



OCCUPATIONAL RETIREMENT SCHEMES ORDINANCE (CHAPTER 426)

GUIDANCE NOTES ON APPLICATION FOR AN EXEMPTION CERTIFICATE

DEFINITION

1. Terms used in both the application form and the guidance notes are defined under the Occupational Retirement Schemes Ordinance (Ordinance) as follows:-

“country” includes any state, province or any territorial entity or part which partly comprises the country.

“defined benefit scheme” means an occupational retirement scheme which is not a defined contribution scheme.

“defined contribution scheme” means an occupational retirement scheme which provides that the amount of a benefit under the scheme is to be an amount determined solely by reference to -

- (a) the contributions to the scheme’s funds by or in respect of the member concerned and any declared return in respect of such contributions (where such return may be subject to a minimum guaranteed rate but is otherwise unascertainable before it is declared); and
- (b) where appropriate, the qualifying service and age of the employee.

“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.

Meaning of “eligible person”-

- (1) An eligible person, in relation to an occupational retirement scheme, is an individual who is entitled or prospectively entitled to benefits under the scheme by virtue of—
 - (a) the individual’s employment (whether past or present) by the relevant employer of the scheme; or
 - (b) an agreement (*transfer agreement*)—
 - (i) made between—
 - (A) the relevant employer of the scheme; and
 - (B) the relevant employer of another occupational retirement scheme (*original scheme*) of which the individual was a member,
 - whether or not the individual is a party to the agreement; and



(ii) made as a result of any company amalgamation, restructuring, joint venture, or any other business transaction of a similar nature, conducted in good faith between the two employers.

(2) However, for an individual to be an eligible person because of an entitlement by virtue of a transfer agreement, the individual must have been a member of the original scheme by virtue of being an individual described in subsection (1) or (3) in relation to the original scheme.

(3) Also, an eligible person is an individual having an interest in the estate of a deceased individual described in subsection (1).

“existing scheme” means an occupational retirement scheme existing at the time when an application for exemption or registration is made for the scheme.

“group scheme” means an occupational retirement scheme formed by a grouping of companies in accordance with section 67.

“Hong Kong domiciled scheme” means an occupational retirement scheme the domicile of which is Hong Kong.

“Hong Kong permanent identity card holder” means a person holding a permanent identity card within the meaning of the Registration of Persons Ordinance (Cap.177).

“insurance arrangement” means an agreement or arrangement -

- (a) made in respect of an occupational retirement scheme with an authorized insurer under which the insurer is responsible for managing the scheme; and
- (b) which is of a class or description specified in rules made by the Registrar.

[“authorized insurer” means a person who is an insurer within the meaning of the Insurance Ordinance (Cap. 41) and who is authorized under section 8 of that Ordinance, or is deemed under section 61(1) or (2) of that Ordinance to be so authorized, to carry on insurance business]

“occupational retirement scheme” means subject to section 2(6) of the Ordinance 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;
- (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
- (c) by its terms limits membership of the scheme to eligible person,

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



[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 4 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 6 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.]

“offshore scheme” means an occupational retirement scheme the domicile of which is a country or territory outside Hong Kong.

“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.

EXEMPTION

2. Under section 7(4)(a) of the Ordinance, the Registrar may allow an application for an exemption certificate if he receives a written statement by the relevant employer of an occupational retirement scheme that such employer has complied with section 7(3) of the Ordinance and is satisfied, where the scheme to which the application relates is an offshore scheme, that the scheme is 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 by the Ordinance.



CRITERIA FOR OVERSEAS AUTHORITY

3. In assessing whether an overseas authority performs functions which are generally analogous to those conferred on the Registrar by the Ordinance for the purpose of section 7(4)(a), the Registrar will adopt the following criteria:

- (a) whether the overseas authority administers a registration regime for the scheme in question and lays down registration requirements in its jurisdiction similar to those in Part IV of the Ordinance; and
- (b) whether the overseas authority imposes ongoing operational requirements on the scheme in question comparable to those in Part V of the Ordinance, including in particular:

- (i) Keeping of proper accounts and records and preparation of annual financial statements (section 20).

