

**A GUIDE
TO THE
OCCUPATIONAL RETIREMENT SCHEMES
ORDINANCE**

Issued by

**THE REGISTRAR OF
OCCUPATIONAL RETIREMENT SCHEMES**

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ORS/C/5

PREFACE

This booklet is issued for the purpose of assisting employers, employees, and persons involved in the administration of occupational retirement schemes which may be subject to the registration and other requirements of the Occupational Retirement Schemes Ordinance ("the Ordinance"). It also highlights the main provisions of the Ordinance and the obligations of the various parties concerned.

This guide serves only for explanatory purposes and will not be legally binding. The reader should refer to the appropriate sections of the Ordinance for details of the statutory obligations contained therein. Professional or legal advice should be sought where there are doubts in the interpretation of the Ordinance or the guide.

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CHAPTER 1

MAJOR PROVISIONS OF THE OCCUPATIONAL RETIREMENT SCHEMES ORDINANCE

Introduction

1. The Occupational Retirement Schemes Ordinance ("the Ordinance") which was enacted on 31 December 1992, came into operation on 15 October 1993. Subsequent to its enactment, the Ordinance was amended by consequential amendments under the Insurance Companies (Amendment) Ordinance 1993, the Inland Revenue (Amendment) (No. 5) Ordinance 1993 and the Occupational Retirement Schemes (Amendment) Ordinance 1995. The Ordinance is also supported by subsidiary legislation in the form of rules made by the Registrar of Occupational Retirement Schemes ("the Registrar") for the better administration of the Ordinance. The Ordinance's objective is to establish a registration system for voluntarily established occupational retirement schemes, to ensure that such schemes are properly regulated, and to provide greater certainty that retirement scheme benefits promised to employees will be paid when they fall due.

2. The Ordinance does not compel employers to set up occupational retirement schemes nor does it specify any minimum level of benefits. However, there are the following merits for the employer to set up a retirement scheme for his employees:

- (a) to provide an alternative means to fulfil the employer's obligations to make long service payments and severance payments under the Employment Ordinance;
- (b) to enjoy the tax relief available under the Inland Revenue Ordinance in respect of the contributions made by the employer to a registered or exempted scheme; and
- (c) to provide incentive for attracting and retaining quality staff.

The ambit of the Ordinance

3. The Ordinance applies to all schemes operated in and from Hong Kong. Offshore schemes (i.e. schemes whose domicile is outside Hong Kong and the scheme or trust is governed by a foreign system of law) providing benefits to members employed in Hong Kong are also covered by the Ordinance.

4. The term "occupational retirement scheme" is defined under section 2(1) of the Ordinance as:

"Occupational retirement scheme means subject to subsection (6) any scheme, not being a contract of insurance under which benefits are payable only upon the death or disability of the insured, which -

- (a) is comprised in one or more instruments or agreements; and
- (b) has or is capable of having effect in relation to one or more descriptions or categories of 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,

and includes, where the context admits, a proposed such scheme."

According to this definition, a stand-alone group life insurance policy under which death or disability benefits are payable upon the death or disability of an assured employee shall not be regarded as an occupational retirement scheme.

On the other hand, section 2(6) of the Ordinance provides that -

"(a) A contract of employment shall not be regarded as an occupational retirement scheme by reason solely that under the contract the employer concerned agrees to pay a gratuity to the employee concerned on the termination of the contract and the period of employment to which the contract relates does not exceed four years.

(b) Where -

- (i) a contract described in paragraph (a) terminates;
 - (ii) the employee concerned is subsequently employed, whether with or without a break in service, by the same employer under another contract; and
 - (iii) the gratuity payable under the terminated contract is not paid in full within six months of such termination, or though such gratuity is so paid the whole or a substantial part of it is repaid by the employee to the employer,
- that other contract shall be regarded as an occupational retirement scheme."

Accordingly, successive contracts of such kind each having a term not exceeding four years shall be regarded as an occupational retirement scheme if the whole or a substantial part of the end-of-contract gratuity payable under the terminated contract has been withheld by the employer and the employee is in fact not paid.

5. The Ordinance excludes schemes contained in or established by any other Ordinance and also those schemes set up by the government of a country or territory outside Hong Kong or its agency or undertaking not operating for the purpose of gain.

6. On the other hand, the Ordinance also exempts certain schemes from the regulatory requirements. More information about the exemption provisions is provided in Chapter 2 of this

guide.

Requirements for Registration/Exemption

7. Employers who operate occupational retirement schemes that fall under the ambit of the Ordinance are required to apply to the Registrar for registration or exemption of their schemes. In respect of a new scheme, the application must be made to the Registrar within three months after the employer has entered into a contract with the employees for the setting up of the scheme. It is an offence for any employer to operate, contribute to, or otherwise participate in a scheme or enter into a contract with his employees under which membership of a scheme is provided, unless that scheme is already registered, exempted or an application for registration or exemption has been made to the Registrar and has not been finally disposed of.

8. Any person who commits such an offence shall be liable -
- (a) on summary conviction to a fine of \$100,000 and to an additional fine of \$5,000 for each day during which the offence continues;
 - (b) on conviction upon indictment to -
 - (i) a fine of \$500,000;
 - (ii) an additional fine of \$10,000 for each day during which the offence continues; and
 - (iii) imprisonment for two years.

Types of occupational retirement schemes

Defined Contribution Schemes and Defined Benefit Schemes

9. There are two types of occupational retirement schemes distinguished by the Ordinance for the purpose of registration:

- (i) Defined contribution schemes

These are schemes commonly known as provident funds under which the benefits are determined solely by reference to the contributions paid, the declared return and where appropriate, the qualifying service and age of the employee.

(ii) Defined benefit schemes

These include all other schemes that are not defined contribution schemes. Generally, they are schemes under which the benefits are determined by a formula which takes into account the years of service and final salary of the scheme member. Schemes which contain elements of both defined contribution scheme and defined benefit scheme are to be classified as defined benefit schemes.

The different treatment of these two types of schemes by the Ordinance is detailed in paragraph 44 of Chapter 3, and paragraph 50 (e) of Chapter 4.

