



**SECURITIES AND FUTURES COMMISSION**  
證券及期貨事務監察委員會

**Consultation Paper on the Securities and Futures  
(Open-ended Fund Companies) Rules and  
Code on Open-ended Fund Companies**

June 2017



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## Personal information collection statement

1. This Personal Information Collection Statement (PICS) is made in accordance with the guidelines issued by the Privacy Commissioner for Personal Data. The PICS sets out the purposes for which your Personal Data<sup>1</sup> will be used following collection, what you are agreeing to with respect to the SFC's use of your Personal Data and your rights under the Personal Data (Privacy) Ordinance (Cap. 486) (PDPO).

### Purpose of collection

2. The Personal Data provided in your submission to the SFC in response to this consultation paper may be used by the SFC for one or more of the following purposes:
  - (a) to administer the relevant provisions<sup>2</sup> and codes and guidelines published pursuant to the powers vested in the SFC;
  - (b) in performing the SFC's statutory functions under the relevant provisions;
  - (c) for research and statistical purposes; or
  - (d) for other purposes permitted by law.

### Transfer of personal data

3. Personal Data may be disclosed by the SFC to members of the public in Hong Kong and elsewhere as part of this public consultation. The names of persons who submit comments on this consultation paper, together with the whole or any part of their submissions, may be disclosed to members of the public. This will be done by publishing this information on the SFC website and in documents to be published by the SFC during the consultation period or at its conclusion.

### Access to data

4. You have the right to request access to and correction of your Personal Data in accordance with the provisions of the PDPO. Your right of access includes the right to obtain a copy of your Personal Data provided in your submission on this consultation paper. The SFC has the right to charge a reasonable fee for processing any data access request.

### Retention

5. Personal Data provided to the SFC in response to this consultation paper will be retained for such period as may be necessary for the proper discharge of the SFC's functions.

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<sup>1</sup> Personal Data means personal data as defined in the Personal Data (Privacy) Ordinance (Cap. 486).

<sup>2</sup> The term "relevant provisions" is defined in section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571) and refers to the provisions of that Ordinance together with certain provisions in the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32), the Companies Ordinance (Cap. 622) and the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615).



## Enquiries

6. Any enquiries regarding the Personal Data provided in your submission on this consultation paper, or requests for access to Personal Data or correction of Personal Data, should be addressed in writing to:

The Data Privacy Officer  
The Securities and Futures Commission  
35/F Cheung Kong Center  
2 Queen's Road Central  
Hong Kong

7. A copy of the Privacy Policy Statement adopted by the SFC is available upon request.



# Proposed Securities and Futures (Open-ended Fund Companies) Rules and Code on Open-ended Fund Companies

## Executive summary

### Background

1. As part of our initiatives to enhance market infrastructure to further develop Hong Kong as a full-service international asset management centre and a preferred fund domicile, the SFC has been working closely with the Government to establish the legal and regulatory framework on a new open-ended fund company (OFC) structure in Hong Kong.
2. Currently, investment funds in Hong Kong are established in unit trust form but not corporate form because of restrictions on capital reduction and distribution out of capital under the Companies Ordinance (Cap. 622)(CO).
3. The option of an OFC structure should create a more flexible business environment for fund managers and help attract more funds to domicile in Hong Kong.
4. To this end, the SFC assisted the Financial Services and the Treasury Bureau (FSTB) of the Government to conduct a public consultation on the proposed legal and regulatory framework to introduce an OFC structure in Hong Kong<sup>3</sup>. The consultation concluded in January 2016 and a consultation conclusions paper (2016 consultation conclusions)<sup>4</sup> was issued to set out final proposals. The Securities and Futures (Amendment) Ordinance 2016 (Amendment Ordinance)<sup>5</sup>, which sets out the basic legal framework on the OFC regime in Hong Kong, was gazetted in June 2016.

