



OCCUPATIONAL RETIREMENT SCHEMES ORDINANCE

GUIDANCE NOTES ON APPLICATION FOR REGISTRATION FOR SCHEMES PARTICIPATING IN A POOLING AGREEMENT

DEFINITION

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

“administrator” means -

- (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.

“associate” means, in relation to an employer -

- (a) the spouse or a parent, child, grandparent, grandchild, sister or brother of that employer;
- (b) a body corporate of which that employer is a director or a shareholder who is entitled, whether directly or indirectly, to exercise or control the exercise of 20% or more of the voting power at any general meeting of that body corporate;
- (c) any person who is a partner of that employer;
- (d) if that employer is a body corporate -
 - (i) any director of that body corporate;
 - (ii) any body corporate which is -
 - (A) a subsidiary;
 - (B) the holding company; or



- (C) another subsidiary of the holding company,
of the employer;
- (iii) any director of any such subsidiary or holding company; and
- (iv) the spouse or a parent, child, grandparent, grandchild, sister or brother of a director referred to in subparagraphs (i) and (iii); or
- (e) such other persons as may be specified by the Registrar by rules made under section 73(1) of the Ordinance.

“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.

“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 of the Ordinance.

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

“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.

“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.

“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 2 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.

“registered trust company” means a company which is for the time being registered under Part VIII of the Trustee Ordinance (Cap. 29).

“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.

THE APPLICATION

2. Each of the occupational retirement schemes participating in a pooling agreement (participating schemes) shall be registered on an individual basis. The pooling agreement itself which applies to the participating schemes is not *registrable* under the Ordinance.
3. An application for registration of each participating scheme in a pooling agreement 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 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.



4. A number of documents supporting the application should be lodged together with the completed application form. The documents required and the contents of these documents vary depending on the type of the scheme. Annexure I shows the classification of schemes according to their types and the relevant documents required for registration purposes. Applicants are advised to follow the instruction specified in Annexure I to ensure that the correct documents are lodged. Annexure II shows the required qualifications of the persons making the statements, certificates or undertaking in support of the application.
5. For defined benefit schemes applying for registration, an actuarial certificate is required to be supplied to the Registrar stating whether the scheme's assets would be sufficient to meet its liabilities. The actuarial certificate must be drawn up, in respect of the last actuarial review of an existing scheme, not more than 9 months before the date of the application, or in respect of the initial actuarial valuation of a proposed scheme, within the 2 months prior to the date of the receipt of the application. The employers or the administrators of such schemes should therefore cause an actuarial investigation of their schemes to be conducted before making the application.
6. For the sake of administrative convenience, application for registration of schemes participating in the same pooling agreement may be submitted in one batch to the Registrar by the pool administrator. In such case the following documents in support of the applications can be submitted to the Registrar in the form of master documents providing blanket coverage to all the schemes under the same batch:
 - (a) The statement by the administrator of the pooling agreement as required by Paragraph 1 of Part 2 of Schedule 1 to the Ordinance.
 - (b) The statement by a solicitor as required by Paragraph 2 of part 2 of Schedule 1 to the Ordinance.
 - (c) The statement by an auditor as required by Paragraphs 2A and 3 of Part 2 of Schedule 1 to the Ordinance.
 - (d) Undertaking by the designated person pursuant to section 15(f) of the Ordinance.
 - (e) The submission of the jurisdiction of the High Court in Hong Kong (only for offshore schemes) as required by Paragraph 3(a) of Part 3 of Schedule 1 to the Ordinance.
 - (f) The legal practitioner's statement (only for offshore schemes governed by trust) as required by Paragraph 4 of Part 3 of Schedule 1 to the Ordinance.

However, the following supporting documents should be submitted individually in respect of each participating scheme:-

- (i) The statement by the applicant as required by Paragraph 3A of Part 2 of Schedule 1 to the Ordinance.
- (ii) A set of audited accounts (if any) prepared in respect of the scheme in relation to the latest financial year of the scheme (only for existing schemes) as required by Paragraph 4 of Part 2 of Schedule 1 to the Ordinance.