Schemes participating in a "Pooling Agreement"

10. The Ordinance also provides for a simpler registration and reporting process, with less documentation, in the case of pooling agreements. These schemes are either governed by a single trust managed by a registered trust company or regulated by an insurance arrangement made with an authorized insurer. Details on the registration of participating schemes in a pooling agreement are provided in Chapter 3 of this guide.

Special provisions for group scheme covering group companies

11. For a group occupational retirement scheme covering two or more companies from within a "grouping of companies" (defined as "companies that are associated companies or are within a group of companies and includes associated companies of a member of a group of companies"), the relevant employers of the group scheme must jointly or severally by power of attorney nominate one of themselves, or the holding company of their group of companies as the representative employer for making an application for registration or exemption of the group scheme under the Ordinance and for other purposes of the group scheme. Details of the provisions applicable to the representative employer are specified in section 67 of the Ordinance. Except for this arrangement, an occupational retirement scheme must only cover one relevant employer.

Obligations of the Relevant Employer

12. In the Ordinance, the term "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.

13. The relevant employer's main obligations in relation to his scheme under the Ordinance are summarized as follows:

- (a) If he intends to establish a retirement scheme for his employees, he should decide on the type of scheme (e.g. defined benefit scheme or defined contribution scheme) and the arrangement therefor (e.g. individual scheme or pooled scheme) and seek professional advice regarding compliance with the Ordinance before filing the application. Such an application must be lodged with the Registrar within three months after the employer has entered into a contract with the employees for the setting up of the scheme;
- (b) He shall pay the prescribed fee on application and a periodic fee thereafter. Such periodic fee shall be paid within one month after the first and any subsequent anniversary of the scheme's registration or of the date of the exemption certificate. If the periodic fee is not paid within the aforesaid one month, a surcharge equal to the amount of the periodic fee will be imposed;
- (c) He is required to provide sufficient funding for the scheme within the periods specified in section 24 of the Ordinance [see paragraph 50(d)];
- (d) Where the scheme is a defined contribution scheme, he must contribute in accordance with the terms of the scheme and where it is a defined benefit scheme, he must implement the recommendations of the actuary as regards funding and periodic actuarial reviews;
- (e) He is required to appoint an auditor to conduct an audit on the scheme as specified in the Ordinance;
- (f) Where a consultative committee has been formed by the scheme members, he should refer any advice given by the committee as regards the scheme to the scheme administrator for consideration;
- (g) He should disclose information to scheme members on various aspects of the scheme as set out in the Ordinance [see paragraph 50(f)];
- (h) He must also comply with the Registrar's requests for information in relation to the scheme and other requirements as directed by the Registrar under the Ordinance;

- (i) He is responsible for notifying the Registrar of changes, including any change of his name or address, any change to the scheme's name, any change of the administrator or the relevant employer, of the scheme within one month of such change. The Registrar's Office has prepared some standard forms for reporting such changes. Copies of these forms are available from the Registrar's Office upon request; and
- (j) In the event of the termination or winding up of the scheme (except in accordance with a court order under section 48 of the Ordinance), he and the designated person must notify the Registrar and each scheme member of that fact within 14 days of the commencement of the winding up or termination.

In respect of an exempted scheme, the on-going obligations of the relevant employer are set out in paragraph 49 in this guide.

Role of the Professionals

14. The regulatory framework of the Ordinance is reliant on professional certification by solicitors, auditors and actuaries in the registration and monitoring processes. The Ordinance requires that these professionals must be independent [see notes below].

15. The following paragraphs give a general description on the statutory roles of the professionals.

The Solicitor

16. For the purpose of registration, an independent solicitor should be engaged to provide the Registrar with the relevant solicitor's statement on certain legal aspects of the scheme in accordance with Schedule 1 to the Ordinance (see paragraph 1 in Part 1 or paragraph 2 in Part 2 of Schedule 1).

Notes :

- (a) Under section 69(1) of the Ordinance, an independent solicitor or actuary must not be -
 - (i) the relevant employer of the scheme;
 - (ii) an associate or employee of the employer; or
 - (iii) a person having a contract of service with an employee referred to in sub-paragraph (ii).
- (b) Under section 68(3) of the Ordinance, an independent auditor must not be -
 - (i) a partner, director or employee of the administrator of the scheme;
 - (ii) the relevant employer of the scheme;
 - (iii) an associate or employee of the employer; or
 - (iv) a person having a contract of service with an employee referred to in sub-paragraph (i) or (iii).

The Auditor

17. In respect of the application for registration of a scheme which is an existing scheme (i.e. a scheme existing before the commencement of the Ordinance), an independent auditor should be engaged to provide the relevant auditor's statement reporting on certain accounting aspects of the scheme in accordance with Schedule 1 to the Ordinance (see paragraph 2 in Part 1 or paragraph 3 in Part 2 of Schedule 1). This auditor's statement should be submitted to the Registrar together with the application form. However, in respect of a proposed scheme applying for registration, such auditor's statement is not required. After the scheme is registered, the administrator's auditor is required to carry out an annual audit on the accounts of the scheme and prepare a report in accordance with section 20(3) of the Ordinance for filing with the Registrar. On the other hand, the employer is also required to appoint an auditor to carry out an audit and give a statement to the administrator's auditor regarding the making of contributions to the scheme in accordance with section 20(7A) of the Ordinance.

The Actuary

18. In respect of a defined benefit scheme applying for registration, an actuary should be appointed to conduct an actuarial review of the scheme. A certificate in accordance with Part 3 of Schedule 1 to the Ordinance reporting his findings in the review should be supplied to the Registrar together with other documents in the application. This actuarial certificate shall be prepared according to the professional standard set out in "Professional Standard 2 (PS2) Occupational Retirement Schemes - Actuarial Reports and Certification", as adopted by the Actuarial Society of Hong Kong.

19. After a defined benefit scheme has been registered, the actuary shall conduct an actuarial review of the scheme every three years (or shorter intervals in certain circumstances) and issue certificates for filing with the Registrar, covering matters such as valuation of liabilities, funding and solvency of the scheme. These actuarial certificates shall be prepared in accordance with Schedule 2 to the Ordinance and the aforesaid PS2, and shall contain information as set out in the Occupational Retirement Schemes (Periodic Certification of Registered Defined Benefit Schemes) Rules.