### Legislative framework

5. The Amendment Ordinance empowers the SFC to make subsidiary legislation<sup>6</sup> and to issue codes and guidelines in relation to the regulation of OFCs<sup>7</sup>.
6. On this basis, the SFC proposes to make the Securities and Futures (Open-ended Fund Companies) Rules (OFC Rules) and to issue a Code on Open-ended Fund Companies (OFC Code) to set out the detailed legal and regulatory requirements for the new OFC vehicles.
7. The proposed OFC Rules and OFC Code have been prepared based on the 2016 consultation conclusions and have also taken into account international regulatory standards and practices, relevant IOSCO<sup>8</sup> principles, the CO and the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) (C(WUMP)O), as well as comments received during our soft consultation with relevant industry stakeholders.

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<sup>3</sup> The public consultation paper issued in March 2014 can be accessed on the FSTB's website at: [http://www.fstb.gov.hk/fsb/ppr/consult/doc/ofc\\_e.pdf](http://www.fstb.gov.hk/fsb/ppr/consult/doc/ofc_e.pdf)

<sup>4</sup> The 2016 consultation conclusions can be accessed on the FSTB's website at: [http://www.fstb.gov.hk/fsb/ppr/consult/doc/ofc\\_conclu\\_e.pdf](http://www.fstb.gov.hk/fsb/ppr/consult/doc/ofc_conclu_e.pdf)

<sup>5</sup> The Amendment Ordinance can be accessed on the e-Legislation website at [https://www.elegislation.gov.hk/hk/2016/16/en?FUNCTION\\_ID=ERTS05](https://www.elegislation.gov.hk/hk/2016/16/en?FUNCTION_ID=ERTS05)

<sup>6</sup> New sections 112ZK, 112ZL, 112ZM and 112ZN in the Amendment Ordinance.

<sup>7</sup> New section 112ZR in the Amendment Ordinance.

<sup>8</sup> International Organization of Securities Commissions.



8. Drafts of the proposed OFC Rules and OFC Code are set out in Appendix A and Appendix B to this paper. The key proposals in the draft OFC Rules and OFC Code are summarised and discussed below.
9. All OFCs (whether publicly or privately offered) will be required to be registered by the SFC under the new Part IVA in the Amendment Ordinance and will be subject to the OFC Rules and OFC Code.
10. OFCs which are intended to be offered to the public will also have to obtain the SFC's authorisation under Part IV of the Securities and Futures Ordinance (SFO) unless an exemption applies (such OFCs are referred to as "public OFCs" in this paper). Accordingly, public OFCs, like other publicly offered funds authorised by the SFC, will also be subject to the authorisation and ongoing post-authorisation requirements set out in the SFC Products Handbook<sup>9</sup>.

### Proposed OFC Rules

11. The OFC Rules are subsidiary legislation which will be made under the SFO<sup>10</sup> following vetting by the Legislative Council.
12. The proposed OFC Rules will set out the more detailed statutory requirements concerning company formation and maintenance (for example, share capital, meetings and registers maintenance, auditors' appointment and financial reports); the key operators of the OFC (i.e. the directors, investment manager and custodian); the functions of the Companies Registry (CR); the segregated liability feature for umbrella and sub-funds structures and cross-investments of sub-funds of OFCs; disqualification of directors; arrangements and compromises; winding-up; and offences.
13. As OFCs will be established and incorporated under the SFO, they will not be "companies" incorporated under the CO and will therefore not be subject to the CO unless otherwise provided in the new Part IVA introduced by the Amendment Ordinance<sup>11</sup>. Those CO provisions which are relevant to an OFC's operations are proposed to be directly set out in the OFC Rules.
14. As for winding-up and disqualification orders, C(WUMP)O provisions (including its subsidiary legislation) are proposed to be applied to OFCs on a wholesale basis (save for necessary modifications). This is in line with the approach taken in legislation for similar corporate fund vehicles in overseas jurisdictions such as the United Kingdom and Ireland.

### Proposed OFC Code

15. The OFC Code will be issued by the SFC pursuant to its power to issue codes and guidelines under the SFO<sup>12</sup>.
16. The proposed OFC Code contains a set of general principles which all OFCs and their key operators are expected to comply with in the management and operation of OFCs. The

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<sup>9</sup> SFC Handbook for Unit Trusts and Mutual Funds, Investment-Linked Assurance Schemes and Unlisted Structured Investment Products.