- (iii) The actuarial certificate (only for defined benefit schemes) as required by Paragraph 1 or 2 of Part 3 of Schedule 1 to the Ordinance.

- 7. A list of the participating schemes to which the applications relate must be incorporated into the master administrator's statement. Henceforth, it will suffice for other master documents to refer to the list that has been incorporated into the master administrator's statement.

APPLICATION FEE

- 8. An application fee of \$1,800 is payable for each participating scheme applying for registration. 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>).
- 9. Where applications of participating schemes in the same pooling agreement are lodged in one batch, one single cheque for the total amount covering the application fees for that batch of applications would also be acceptable.

GENERAL NOTES FOR COMPLETION OF APPLICATION FORM ORS-2

- 10. Names should be given IN FULL and IN BLOCK LETTERS.
- 11. 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 VIII of the application form.
- 12. The address to be given in respect of any person in this application form should be:-
 - (i) in case such person 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 such person 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 such person 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 case such person is an individual, his residential or business address.
- 13. "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.



14. If there is not enough space for your answers, please use a separate sheet of paper and affix it to the relevant section.
15. 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.
16. 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 application and the date of registration.

NOTES FOR COMPLETION OF SPECIFIC SECTIONS

SECTION I

17. The name of the scheme should be stated in Section I. If the scheme does not bear a name, the relevant employer of the scheme should discuss with the administrator of the scheme and 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.
18. The applicant should refer to Annexure I to determine what category of schemes his scheme belongs to. The relevant category listed in Annexure I should be stated in Section I of the application form. It is important that the applicant finds the right category for his scheme, otherwise there would be delay in the processing of his application. For the purpose of determining the categories of schemes for registration under the Ordinance, a scheme under a trust with the whole or part of its assets invested in an insurance policy is, despite that insurance arrangement, still regarded as a scheme governed by trust. If in doubt, the applicant should seek professional advice in determining the right category.
19. Except for applications submitted in one batch as specified in paragraph 6 above, the documents required to accompany the application as listed in the relevant category stated in Section I should be attached to the application form.

SECTION II (4) to (7)

20. These questions on the number of members of schemes are requested for the compilation of statistics.

SECTION V

21. The trusteeship requirement in section 25(2) of the Ordinance provides that where a registered scheme is governed by a trust, the sole trustee of the trust shall not be an employer trustee, and where the trust instrument provides for the appointment of two or more trustees, there shall be appointed for the time being at least one non-employer trustee.



An employer trustee in relation to a trust means -

- (a) the relevant employer of the registered scheme which is governed by the trust;
- (b) an associate, not being a registered trust company, of such employer; or
- (c) an employee of such employer,

when acting in the capacity of a trustee of the trust.

A non-employer trustee in relation to a trust means a trustee who is not an employer trustee.

- 22. A statement by the administrator of a pooling agreement stating whether or not the requirements of section 25(2) and (5) of the Ordinance (where the scheme is an existing scheme governed by a trust) have been complied with in relation to the scheme as if it was a registered scheme or (where the scheme is a proposed scheme which will be governed by a trust) will be complied with in relation to the scheme as required under Paragraph 1 in Part 2 of Schedule 1 to the Ordinance, must be submitted with the application.
- 23. Since section 2(4) of the Ordinance requires that in the case of an agreement or arrangement which is governed by a single trust and which applies to two or more individual occupational retirement schemes each of which is governed by such trust, should be managed by a registered trust company, the particulars of the registered trust company concerned must be furnished in Section V(4) of the application form.

SECTION VI

- 24. “Designated Person” refers to the person giving the undertaking under section 15(f) of the Ordinance who undertakes to perform in relation to the scheme the functions imposed or conferred on a designated person by the Ordinance. The undertaking by the designated person shall accompany the application for the purpose of registration. A specimen undertaking for use in the application is provided in Annexure III.
- 25. The persons qualified to be the designated persons of a scheme are summarized in paragraph V of Annexure II.

These notes are issued for the guidance of relevant employers applying for registration of 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 the 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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