Role of other persons in relation to the scheme

The Administrator

20. An "administrator" in relation to an occupational retirement scheme is defined by the Ordinance as:

- (a) in the case of a scheme or pooling agreement governed by a trust, the trustee concerned;
- (b) in the case of a scheme or pooling agreement which is the subject of or regulated by an insurance arrangement, the insurer concerned;
- (c) in any other case, the person who is principally responsible for the management of the scheme and its assets otherwise than as a person who is solely concerned with the investment or custody of the assets.

21. The main duties of the administrator are summarized as follows -

		Relevant section in <u>the Ordinance</u>
(a)	To keep proper accounts and records of the scheme and cause to be prepared annual financial statements of the scheme for audit and filing purposes;	20(1)
(b)	In respect of a pooling agreement, to appoint a common accounting year for each of the schemes within the pooling agreement and to appoint the same auditor to audit the financial statements of each participating scheme under the pooling agreement;	20(7C)
(c)	Where the scheme is a defined benefit scheme, to receive from the relevant employer a written undertaking to implement the actuary's recommendations;	Schedule 2
(d)	To meet the requirements in relation to assets of the scheme;	21(1)
(e)	Where the scheme ceases to be a participating scheme of a pooling agreement, to apply for the Registrar's consent to the cessation of application of the pooling agreement to the scheme, and to inform the Registrar within 14 days of such cessation;	23(3) & (4)
(f)	To comply with the Registrar's requirement to rectify any breach of the investment requirement;	27(7)
(g)	Where a qualified actuarial certificate has been supplied in the case of a defined benefit scheme, to comply with the Registrar's requirement to provide a special actuarial report on such matters as specified;	31(3)(b)
(h)	Where a consultative committee has been formed, to attend meetings of the committee and to consider such advice as the committee may give with regard to the scheme;	34(5) & (6)
(i)	To notify the relevant employer of any amendment to the scheme;	35(7)
(j)	To accept service of any notice or documents which the Registrar may give under the Ordinance; and	-
(k)	To comply with the requirements that the Registrar may impose on him under the Ordinance.	-

22. A chart to assist in identifying the person who should be the administrator in different circumstances is shown at Appendix I of this guide.

The Designated Person

23. "Designated person" in relation to an occupational retirement scheme means a person who has given an undertaking under section 15(f), 38 or 39(3) of the Ordinance as regards the scheme and who has not been released under section 40 of the Ordinance ("the undertaking"). He is the person whom the Registrar will contact as regards most matters concerning a registered scheme.

24. The Ordinance contains specific criteria as regards who the designated person of a scheme should be. These criteria are as follows:

- (a) In the case of a scheme governed by a trust the designated person should be -
 - (i) each of the trustees who is (in the case of an individual) ordinarily resident in Hong Kong and holder of a Hong Kong identity card or (in the case of a body corporate) has a place of business in Hong Kong; or
 - (ii) where none of the trustees is (in the case of an individual) ordinarily resident in Hong Kong and holder of a Hong Kong identity card or (in the case of a body corporate) has a place of business in Hong Kong, a person directed by the Registrar;
- (b) In the case of a scheme regulated by an insurance arrangement, the designated person should be the relevant insurer authorized under the Insurance Ordinance (Cap.41); or
- (c) In the case of an offshore scheme which is neither governed by a trust nor is the subject of or regulated by an insurance arrangement, the designated person should be a person directed by the Registrar.

25. A chart to assist in identifying the person who should be the designated person in different circumstances is shown at Appendix II of this guide.

26. If a designated person wishes to be released from the undertaking he has made under the Ordinance, he may apply in writing to the Registrar. In the case where the scheme has only one designated person, the Registrar will only allow the application for release on condition that the application is accompanied by a new undertaking given by a substitute designated person whom the Registrar considers to be suitable.

27. Where any person is appointed as a new (or additional) trustee of a trust governing a registered scheme and the trustee concerned meets the criteria for becoming a designated person as described in paragraph 24(a)(i) above, he shall also send to the Registrar an undertaking within 28 days after such appointment.

28. The main duties of the designated person under the Ordinance are summarized as follows:

	<u>Relevant section in the Ordinance</u>
(a) To notify the Registrar of any major change in the particulars of the scheme;	22(2), 29(1) & 37(1)
(b) To file with the Registrar -	30
(I) an annual return for the year relating to the scheme; and	
(II) (i) a copy of the audited financial statements of the scheme for the year together with a copy of the auditor's report; or	
(ii) in the case of a participating scheme of a pooling agreement where the requirement for audit is dispensed with by a resolution of members, a certified copy of the resolution;	
(c) In the case of a defined benefit scheme, to provide the Registrar with the required actuarial certificates;	31(1) & 31(3)(a)
(d) To comply with the Registrar's requirement to supply an auditor's report (and account), and/or (in the case of a defined benefit scheme) an actuary's certificate relating to the scheme;	32(2)
(e) To comply with the Registrar's requirement to provide any specified information or documents that he has in his possession or under his control;	33(1)
(f) To provide scheme members and the consultative committee (if any) with the necessary information relating to the operation of the scheme such as statutory statement as prescribed in Schedule 3 to the Ordinance, market values of the scheme's total assets, and information relating to the compliance with the investment requirement;	35
(g) To accept service of any notice or documents which the Registrar may give under the Ordinance; and	-
(h) To comply with the requirements that the Registrar may impose on him	-

under the Ordinance.

Consultative Committees

29. Members of a registered scheme with more than 20 members have the statutory right to establish consultative committees, which may advise the administrator on matters regarding the scheme.

30. The committee is entitled to details about various aspects of a scheme, and to request, under specified circumstances, information from the designated person on the investment position of the scheme's assets and their market values.

The Register

31. The Office of the Registrar of Occupational Retirement Schemes maintains a Register setting out the particulars of a registered or exempted scheme including the name of scheme, relevant employer, administrator and designated person. The register can be accessed on MPFA's website (<http://www.mpfa.org.hk>). A certified copy of an entry in the register will also be available during office hours on payment of a prescribed fee.

CHAPTER 2

EXEMPTION

32. The provisions governing exemption for schemes are found in Part III of the Ordinance.

What schemes may be exempted from the Ordinance?