<sup>10</sup> New sections 112ZK, 112ZL, 112ZM and 112ZN in the Amendment Ordinance.

<sup>11</sup> Under section 112U of the new Part IVA in the Amendment Ordinance for example, it is specified that the directors shall owe the OFC the duty to exercise reasonable care, skill and diligence that is owed by a director of an ordinary company to the ordinary company under section 465 of the CO.

<sup>12</sup> New section 112ZR in the Amendment Ordinance.



proposed OFC Code also elaborates on various requirements (such as naming guidance and the eligibility of key operators) applicable to all OFCs seeking the SFC's registration as well as baseline requirements (such as duties of key operators, corporate administration matters and a streamlined termination process) applicable to all OFCs. The proposed OFC Code further sets out some basic investment restrictions, disclosure and operational requirements applicable to non-public OFCs (referred to as "private OFCs" in this paper) in line with the 2016 consultation conclusions as well as with IOSCO principles.

17. We have adopted a principles-based rather than prescriptive approach in formulating the proposed OFC Code in line with other codes and guidelines issued by the SFC. All public OFCs will have to comply with the detailed requirements set out in the SFC Products Handbook, so there is no need to duplicate these in the OFC Code. Private OFCs should be allowed the flexibility to pursue their investment strategies as set out in their instrument of incorporation and offering documents, as long as they meet the basic principles in the OFC Code. Given that the investment management function of an OFC must be delegated to an investment manager who is licensed by or registered with the SFC to carry out Type 9 (asset management) regulated activity, the investment manager must also comply with all relevant conduct requirements, including those under the Fund Manager Code of Conduct, in carrying out their functions for the OFC.

#### Other matters

18. Fees chargeable by the SFC and the other relevant authorities, namely the CR and the Official Receiver's Office (ORO) will be set out in separate subsidiary legislation to be issued by the Financial Secretary under the SFO<sup>13</sup> (OFC Fees Rules).
19. It is proposed that no new SFC fees will apply to public OFCs. In other words, applicants only pay the existing application and authorisation fees applicable to funds seeking the SFC's authorisation under Part IV of the SFO as well as post-authorisation annual fees<sup>14</sup>.
20. For private OFCs, it is proposed that minimal registration fees, and fees for changes that require the SFC's approval, will be charged. No annual fees will be charged.
21. As to fees chargeable by the CR and the ORO, please refer to Section III on "CR's and ORO's fees".
22. As regards tax matters relating to OFCs, in particular the potential profits tax exemption for private OFCs, this is a matter subject to a separate legislative exercise led by the FSTB, with the support of the Inland Revenue Department (IRD).
23. The SFC invites market participants and interested parties to submit written comments on the proposals discussed in this consultation paper by no later than 28 August 2017.

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<sup>13</sup> New section 112ZQ in the Amendment Ordinance.

<sup>14</sup> As set out in Schedule 1 to Securities and Futures (Fees) Rules (Cap.571AF).



## Section I – Introduction

### Overview of the legal and regulatory framework on OFCs

#### New Part IVA of the SFO

24. Following the prior OFC public consultation and legislative process, the Amendment Ordinance was gazetted on 10 June 2016 to provide the basic legal framework for the OFC regime in Hong Kong.
25. The Amendment Ordinance introduced a new Part IVA into the SFO to lay down the key structural requirements and the supervisory powers of the SFC in respect of OFCs. Set out below are some of these key requirements<sup>15</sup> in relation to which further regulations and guidance will be provided in the proposed OFC Rules and/or the OFC Code as discussed in Section II of this paper.
  - (a) An OFC must be registered with the SFC and incorporated by the CR.
  - (b) An OFC must not have a name which is misleading or undesirable or is the same as the name of another existing OFC.
  - (c) An OFC must have at least two individual directors. Directors of an OFC are subject to fiduciary duties and the duty to exercise reasonable care, skill and diligence.
  - (d) An OFC must have an investment manager who must be licensed by or registered with the SFC to carry out Type 9 (asset management) regulated activity.
  - (e) An OFC must have a custodian to whom all scheme property must be entrusted for safe-keeping. The custodian must take reasonable care, skill and diligence to ensure the safe-keeping of the scheme property so entrusted to it.
  - (f) An OFC must appoint an auditor for each financial year of the OFC.
  - (g) The instrument of incorporation of an OFC must include certain mandatory contents.
  - (h) A solvent OFC may make an application to the SFC for the termination of its registration under a streamlined process.
  - (i) The Financial Secretary may make regulations relating to the charging or collecting of fees by the SFC, CR and ORO.