Proper accounts and records as regards all assets, liabilities and financial transactions of the scheme should be kept and annual financial statements of the scheme should be prepared for audit purpose.

- (ii) Requirements in relation to assets (section 21)

The assets of the scheme must be kept separate and distinct from those of the relevant employer or those of the scheme administrator which are not vested in it in its capacity as such. Such assets may only be applied for the purposes of the scheme and, subject to certain exceptions, no assignment, charge, pledge or encumbrance may be created over such assets. Any assignment, charge, pledge or encumbrance created in contravention of this requirement will be rendered void.

- (iii) Funding requirements and duties (section 24)

The employer must make contributions in accordance with the terms of the scheme and must ensure that the scheme is solvent (i.e. the assets of the scheme are sufficient to meet the aggregate vested liabilities payable to scheme members). Where the scheme is a defined benefit scheme (e.g. where a member's benefits are based on his final salary on retirement), the employer must implement the relevant actuary's recommendations as regards funding and actuarial reviews of the scheme.

- (iv) Independent trusteeship (section 25)

Where the scheme is 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 Ordinance) unless that associate is a trust company registered under the Trustee Ordinance (Chapter 29)



(v) Investment requirement or restriction (section 27)

There is prohibition of, or restriction on, loans that can be made to the employer or his associate out of the scheme's assets.

There is limit on the proportion of the scheme's assets that may be invested in any security of, or issued by, the employer or his associate.

There is prohibition of, or restriction on, investment in non-listed companies.

(vi) Filing of periodic returns (section 30)

Periodic returns or audited financial statements relating to the scheme are required to be filed with the overseas authority.

THE APPLICATION

4. An application for an exemption certificate in respect of an occupational retirement scheme shall be made by the relevant employer of the scheme. Except for a group occupational retirement scheme that covers 2 or more relevant employers from within the grouping of companies as stipulated in section 67 of the Ordinance, an occupational retirement scheme must only cover 1 relevant employer. Section 67 of the Ordinance provides that the relevant employers from within a grouping of companies may operate, contribute to or participate in, group occupational retirement scheme that covers 2 or more companies from within the grouping of companies.

In this connection -

- (a) "grouping of companies" means companies that are associated companies or are within a group of companies and includes associated companies of a member of a group of companies;
- (b) "group of companies" means a holding company and its subsidiaries;
- (c) companies are regarded as being associated companies if -
 - (i) one of the companies holds, or is entitled to control the exercise of, 20% or more of the voting power in the other company's general meetings;
 - (ii) one of the companies is a subsidiary of an associated company; or
 - (iii) they are partners under a written partnership agreement.

These relevant employers must jointly or severally by power of attorney nominate one of themselves, or the holding company of a group of companies within the grouping of companies, as the representative employer for the purposes of the scheme. Under such circumstances, an application for registration of the scheme shall be made by the representative employer. A copy of the power of attorney (duly certified and/or authenticated as required by the Occupational Retirement Schemes (Authentication and Certification of Documents) Rules) nominating the representative employer by all the



relevant employers should be submitted together with the application.

5. The name of the scheme should be stated in Section I. This name should be identical to the name in which the scheme is registered or approved by the overseas authority if it has such overseas registration. However, if the scheme does not bear such a name, the relevant employer of the scheme should give a name to the scheme for identification purpose. In this regard, it is suggested that the name of the scheme may be related to the name of the relevant employer (e.g. the occupational retirement scheme operated by ABC Company may be named as “ABC Company Occupational Retirement Scheme”). Where there is more than one scheme operated by the same relevant employer for different types or classes of employees, different names distinguishing one scheme from another should be given to the respective schemes.