33. Under section 7(4) of the Ordinance, the following categories of occupational retirement schemes may apply to the Registrar for a certificate of exemption:

- (a) offshore schemes (see notes below) registered or approved by an overseas authority which performs functions generally analogous to that conferred on the Registrar by the Ordinance;
- (b) existing schemes (whether domiciled (see notes below) in Hong Kong or offshore) with not more than either 10% or 50 of that scheme's members, whichever is less, who are, on the date of the application, Hong Kong permanent identity card holders; or
- (c) proposed schemes (whether domiciled (see notes below) in Hong Kong or offshore) with not more than either 10% or 50 of that scheme's members, whichever is less, who will be, on the establishment of the scheme, Hong Kong permanent identity card holders.

Notes :

- (a) "Domicile" means, in relation to an occupational retirement scheme or trust, the country or territory by whose system of law the scheme or trust is governed.
- (b) "Offshore scheme" means an occupational retirement scheme the domicile of which is a country or territory outside Hong Kong.

34. For applications made on the grounds of limited number of Hong Kong members as specified in paragraphs 33(b) and (c) above, the following are a few examples illustrating the rule -

	<u>No. of scheme members</u>	<u>No. of scheme members who are Hong Kong permanent identity card holders</u>	<u>Eligibility for exemption</u>
Example (1)	500	50 (not more than 10% and not more than 50)	Yes
Example (2)	600	55 (not more than 10% but more than 50)	No
Example (3)	30	10 (not more than 50 but more than 10%)	No

Application for Exemption

35. An application for an exemption certificate in respect of a scheme has to be made to the Registrar on Application Form ORS-3, which is available at the Registrar's Office. The application has to be made by the relevant employer or, for a group occupational retirement scheme formed by a grouping of companies in accordance with section 67, by the representative employer of the scheme (see paragraph 11). The relevant employer or the representative employer has to provide the necessary information in the application to enable the Registrar to determine the application.

36. An exempted scheme will not be subject to the statutory requirements under the Ordinance applicable to registered schemes. Notes on the basic requirements for exempted schemes are found in paragraph 49 in Chapter 4 of this guide.

Fees

37. A fee is payable upon the submission of an application for exemption under the Ordinance. Thereafter a periodic fee is payable by the relevant employer of the exempted scheme annually, commencing from the first anniversary date of the date of issue of the certificate of exemption. Such periodic fee shall be paid not later than one month after the first day of the period in respect of which it is payable. If the periodic fee is not paid within the aforesaid one month, a surcharge equal to the amount of the unpaid fee shall be chargeable.

CHAPTER 3

REGISTRATION

38. The provisions governing registration of occupational retirement schemes are found in Part IV of the Ordinance.

What schemes may be registered?

39. The following are the various categories of schemes eligible for registration under the Ordinance:

- (a) Individual schemes domiciled in Hong Kong governed by trust or being the subject of or regulated by an insurance arrangement;
- (b) Offshore individual schemes governed by trust (meeting the trusteeship requirement) or being the subject of or regulated by an insurance arrangement;
- (c) Offshore individual schemes governed by trust but not meeting the trusteeship requirement;
- (d) Offshore individual schemes neither governed by trust nor is the subject of or regulated by an insurance arrangement --- with separation of scheme assets;
- (e) Offshore individual schemes neither governed by trust nor is the subject of or regulated by an insurance arrangement --- without separation of scheme assets;
- (f) Schemes domiciled in Hong Kong participating in a pooling agreement governed by trust or being the subject of or regulated by an insurance arrangement; and
- (g) Offshore schemes participating in a pooling agreement governed by trust or being the subject of or regulated by an insurance arrangement.

The above categories of schemes are further distinguished between defined contribution schemes and defined benefit schemes for which different documentation is required to be submitted to the Registrar for registration purposes.

Insurance Arrangements

40. An insurance arrangement means an agreement or arrangement made in respect of a scheme with an authorized insurer (as defined in section 2(1) of the Ordinance) under which the insurer, as the scheme administrator, is responsible for managing the scheme. The Registrar has specified certain requirements of an insurance arrangement in rules made under the Ordinance.

Registration of schemes participating in a pooling agreement

41. The Ordinance also provides for the registration of schemes participating in a pooling agreement. Under the Ordinance, "pooling agreement" means an agreement or arrangement -

- (a) which is:
 - (i) governed by a single trust; or
 - (ii) the subject of or regulated by an insurance arrangement including a series of insurance arrangements which are of the same class or description;
- (b) which applies to two or more individual occupational retirement schemes each of which is:
 - (i) governed by such trust; or
 - (ii) (where appropriate) the subject of or regulated by such insurance arrangement; by virtue of such application;
- (c) under which, in the case of an agreement or arrangement governed by such trust, the assets of its participating schemes are vested with the administrator of the agreement or arrangement, as the case may be;
- (d) which is managed, in the case of an agreement or arrangement governed by such trust, by a registered trust company;
- (e) in relation to which, and its participating schemes, proper accounts and records are kept; and
- (f) under which the value of the assets attributable to, and the liabilities of, each of its participating schemes are readily determinable from such accounts and records.

42. For the sake of administrative convenience, there is a simpler registration process for schemes which participate in a pooling agreement. Instead of requiring separate individual statutory statements from the relevant professionals to accompany each application (see paragraph 44), schemes participating in the same pooling agreement may be lodged with the Registrar in one batch with one master solicitor's statement, one master auditor's statement and one master administrator's statement covering all the applications of those participating schemes in that batch.

Who should apply for registration?

43. Application for registration in respect of an individual scheme or a scheme participating in a pooling agreement must be made by the relevant employer or, for a group occupational retirement scheme formed by a grouping of companies in accordance with section 67, by the representative employer (see paragraph 11) of that scheme on Application Form ORS-1 (for an individual scheme) or Form ORS-2 (for a participating scheme) as appropriate. These forms together with the detailed guidance notes and specimens of the required statutory statements and certificates are available at the Registrar's Office.

