

# Corporate Commercial Client Alert

## Employment & Pensions

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### Proposed changes to ORSO: what employers and employees need to know

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On 4 April 2019, the Occupational Retirement Schemes (Amendment) Bill 2019 was gazetted. The primary aim of the proposed amendments is to plug the loophole in the misuse of schemes for purposes unrelated to employment and retirement, such as creating investment products for non-employees.

The following are the key proposed amendments to the Occupational Retirement Schemes Ordinance (**ORSO**).

#### (1) New employment-based criteria

According to the enhanced definition of “*occupational retirement scheme*”, the scheme must limit membership to eligible persons, namely employees (whether past or present), transferred individuals in case of business transactions and the beneficiaries of deceased members (**New Criteria**).

#### (2) Schemes must meet the New Criteria

In addition to submitting an annual return and relevant supporting documents within 1 month of the financial year of a scheme (whether registered or exempted), employers are required to file with the Registrar an annual written statement confirming compliance with the New Criteria.

The Registrar may also require information or document confirming, or a legal opinion or an auditor’s certificate stating compliance with the New Criteria.

#### (3) Additional documents required for registration

For new applications for registration, submission of the following documents are required to ensure compliance with the New Criteria on an on-going basis:

- Solicitor’s statement confirming that the scheme terms reflect the New Criteria;
- Auditor’s statement confirming that the New Criteria have been complied with within 3 months before the date of application; and
- Applicant’s statement confirming that the New Criteria are met.

#### (4) Exemption from ORSO

Under the proposed amendments, there is now only one way left to apply for an exemption certificate, and the requirements for retaining it are tightened up.

#### ***Not accept certain new exemption applications after the proposed amendments take effect***

Currently, the Registrar may on an application in writing issue an exemption certificate in respect of a scheme which:

- (i) is an acceptable registered/approved offshore scheme; or
- (ii) has not more than either 10% or 50 of that scheme's members (whichever is less), who are Hong Kong permanent identity card holders.

After the proposed amendments come into operation, the Registrar will no longer issue an exemption certificate in respect of any case under category 2 above.

For existing exempted schemes, the Registrar is given additional powers to impose, amend or revoke conditions. The relevant employer may appeal to the Occupational Retirement Schemes Appeal Board against the Registrar's decision.

***Non-compliance with New criteria***

After the proposed amendments come into operation, any term of a scheme (whether registered or exempted) that does not meet the New Criteria shall be void and unenforceable. In addition, if without reasonable excuse, a person other than an eligible person is allowed to be a member of the scheme, the employer would commit an offence and is liable to a fine and, in the case of conviction on indictment, imprisonment.

***Additional grounds that allow the Registrar to withdraw exemption certificates***

For example, non-compliance with:

- the New Criteria;
- conditions on exempted schemes;
- the Registrar's request for information or documents;
- bona fide transfer-in of benefits;
- the definition of an occupational retirement scheme; or
- the notion of public interest.

**(5) Cancellation of registration**

The proposed amendments empower the Registrar to cancel the registration of a scheme if it no longer meets, among other things, the New Criteria.

***Additional grounds to cancel the registration of schemes***

There are new grounds for the Registrar to cancel the registration of a registered scheme which include, for example, non-compliance with:

- the New Criteria;
- the requirements in relation to terms of a registered scheme regarding indemnification and alteration;
- the Registrar's request for information or documents;
- bona fide transfer-in of benefits;
- the definition of an occupational retirement scheme; or
- the notion of public interest.

***Court order to freeze scheme assets***

If the Registrar intends to issue or after issuing a proposal to cancel the registration of a scheme, then in such event, the Registrar may apply to the court for an order to freeze the scheme assets to avoid the risk that scheme assets may be transferred out of a scheme before the grant of a court order, if the Registrar is satisfied that the order is desirable and will not unfairly prejudice any person.

#### (6) Bona fide transfer-in payments

To minimise the risk of registered and exempted schemes being misused or abused for holding monies of unknown source, a new section 70B is introduced. Employers of registered schemes or exempted schemes (**Receiving Scheme**) will only be permitted to accept a transfer of benefits from another scheme (**Transferring Scheme**) if it meets the following specified conditions:

- the transfer is made in accordance with an agreement between the relevant employers of the Receiving Scheme and the Transferring Scheme;
- the benefits are payable to a member of the Receiving Scheme who was a member of the Transferring Scheme; and
- the benefits are held in an account in the name of the member under the Transferring Scheme (before transfer) and Receiving Scheme (after transfer).

Similar requirements will also apply in case the Transferring Scheme is not a registered scheme or exemption scheme but is a retirement scheme established outside Hong Kong.

#### (7) Registrar's new inspection, investigation and enforcement powers

A new Part VIIIA is added to give the Registrar inspection, investigation and enforcement powers to ensure compliance of schemes with the statutory requirements. New offences of failing to comply with an investigation requirement, and of giving false/misleading information are created. An investigator may apply to the court for an inquiry into the failure to comply with an investigation requirement.

#### Comments

Employers should take note and make necessary amendments to cater for registration as well as to comply with the ongoing requirements under the amended ORSO, especially compliance with the New Criteria and conditions for bona fide transfer-in payments. Certain new requirements will also apply to exempted schemes.

For employers that wish to set up exempted schemes, they have to note that new exemption certificates can only be applied for when it is an acceptable registered/approved offshore scheme. Therefore, when relocating staff from other overseas offices to Hong Kong, employers should consider whether there is a need to provide alternative retirement arrangements while the staff is in Hong Kong.

### Want to know more?

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