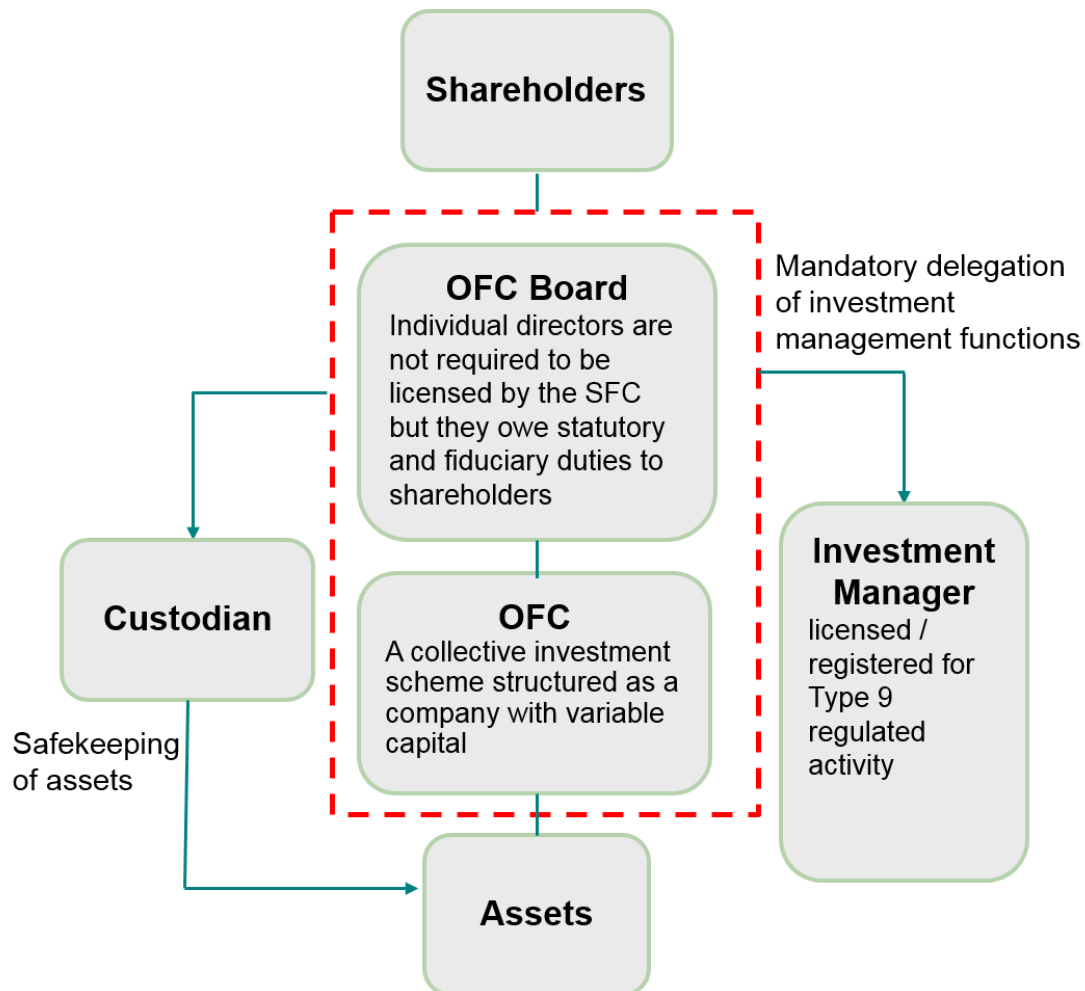
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<sup>15</sup> New sections 112C, 112D, 112H, 112K, 112U, 112V, 112Z, 112ZA, 112ZB, 112ZH and 112ZQ in the Amendment Ordinance.