Documents required to be submitted for application for registration

44. The following are the basic documents which should accompany the application form to be submitted to the Registrar for an application for registration:

- (a) a statement by a solicitor (see paragraph 1 in Part 1 or paragraph 2 in Part 2 of Schedule 1 to the Ordinance);
- (b) an undertaking by the designated person of the scheme;
- (c) where the scheme is an existing scheme, a statement by an auditor (see paragraph 2 in Part 1 or paragraph 3 in Part 2 of Schedule 1 to the Ordinance) together with a copy of the latest audited accounts of the scheme (if any);
- (d) where the scheme is/will be governed by a trust, a statement by the applicant stating whether the trusteeship requirement has been/will be complied with in relation to the scheme (see paragraph 3 in Part 1 of Schedule 1 to the Ordinance);
- (e) where the scheme is a participating scheme of a pooling agreement, a statement by the administrator of the pooling agreement (see paragraph 1 in Part 2 of Schedule 1 to the Ordinance);
- (f) where the scheme is a defined benefit scheme, a certificate issued by an actuary (see paragraph 1 or 2 in Part 3 of Schedule 1 to the Ordinance);

- (g) where the scheme is an offshore scheme, a submission to the jurisdiction of the Court of First Instance to be made by or on behalf of the trustee, or (in case there is no trustee) such other person and in such form as the Registrar may direct, together with a statement by a solicitor stating that the terms of the scheme have the effect provided for in section 18(1)(d) of the Ordinance (see paragraph 3 in Part 3 of Schedule 1 to the Ordinance);
- (h) where the scheme is an offshore scheme governed by trust, a statement confirming certain aspect of the trust instrument by a person qualified to practise as a professional legal practitioner in the country or territory stated to be the domicile of the scheme (see paragraph 4 in Part 3 of Schedule 1 to the Ordinance); and
- (i) where the scheme covers two or more relevant employers that are related in the manner as specified under section 67 of the Ordinance (see paragraph 11), a copy of the power of attorney nominating the representative employer.

Fees

45. A fee is payable upon the submission of an application for registration under the Ordinance. Thereafter a periodic fee is payable by the relevant employer of the scheme annually commencing from the first anniversary date of the date of registration. Such periodic fee shall be paid not later than one month after the first day of the period in respect of which it is payable. If the periodic fee is not paid within the aforesaid one month, a surcharge equal to the amount of the unpaid fee shall be chargeable.

Registration Criteria

46. Generally, the Registrar shall allow an application for registration if he is satisfied that:
- (a) the requirements for application in respect of submission of statutory documents and payment of prescribed fee, etc., under section 15 of the Ordinance have been complied with;
 - (b) where the scheme is (for an existing scheme) or will be (for a proposed scheme) governed by a trust, the trusteeship requirement under section 25(2) of the Ordinance has been (for an existing scheme) or will be (for a proposed scheme) complied with. This will have to be confirmed by the applicant (or, in the case of a scheme participating in a pooling agreement, the administrator), in his statement (in accordance with Part 1 or Part 2 of Schedule 1 to the Ordinance) to be filed with the application;

- (c) the terms of the scheme ensure that in the event that the scheme was terminated or otherwise wound up, the benefits payable to every member of the scheme under such terms would be paid directly to such member instead of being paid through the relevant employer of the scheme or his agent. This will be covered by the solicitor's statement accompanying the application; and
- (d) where the scheme is an offshore scheme, the terms of the scheme provide that in the event that the registration of the scheme under the Ordinance is cancelled, any vested benefit of a Hong Kong member shall become payable to him. This will be covered by the solicitor's statement accompanying the application.

47. Registration of schemes under paragraphs 39(c), (d) and (e) above is on a discretionary basis and the Registrar will consider the merit and the particular circumstances of the individual case in determining the application. In particular, the Registrar will have regard to the arrangements for the segregation of scheme assets from those of the employer and the administrator of the scheme, and the scheme's rules relating to investment of its assets.

CHAPTER 4

BASIC REQUIREMENTS FOR ORSO SCHEMES

48. The provisions governing the basic requirements for exempted and registered schemes are found in Parts III and V of the Ordinance respectively.

For Exempted Schemes

49. An ORSO scheme which is granted an exemption certificate must comply with the requirements, which include (but are not limited to):

a. Information to be Provided Annually

The relevant employer of an exempted scheme shall provide annually to the Registrar -

- i) where the exemption was granted on the grounds of limited number of members who are permanent Hong Kong identity card holders, a written statement of the total number of scheme members on the date of the statement and the number of such members who were on that date Hong Kong permanent identity card holders; or
- ii) where the exemption was granted by virtue of the offshore scheme's overseas registration or approval by an overseas authority which performs functions generally analogous to the Registrar, documentary evidence such as a copy of the latest contribution statement made by the relevant employer, in respect of the scheme as regards the validity of the scheme's overseas registration or approval during that year.

These documents must be provided within 14 days after the expiration of each period of 12 months beginning on the date of the exemption certificate or an anniversary of the date, or such longer period as the Registrar may allow.

b. Notification of certain changes

The relevant employer shall notify the Registrar of any changes of the relevant employer / representative employer, scheme name, name and address of relevant employer (in a form specified by the Registrar) within one month of such changes.

c. Payment of Periodic Fees

The relevant employer shall pay an annual fee of \$600 (To be revised to \$940 on or after 1 January 2018) for an exempted scheme. This should be paid within one month after the annual due date, which means the last day of such period of 12 months during which the exemption certificate continues to be valid and beginning on the first or any subsequent anniversary of the date of the exemption certificate. If the fee is not paid within one month after the due date, a surcharge equal to the amount of the unpaid fee will be imposed.

For Registered Schemes

50. Once a retirement scheme has been registered under the Ordinance, it must comply with the requirements, which include (but are not limited to):

a. Assets

Except in circumstances as provided under sections 21(4)(b) and 21(4A) of the Ordinance and except where the Registrar is satisfied as regards the scheme in the manner described in section 18(4)(b)(ii) of the Ordinance, the assets of a scheme must be kept separate and distinct from and must not form part of the assets of the employer or that of the administrator of the scheme which are not vested in him in his capacity as such.

The assets of a registered scheme must not be subject to any assignment, charge, pledge or other encumbrances except the trust (if any) governing the scheme, the charge or pledge created for the purposes of securing loans necessary for meeting the liabilities of the scheme, and the option to acquire for valuable consideration any interest in the assets of the scheme granted in the normal course of business.

The assets of a registered scheme must only be applied for the purposes of the scheme.