DOCUMENTS TO BE PROVIDED

6. An application for exemption should be accompanied by the following documents/information:
 - (a) a written statement by the relevant employer or representative employer that –
 - (A) the scheme by its terms limits membership of the scheme to eligible persons; and
 - (B) all members of the scheme are eligible persons.
 - (b) a copy of the scheme instrument (e.g. trust deed, insurance policy, agreements or governing rules) specifying the scheme’s particulars such as eligibility of membership, membership requirement on employment basis, contribution, vesting mechanism and payment of benefits;
 - (c) information/documents evidencing the scheme is currently registered or approved by the overseas authority, e.g. a copy of the certificate of registration / approval, a copy of the latest annual return submitted to the overseas authority, the latest contribution record in respect of scheme member(s) made by the relevant employer of the scheme or an extract of the relevant record of the register of such overseas authority. The validity of the information or the issue date of the documents must be within 6 months prior to the date of the application;
 - (d) an explanatory summary prepared by a person qualified to practise as a legal practitioner in the country, territory or place in which the scheme has been approved or registered, stating the functions of the overseas authority responsible for the registration, authorization, regulation or supervision of the scheme as mentioned in 3(a) and (b) above. The particulars of that legal practitioner (including his name, professional qualifications, experience relating to that particular jurisdiction, etc.) should also be stated*; and
 - (e) any other documents/information that the relevant employer considers relevant to the application.

* In the case of an application for an exemption certificate concerning an overseas authority which is on the “List of Authorities for the purpose of section 7(4)(a) of the Occupational Retirement Schemes Ordinance” published by the Registrar (as amended from time to time), the applicant is not required to submit such document. For the list of authorities, please visit MPFA website.



APPLICATION FEE

7. An application fee of \$940 is payable for each application. Payment should be made by a crossed paper cheque, e-cheque or bank draft in HK dollar and made payable to “MPFA Administration Account” and submitted together with the application form. For payment by e-cheque, please send an e-cheque via the e-Cheque Collection Portal (<http://echeque.mpfa.org.hk>).

GENERAL NOTES FOR COMPLETION OF APPLICATION FORM ORS-3

8. Names should be given IN FULL and IN BLOCK LETTERS.
9. The application shall be signed by the relevant employer (or the representative employer as appropriate) of the scheme. If the employer is a partnership or a limited company, the official chop of the firm/company should be stamped above the signature of its authorized signatory in the space provided in Section VI of the application form.
10. The address of the relevant employer or the representative employer to be given in this application form should be:-
 - (i) in case the employer is a company incorporated in Hong Kong or a re-domiciled company as defined in the Companies Ordinance (Cap 622) (CO), the company’s registered office in Hong Kong;
 - (ii) in case the employer is a non-Hong Kong company to which Part XI of the predecessor Ordinance (as defined in the CO) or Part 16 of the CO applies, the principal place of business of the company in Hong Kong;
 - (iii) in case the employer is a body corporate other than a company (whether incorporated or otherwise established in Hong Kong or elsewhere), or an unincorporated body of persons, the address at which the body carries on business; or
 - (iv) in any other case, the business address.
11. “None”, “Nil” or “Not Applicable” should be entered where appropriate. Blank spaces, dashes or “to be advised” are to be avoided. Ticks should be used in the selection of alternative boxes.
12. Every care must be taken to ensure that correct information is provided in the application. It is an offence under section 79 of the Ordinance for any person to provide information which is false in a material particular and which he knows to be false or he has no reasonable ground to believe to be true in such particular.
13. The Registrar should be informed immediately in writing of any change of the information given in the application form if such change takes place between the date of the application and the date of issue of the exemption certificate.



These notes are issued for the guidance of relevant employers applying for an exemption certificate in respect of their occupational retirement schemes under the Occupational Retirement Schemes Ordinance. Whilst every care has been taken in their preparation, they have no legal effect and do not spell out exhaustively the statutory obligations imposed on the relevant employer. These notes are not authoritative interpretation of the Ordinance and should be read in conjunction with the provisions thereof. Reference should be made to the Ordinance wherever there is any doubt as regards these notes and professional advice should be sought. Under no circumstances will the Registrar be responsible or liable for any error, omission or mistake contained in these notes.

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THE REGISTRAR OF
OCCUPATIONAL RETIREMENT SCHEMES