## The OFC structure

26. The following diagram shows the OFC structure as laid down under the Amendment Ordinance.



## Proposed OFC Rules and OFC Code

27. The OFC Rules are proposed to be made under the SFO<sup>16</sup> to set out the more detailed statutory requirements concerning matters such as company formation and maintenance, the key operators of the OFC, the functions of the CR, the segregated liability feature for umbrella and sub-funds structures and cross-investments of sub-funds of OFCs, arrangements and compromises as well as offences applicable to OFCs and their key operators. Under the proposed OFC Rules, the C(WUMP)O regime on winding-up and disqualification of directors would be applicable to OFCs by way of incorporation with appropriate modifications.

<sup>16</sup> New sections 112ZK, 112ZL, 112ZM and 112ZN in the Amendment Ordinance.



28. The proposed non-statutory OFC Code to be issued under the SFO<sup>17</sup> will be divided into two main sections. The first section (Section I) sets out the general principles, as well as certain key structural and ongoing requirements applicable to all OFCs. The second section (Section II) sets out the basic investment restrictions, disclosure and operational requirements applicable only to private OFCs. Public OFCs will be subject to the requirements in the SFC Products Handbook.
29. Under the new Part IVA in the Amendment Ordinance<sup>18</sup>, the SFC is empowered to register an OFC and may impose any registration condition that it considers appropriate. The SFC may also refuse to register a proposed OFC and to cancel the registration of an OFC. In considering such registration, cancellation and/or imposition of conditions, the SFC will have regard to, among other things, compliance with the SFO, the OFC Rules, and relevant codes and guidelines issued by the SFC including the OFC Code.

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<sup>17</sup> New section 112ZR in the Amendment Ordinance.

<sup>18</sup> New section 112D in the Amendment Ordinance.



## Section II – Key proposals under the OFC Rules and OFC Code

### A. Establishment process and name of OFC

#### **One-stop processing for registration, incorporation and business registration**

30. Under Part IVA introduced by the Amendment Ordinance<sup>19</sup>, an OFC will be established by obtaining a registration from the SFC and a certificate of incorporation from the CR. This is done via a one-stop process whereby the SFC will notify the CR of registration of the OFC, and the SFC's registration will take effect upon the issuance of a certificate of incorporation by the CR. A similar process will apply to business registration with the IRD<sup>20</sup>.
31. The proposed OFC Rules further elaborate on this one-stop approach. In short, the applicant would only have to deal with the SFC for all registration purposes.

#### **Name of the OFC**

32. Part IVA in the Amendment Ordinance<sup>21</sup> provides that the name of an OFC must end with "open-ended fund company" or OFC, must not be the same as the name of another existing OFC, and must not be misleading or otherwise undesirable.
33. Under the proposed OFC Rules, the name of the proposed OFC and any change to the name of a registered OFC will be reviewed and approved by the SFC only. No further approval by the CR would be required.
34. The proposed OFC Code also provides guidance on the factors which would be considered by the SFC in determining whether a proposed OFC name would be regarded as "misleading or otherwise undesirable". For example, whether the proposed name (a) is inconsistent with the nature, investment objectives or policy of the OFC, (b) is substantially similar to the name of another OFC, (c) would give investors a sense of assurance or security not justified by the underlying features of the OFC, or (d) might lead investors into inferring or might otherwise create the impression, that the directors are not responsible for the OFC.
35. In the case of a change of name, a one-stop approach is also proposed. The applicant only has to submit all the documents and fees required by the SFC and the CR to the SFC. After the SFC has approved of the change, the SFC will pass the relevant application documents and fees to the CR. If the documents and fees are in order, the CR will then register the change and issue a Certificate of Change of Name to the OFC.