Notes :

The Ordinance has, for the avoidance of doubt, declared in section 2(7) that where a registered scheme is the subject of or regulated by an insurance arrangement, the assets of the scheme are, in so far as that arrangement is concerned, any claims (including contingent and prospective claims) which may be made against the authorized insurer concerned under that arrangement.

b. Trusteeship

In the case of a scheme governed by a trust, there should be at least one independent trustee who must not be the employer himself, his employee or associate (as defined in the ORSO) unless such associate is a trust company registered under the Trustee Ordinance.

c. Investment

Any loan to the relevant employer of a scheme or his associate out of the scheme's assets is prohibited. Not more than 10% of the assets of the scheme should consist of restricted investments as defined under the Ordinance.

Restricted investment means -

- i) any security of, or issued by, the relevant employer of a registered scheme or an associate of such employer except security issued by an associate of such employer in the form of an option which if exercised will constitute investment in the share capital of a body corporate other than the relevant employer or an associate of such employer; or
- ii) any security in the form of an option which if exercised will constitute investment in the share capital of the relevant employer of a registered scheme or an associate of such

employer;

Subject to the extent allowed under section 27(3) of the Ordinance, no asset of the scheme acquired on or after 15 October 1993 should consist of investments in the share capital of a body corporate, which is neither listed on a recognized stock market as defined in the Securities and Futures Ordinance, nor publicly listed on a specified stock exchange.

Section 27(3) of the Ordinance allows -

- i) up to but not exceeding 15% of the assets of the scheme to be invested in the share capital of bodies corporate which share capital is publicly listed on a stock exchange legally established and regulated as a stock exchange in accordance with the laws of the jurisdiction in which it is established and which is other than those stock exchanges mentioned above. However, that 15% should not be in addition to any investments of the same nature held prior to 15th October 1993 and exempted from the restriction of paragraph (c) above;
- ii) the assets of the scheme to be invested in redeemable shares in a mutual fund corporation; and
- iii) investments that derive directly from entitlements attached to investment held prior to 15 October 1993 or acquired as a result of this paragraph, subject to the Registrar's permission which may be given upon satisfying certain conditions.

d. Funding

Subject to the provisions of the ORSO, the assets of a registered scheme should be sufficient to meet its aggregate vested liability, and such a scheme should be funded in accordance with the terms of the scheme and (where the scheme is a defined benefit scheme) recommendations, if any, contained in the actuarial certificate.

Where an existing scheme becomes a registered scheme, it shall be the duty of the relevant employer of the scheme to provide, within the period specified under section 24(3) of the Ordinance, the resources necessary to enable the scheme to meet both its aggregate vested liability and its aggregate past service liability. Generally, any shortfall between the scheme's assets and its aggregate vested liability as identified by the actuary when making an application for registration must be made good within five years from the commencement of the Ordinance. Any shortfall between the scheme's assets and its aggregate past service liability as identified by the actuary must be made good within the period as agreed on between the relevant employer and the administrator of the scheme.

e. Annual Return / Actuarial Certificate

i) Independent audit and actuarial review

The ORSO requires that proper accounts and records regarding all assets, liabilities and

financial transactions of a registered scheme be kept by its administrator. The administrator is also responsible for preparing the financial statements as soon as reasonably practicable after each financial year of the scheme, and providing such statements to an independent auditor for audit, requiring the auditor to prepare a report on the accounts. In addition, the relevant employer is also required to appoint an auditor to carry out an audit and give a statement to the administrator's auditor regarding the making of contributions to the scheme.

In respect of a defined benefit scheme, actuarial reviews must be undertaken by an actuary once every three years to ascertain the financial position of the scheme. If the actuary finds that the scheme is insolvent, an annual actuarial review is required. An actuary who prepares the actuarial certificate in respect of a scheme must not be (a) the relevant employer of the scheme; (b) an associate or employee of the employer; or (c) a person having a contract of service with an employee referred to in (b).

Both the auditor and the actuary are given the right of access to the books and records of the employer and to obtain the information and explanation from him for the purpose of discharging their statutory duties relating to the scheme.

ii) Provision of Annual Return / Actuarial Certificate

- Employer's auditor's statement is required to be supplied to the administrator's auditor not later than four months after each of the scheme's financial years. Annual return (in a form specified by the Registrar), auditor's report and audited financial statements are required to be supplied to the Registrar within six months after the end of a scheme's financial year.
- If an ORSO registered scheme is terminated during a financial year, the Authority requires the annual return, audited financial statements and auditor's report to report on the scheme's position up to the later of the following dates:
 - the scheme's effective date of termination, as it appears on the "Notice of Termination / Winding Up of a Registered Scheme" form; or
 - the date on which all the benefits under the scheme have been paid to members or (if applicable) the assets of the scheme have been transferred to another scheme.
- Generally, for a defined benefit scheme, the designated person shall supply to the Registrar a triennial actuarial certificate confirming the solvency position of the scheme within six months from the date of the most recent actuarial review. Annual actuarial certificate shall be supplied to the Registrar if the last certificate reported that the financial position of the scheme was insolvent or was expected to become insolvent.
- For schemes participating in a pooling agreement, the requirement for the annual submission of the auditor's report may be waived for not more than two consecutive

financial years if the assets of the scheme were stated to be sufficient to meet its aggregate vested liability in the last auditor's report (for defined contribution schemes) or in the last actuarial certificate (for defined benefit schemes) and if a majority of over 50% of the members of the scheme concerned passed a resolution to that effect. Such a resolution shall be passed in accordance with the Occupational Retirement Schemes (Exemption from Audit) Rules. In these circumstances, a copy of the relevant resolution certified by the administrator of the scheme should be sent to the Registrar.

f. Disclosure of information

The Ordinance requires that there are adequate arrangements for the disclosure of information concerning the operation of the scheme to individual scheme members and its consultative committee (if one has been formed by election amongst scheme members). In particular, the relevant employer of a registered scheme must -

- I) within two months of an employee joining the scheme or, for an employee who is already a member of the scheme, within two months after registration of the scheme, provide the employee with the information including that concerning the criteria and conditions of membership and how contributions and benefits are calculated and payable under the scheme;
- II) provide each scheme member with an annual statement of his benefit entitlement under the scheme; and
- III) upon the written request of a scheme member who has ceased to be employed, provide particulars of that member's benefits entitlement under the scheme, within 3 months after such cessation.

The employer must also inform scheme members of any amendment to the scheme.

