audit and disclosure of information requirements under Cap. 426, Exempted Schemes are only

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<sup>1</sup> Under section 2(1) of Cap. 426, an OR scheme refers to a scheme, not being a contract of insurance under which benefits are payable only upon the death or disability of the insured, 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 gainfully employed (whether in Hong Kong or elsewhere) under a contract of service in any employment.

<sup>2</sup> Such criteria are (a) the scheme being an offshore scheme registered or approved by an authority in a country, territory or place outside Hong Kong and that the authority performs in that country, territory or place functions which are generally analogous to the functions conferred on the Registrar; or (b) the scheme being a scheme which has not more than either 10% or 50 of that scheme's members, whichever is less, who are Hong Kong permanent identity card holders.

required to comply with the requirements in relation to providing information to the Registrar and notifying the Registrar of certain changes of the schemes.

4. According to paragraphs 5 and 10 of the LegCo Brief, some OR schemes might have been misused as investment schemes with open participation of investors who are not employees of the relevant employers. The low threshold for qualifying as Exempted Schemes under Cap. 426 makes them susceptible to misuse as general investment vehicles which are outside the regulatory ambit of the Securities and Futures Ordinance (Cap. 571). To address these issues, the Administration proposes to amend Cap. 426.

### **Provisions of the Bill**

5. The Bill seeks to implement the policy intent that only schemes which meet the employment-based criterion will fall within the ambit of Cap. 426 and be eligible for registration or exemption under Cap. 426. The key provisions of the Bill are summarized in the following paragraphs.

#### Employment-based requirements

6. Clauses 3 and 4 of the Bill seek to amend the definition of "occupational retirement scheme" and introduce the meaning of "eligible person"<sup>3</sup> and interpretation of "employment" in section 2 of Cap. 426. The effect of the proposed amendments is that the membership of OR schemes under Cap. 426 would be restricted to those who meet the conditions related to employment under the amended section 2 of Cap. 426.

7. Under the proposed amended section 7 of Cap. 426, the Registrar would no longer be able to issue an exemption certificate in respect of an OR scheme with not more than 10% or 50 (whichever is less) of the members of the scheme who are Hong Kong permanent identity card holders.

8. The Registrar would be granted by the Bill new regulatory powers in respect of the employment based requirements as follows:

- (a) requiring the relevant employer who applies for an exemption certificate in respect of Exempted Schemes to submit a written statement confirming that the membership of the OR scheme is limited to eligible persons and all members of the scheme are eligible persons (clause 7);

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<sup>3</sup> Under the proposed meaning, an eligible person is an individual who is entitled or prospectively entitled to benefits under an OR scheme by virtue of his employment (whether past or present) by the relevant employer of the scheme concerned.

- (b) requiring relevant employers of Exempted Schemes and Registered Schemes to submit to the Registrar an annual written statement confirming compliance with the employment-based criterion (clauses 10 and 22);
- (c) requiring a person to give information or documents relating to the Exempted Scheme or Registered Scheme to prove compliance with the employment-based criterion by those schemes (clauses 10 and 24);
- (d) proposing to withdraw or withdrawing exemption certificate of Exempted Schemes on grounds such as non-compliance with the employment-based criterion or public interest (clauses 11 and 12);
- (e) proposing to cancel or cancelling the registration of a Registered Scheme on grounds such as non-compliance with the employment-based criterion or public interest (clauses 27 and 30); and
- (f) requiring the relevant employers who apply for registration of their OR schemes to provide to the Registrar written statements by a solicitor, auditor and the applicant employer to confirm that the membership of the scheme is limited to eligible persons and all members of the scheme are eligible persons (clause 52).

9. To enforce the employment-based criterion for membership of Exempted Schemes and Registered Schemes, new offences are proposed under the new sections 8A and 20B of Cap. 426 for non-compliance with the employment-based criterion for membership of Exempted Schemes and Registered Schemes. The maximum penalty proposed for these new offences would be (a) on summary conviction—a fine at level 6 (i.e. \$100,000) and, in the case of a continuing offence, a further fine of \$5,000 for every day during which the offence continues; or (b) on conviction on indictment—a fine of \$500,000 and imprisonment for two years and, in the case of a continuing offence, a further fine of \$10,000 for every day during which the offence continues.

#### Enhancing the enforcement and investigation powers of the Registrar

10. Clause 29 of the Bill seeks to amend section 44 of Cap. 426 by empowering the Registrar to apply for a court order to freeze the assets of a Registered Scheme if the Registrar intends to issue a proposal to cancel the registration of that scheme.

11. A new Part VIIIA (new sections 66A to 66I) is proposed to be added to Cap. 426 by clause 43 of the Bill to:

- (a) confer powers of inspection on the Registrar in relation to compliance with provisions of Cap. 426. Under new section 66B of Cap. 426, an authorized person may, at any reasonable time during ordinary business hours, enter premises, not being a private dwelling place, where affairs of an OR scheme are being conducted for the purpose of ascertaining whether or not the provisions of Cap. 426 are being complied with or have been complied with;
- (b) confer powers of investigation on the Registrar to investigate any matter in relation to a Registered or Exempted Scheme, which include requiring a person to produce documents and to answer questions relating to any matter under investigation (new section 66D);
- (c) provide that failing to comply with an investigation requirement or giving false or misleading information would be an offence under Cap. 426 (new sections 66E and 66F); and
- (d) confer powers on an investigator to apply to the Court of First Instance for an inquiry into a person's failure to comply with an investigation requirement (new section 66G).

12. Under the new section 79A of Cap. 426, as added by clause 49 of the Bill, it would be an offence if a person, without lawful authority, obstructs the Registrar in the performance of a function under Cap. 426, or without reasonable excuse, fails to comply with a requirement made by the Registrar under Cap. 426. The new section 79A would not apply in relation to failure to comply with an investigation requirement and giving false or misleading information under the proposed new sections 66E and 66F.

#### Miscellaneous and technical amendments

13. Other amendments include:

- (a) empowering the Registrar to issue guidelines for the guidance of administrators of OR schemes, relevant employers and their employees, and other persons concerned with Cap. 426 (clause 6);
- (b) providing circumstances in which benefits from other schemes may be legally transferred to a Registered Scheme or an Exempted Scheme (clause 45); and

- (c) amending Schedule 1 to the Occupational Retirement Schemes (Authentication and Certification of Documents) Rules (Cap. 426A) to provide for the additional documents required to be authenticated before submission to the Registrar (clause 53).

### Commencement

14. The Bill, if passed, would come into operation on the day on which the enacted Ordinance is published in the Gazette.

### **Public consultation**

15. According to paragraph 19 of the LegCo Brief, the Mandatory Provident Fund Schemes Authority, acting as the Registrar, has consulted relevant employers, employer associations, scheme administrators, industry bodies and professional bodies on major proposed amendments. The parties consulted agreed with the need to enhance Cap. 426's regulatory regime and were supportive of the proposals in general.

### **Consultation with LegCo Panel**

16. As advised by the Clerk to the Panel on Financial Services, the Administration briefed the Panel on 4 June 2018 on the proposals to update Cap. 426 to ensure that OR schemes are employment-based and will not be misused for non-retirement purpose. Members discussed issues including the proposal to empower the Registrar to enter non-domestic premises for making inspection and investigating cases of misuse of OR schemes for non-retirement purpose.

### **Conclusion**

17. The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. In view of the changes proposed by the Bill to the regulation of OR schemes in Hong Kong, Members may wish to form a Bills Committee to study the Bill in detail.

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