#### **Questions:**

1. Do you have any comments on the suggested one-stop process for the establishment of an OFC? Please explain your view.

<sup>19</sup> New sections 112C and 112D in the Amendment Ordinance.

<sup>20</sup> The applicant would only have to submit the documents required for business registration to the SFC. The SFC will onward provide the documents to the CR for handling and the issuance of business registration certificate by the IRD.

<sup>21</sup> New section 112H in the Amendment Ordinance.



2. With regards to the suggested factors as to whether a proposed OFC name is “misleading or otherwise undesirable”, are there other factors which you think should be taken into account? Please explain your view.

## **B. Instrument of incorporation and legal capacity of an OFC**

### **Instrument of incorporation**

36. Under Part IVA in the Amendment Ordinance, an OFC must have an instrument of incorporation containing certain mandatory contents<sup>22</sup>, and other matters prescribed by the OFC Rules.
37. It is proposed under the draft OFC Rules that the instrument of incorporation of an OFC must include a statement that the object of the OFC is the operation of the company as a collective investment scheme. This is important to ensure the OFC cannot be a conventional company operating a commercial business or trade.
38. The proposed OFC Rules further provide that the objects of the OFC must include a statement that the OFC is formed for a lawful purpose, similar to the CO’s requirement for formation of companies<sup>23</sup>.
39. Save for statutory mandatory provisions<sup>24</sup>, it is proposed that an OFC should be provided with the flexibility to alter its instrument of incorporation. An OFC may also amend its instrument of incorporation where shareholders’ approval has been obtained or where the custodian has certified the immateriality of the change or the necessity to comply with applicable statutory or regulatory requirements<sup>25</sup>.
40. In line with the 2016 consultation conclusions, the proposed OFC Rules provide that any material change to an OFC’s instrument of incorporation requires the SFC’s approval. Examples of material changes are provided in the proposed OFC Code. Public OFCs should, in addition, comply with the requirements of the SFC Products Handbook.
41. To provide guidance to the industry, a template for an OFC instrument of incorporation which reflects mandatory and optional provisions will be made available on the SFC’s website for reference.

### **Legal capacity of an OFC**

42. An OFC has a legal capacity similar to a conventional company under the CO and the rights and powers provided in its instrument of incorporation.

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<sup>22</sup> New section 112K in the Amendment Ordinance. These include the OFC’s name, a statement that its registered office is in Hong Kong, its objects, the kinds of property in which it is to invest, a statement that it is an OFC with variable share capital, a statement that the amount of its paid-up share capital is at all times equal to its net asset value, a statement that the OFC’s shareholders are not liable for the OFC’s debts, and a statement that its scheme property is entrusted to the custodian for safe-keeping in compliance with the law.

<sup>23</sup> Section 67 of the CO.

<sup>24</sup> Please refer to section 112K in the Amendment Ordinance and footnote 22 above.

<sup>25</sup> This is similar to the amendment allowed to be made by SFC-authorized public investment funds under 6.7 of the Code on Unit Trusts and Mutual Funds in the SFC Products Handbook.



43. However, it is also proposed that the draft OFC Rules will provide that any transaction entered into by the OFC which falls outside its operation as a collective investment scheme will be invalid. This ensures the OFC will only be operated as an investment fund.

**Question:**

3. Do you have any views on the proposals regarding the instrument of incorporation and the legal capacity of an OFC?

### **C. General principles for the OFC and its key operators**

44. The SFC proposes to introduce seven fundamental general principles (General Principles) in the OFC Code with which all OFCs and their key operators are expected to comply when managing and operating an OFC, namely (1) acting fairly, (2) diligence and competency, (3) proper protection of assets, (4) managing conflicts of interest, (5) disclosure, (6) regulatory compliance, and (7) complying with constitutive documents.
45. In formulating the General Principles, the SFC has taken into account relevant IOSCO principles as well as international regulatory standards and practices.
46. As the draft OFC Code proposes to take a principles-based approach, the General Principles are particularly important in establishing a baseline framework to be observed by private OFCs whilst having substantial flexibility in conducting their operations.