The consultative committee of a registered scheme or any scheme member also has the right to request certain information relating to the scheme from the relevant employer or the designated person. The consultative committee can be formed by election amongst scheme members if the scheme has more than 20 members and the majority of the scheme members agreed to its formation.

g. Notification of certain changes

The Registrar must be notified of the following changes within one month of such changes:

- the name / address of the scheme administrator and the designated person (by the designated person, in a form specified by the Registrar);
- the name / address of the relevant employer (by the employer, in a form specified by the Registrar); and
- the administrator / relevant employer / representative employer (by the employer, in a form specified by the Registrar).

Any change in the scheme's domicile shall also be notified to the Registrar as soon as reasonably practicable.

h. Settlement of Periodic Fee

The relevant employer shall pay an annual fee of \$2,400 (To be revised to \$3,700 on or after 1 January 2018) for an individual scheme and \$1,200 (To be revised to \$1,800 on or after 1 January 2018) for a pooled scheme. This should be paid within one month after the annual due date, which means the last day of each period of 12 months during which the scheme continues to be a registered scheme and beginning on the first or any subsequent anniversary of its registration. If the fee is not paid within one month after the due date, a surcharge equal to the amount of the unpaid fee will be imposed.

i. Termination / Winding up of Registered Scheme

Where a registered scheme is terminated or wound up, the relevant employer and designated person of the scheme shall, within 14 days of the commencement of the winding up or termination process, give a notice in writing of that fact to the Registrar and each member of the scheme.

CHAPTER 5

JURISDICTION OF THE HONG KONG COURTS

51. In respect of a Hong Kong domiciled scheme whose registration has been cancelled, the Court of First Instance may -

- (a) under section 48 of the Ordinance, upon an application being made to it by either the Registrar, the relevant employer or any scheme member, order that the scheme be wound up; and
- (b) under section 57 of the Ordinance, upon an application being made by the liquidator on behalf of the beneficiary of the scheme which is subject to a winding up order, give judgment against the respondent in the application (who may be the relevant employer, administrator or any person who is concerned with the operation and management of the scheme) in favour of the beneficiary for any shortfall between his vested benefits under the scheme as at the date of the commencement of the winding up and the amount received by him, if the Court is satisfied that the shortfall is caused by the act or omission of the respondent.

52. In respect of an offshore occupational retirement scheme which is, or has at any time been a registered scheme, section 74 of the Ordinance provides that the Court of First Instance shall have jurisdiction to hear and determine (in accordance with the law of the scheme's domicile) -

- (a) whether or not under the scheme a particular person is entitled (or prospectively entitled) to benefit at all or is entitled (or prospectively entitled) to a benefit or benefits of a particular kind; and
- (b) the amount of any benefit to which any particular person is entitled, or prospectively entitled, under the scheme.

CHAPTER 6

POWERS OF THE REGISTRAR TO INTERVENE

For Exempted Schemes

53. When an exempted scheme fails to comply with the requirements of the Ordinance applicable to exempted schemes, the Registrar may withdraw the exemption certificate of the scheme. Section 11(1) of the Ordinance provides for the circumstances under which the Registrar may consider to withdraw an exemption certificate. Such circumstances include where:

- (a) (if the exemption certificate is granted by virtue of the offshore scheme's registration or approval by an overseas authority) the scheme has ceased to be registered or approved by the overseas authority or that overseas authority has ceased to perform functions which are generally analogous to that conferred on the Registrar by the Ordinance;
- (b) (if the exemption certificate is granted on the grounds of limited number of Hong Kong members) more than 10% or 50 of the members of the scheme, whichever is less, are Hong Kong permanent identity card holders;
- (c) the periodic fee for exempted scheme together with surcharges (if any) are not paid accordingly; and
- (d) the required documents mentioned in paragraph 49 above are not submitted.

54. There are procedures governing the Registrar's proposal to withdraw an exemption certificate and for notifying the relevant employer and members of a scheme. There are also opportunities for the relevant employer to make representations and appeal to an Appeal Board against the withdrawal of the exemption certificate.

For Registered Schemes

55. Where the Registrar receives evidence that a registered occupational retirement scheme is not properly funded or administered or where the Registrar reasonably believes that there exist or existed circumstances which may prejudice the interests of the scheme members, he may, where appropriate, exercise his interventionary powers which include the following:

- (a) require the relevant employer or the trustee of the scheme to take necessary steps to ensure compliance with the trusteeship requirement and to inform him whether such steps have been taken (section 26(1) of the Ordinance);
- (b) require the administrator of the scheme to ensure compliance with the investment

requirement (section 27(7) of the Ordinance);

- (c) (for defined benefit scheme) require the administrator of the scheme to submit an actuarial report on such matters as specified by him (section 31(3)(b) of the Ordinance);
- (d) require the designated person of the scheme to submit an auditor's report on such matters and an account of such description as specified by him (section 32(2)(a) of the Ordinance);
- (e) (for defined benefit scheme) require the designated person of the scheme to supply an actuarial certificate in such form as specified by him (section 32(2)(b) of the Ordinance);
- (f) require the designated person or the relevant employer of the scheme to supply information or documents relating to the investment requirement under section 27 of the Ordinance, and to supply such information relating to any accounts and records kept under section 20(1) of the Ordinance (section 33 of the Ordinance);
- (g) appoint a person to conduct an inquiry as regards the scheme (section 36 of the Ordinance); and
- (h) cancel the registration of the scheme (section 45 of the Ordinance).

Enforcement by de-registration and winding up

56. When a registered scheme fails to comply with certain requirements of the Ordinance, the Registrar may cancel the registration of the scheme. Section 42 of the Ordinance provides for the circumstances under which the Registrar may consider it necessary to take such interventionary action. Such circumstances include:

- (a) any requirement of section 20 of the Ordinance (dealing with the keeping of proper accounts and records, etc.) is not complied with;
- (b) the requirement of section 21 of the Ordinance (dealing with the requirements in relation to assets) is not complied with;
- (c) any requirement of section 24 of the Ordinance (dealing with the funding requirements) is not complied with;
- (d) any requirement under section 26(1) of the Ordinance (dealing with the independent trusteeship requirement) is not complied with;
- (e) any requirement under section 27(7) of the Ordinance (dealing with the investment

requirement) is not complied with;

- (f) the requirement of section 28(3) of the Ordinance (dealing with the payment of periodic fee for registered schemes) is not complied with;
- (g) a notice has been given under section 29(1) (concerning the termination or winding up of a registered scheme);
- (h) any requirement of section 30 of the Ordinance (dealing with the annual return) is not complied with;
- (i) the requirement of section 31 of the Ordinance (dealing with the periodic actuarial certification) is not complied with;
- (j) any requirement under section 32(1) of the Ordinance (dealing with the Registrar's request for certain reports and certificates) is not complied with;
- (k) any requirement under section 33 of the Ordinance (dealing with the Registrar's request for information, etc.) is not complied with;
- (l) the requirement of section 37 of the Ordinance (dealing with the change of domicile) is not complied with;
- (m) the requirement under section 39 of the Ordinance (dealing with the replacement of designated person or the person who has made the submission to the jurisdiction of the Court of First Instance) is not complied with; and
- (n) the Registrar, after careful consideration of the information available to him, believes that cancellation of registration of the scheme will be in the interests of the scheme members as a whole (section 42(o)).

57. There are procedures governing the Registrar's proposal to cancel registration and for notifying the relevant employer, designated person and members of a scheme. There are also opportunities for the relevant employer to make representations and appeal to an Appeal Board against the cancellation.

58. Where the Registrar issues a proposal to cancel the registration of a registered scheme, the Court may on an application by the Registrar order the freezing of the assets of the scheme under section 44 of the Ordinance.

59. In respect of a Hong Kong domiciled scheme whose registration has been cancelled, the Registrar may, pursuant to section 48 of the Ordinance, apply to the Court for the winding up of the scheme. The Ordinance also provides that the relevant employer or the scheme members may themselves apply to the Court for the winding up.

60. Upon the making of an order for the winding up of the scheme, the Court shall appoint a liquidator to conduct the winding up of the scheme and to perform related functions under the Ordinance. The winding up provisions of Hong Kong domiciled schemes are set out in Part VII of the Ordinance.

The Provident Fund Schemes Legislation (Amendment) Ordinance 1998 (4 of 1998) (Commencement) (No.2) Notice 1999 was gazetted on 26 November 1999. According to the Commencement Notice, the Mandatory Provident Fund Schemes Authority will assume the role of the Registrar of Occupational Retirement Schemes in administering the Occupational Retirement Schemes Ordinance with effect from 10 January 2000.

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CHART FOR ADMINISTRATOR

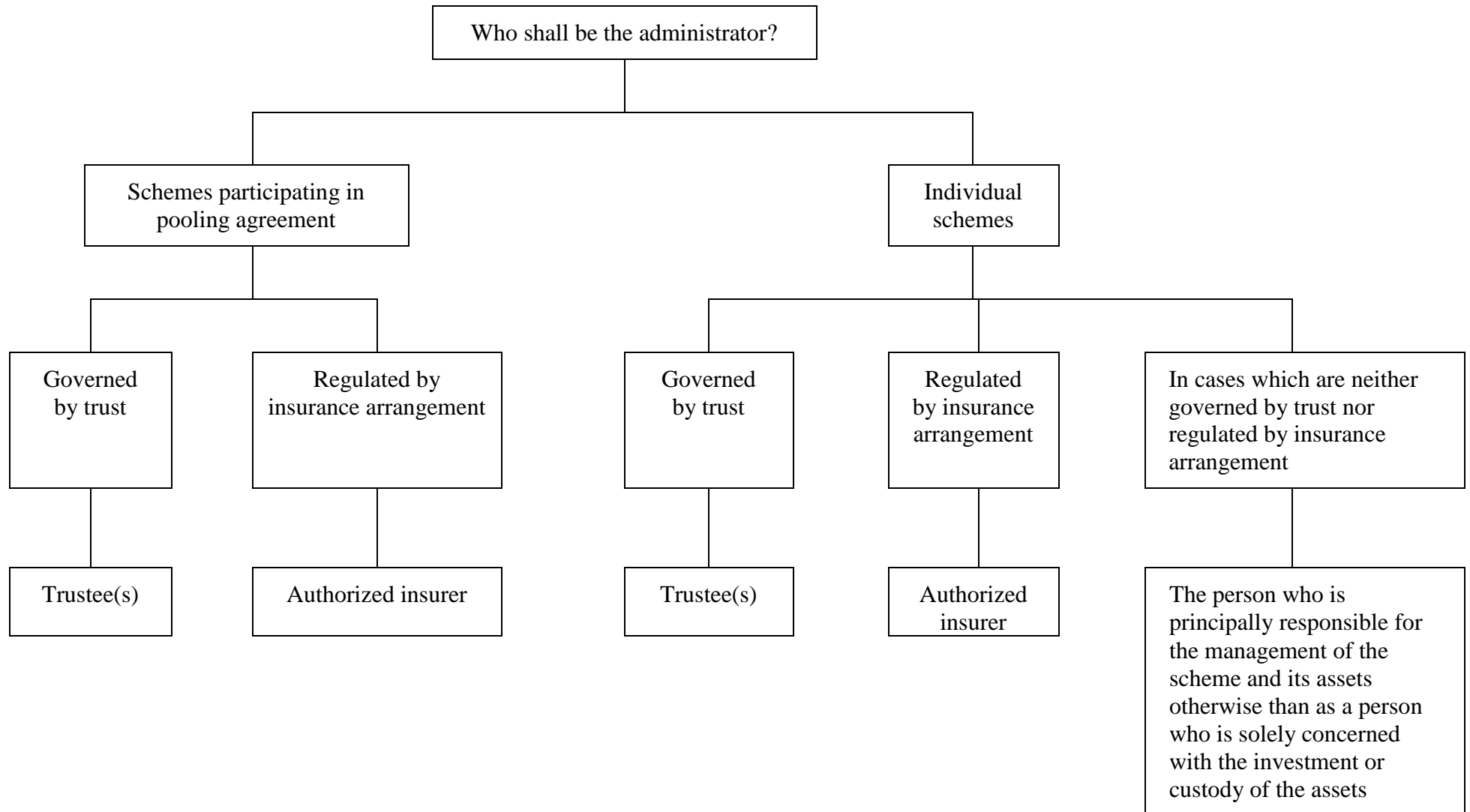


CHART FOR DESIGNATED PERSON