**Question:**

4. What are your views on the proposed General Principles in the draft OFC Code as outlined above? Are there any other areas which you think the General Principles should cover?

### **D. Key operators**

#### **Directors**

##### Eligibility

47. Under Part IVA in the Amendment Ordinance<sup>26</sup>, an OFC must have a board of directors with at least two directors. Such directors must be natural persons of age 18 or above. An undischarged bankrupt cannot serve as a director of an OFC without the leave of the court.
48. The draft OFC Rules propose that the experience and expertise of persons appointed as directors, taken together, should be appropriate for the purposes of carrying on the business of the OFC. The proposed OFC Code further elaborates on the experience and expertise required of an OFC director. It also contains the proposed requirement that the

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<sup>26</sup> New sections 112U, 112V, 112W and 112X in the Amendment Ordinance.



independent director must not be a director or employee of the custodian. This takes into account the prior OFC public consultation feedback and overseas regulatory requirements.

49. The proposed OFC Rules have also applied the C(WUMP)O regime on disqualification of directors to OFCs by way of incorporation with appropriate modifications.

#### Appointment and removal

50. Under Part IVA in the Amendment Ordinance<sup>27</sup>, the first directors of an OFC would be those named in the OFC's incorporation form. Under the proposed OFC Rules, subsequent appointments may be made by the board of the OFC or by way of shareholders' resolution.
51. As discussed in the 2016 consultation conclusions, in view of the importance of the directors of an OFC, appointments must be subject to SFC approval under the proposed OFC Rules.
52. For transparency, an OFC must keep a register of directors and the CR will keep an index of directors. In the case of a change of directors, the OFC must update its register of directors and file the change with the CR.

#### Duties

53. Under Part IVA in the Amendment Ordinance<sup>28</sup>, the directors owe the OFC to which they are appointed a fiduciary duty and the duty to take reasonable care, skill and diligence.
54. The directors of an OFC must comply with their statutory duties and applicable codes and guidelines including the OFC Code and SFC Products Handbook when discharging their functions in respect of an OFC.

#### Process agent

55. As noted in the 2016 consultation conclusions, an overseas director must appoint a process agent to facilitate the service of process. The proposed OFC Rules have formalised this requirement.
56. In particular, the proposed OFC Rules specify that a process agent can either be (a) an individual whose usual residential address is in Hong Kong, (b) a company formed and registered under the CO in Hong Kong, or (c) a firm of solicitors or certified public accountants in Hong Kong.
57. An OFC must keep a record of the process agent and any person must be able to inspect such record free of charge on request to the OFC. If there is any change in this information, the director must notify the OFC of the change. This requirement seeks to ensure that information about the process agent is updated and the ability to serve process is preserved.

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<sup>27</sup> New section 112U(2) in the Amendment Ordinance.

<sup>28</sup> New section 112U(3) in the Amendment Ordinance.



## **Investment manager**

### Eligibility

58. Under Part IVA in the Amendment Ordinance<sup>29</sup>, an OFC must have an investment manager who must be licensed by or registered with the SFC to carry out Type 9 (asset management) regulated activity. The investment management function of the OFC must be delegated to the investment manager. The investment manager must be and remain fit and proper at and after the time of registration of the OFC.

### Appointment and removal

59. Under the proposed OFC Rules, the first investment manager of an OFC is the person named in the application for registration of the OFC. Subsequent appointments must be made by the directors of the OFC.
60. An investment manager must retire when it ceases to meet the eligibility requirements under the SFO. An investment manager may also be removed pursuant to the circumstances set out in the instrument of incorporation of the OFC.

### Duties

61. The investment manager must comply with the General Principles and other relevant requirements under the proposed OFC Code. Given that the investment manager is also a SFC-licensed or registered person, it must comply with the Fund Manager Code of Conduct, the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission and other applicable SFC codes and guidelines, in addition to fulfilling applicable statutory requirements.

## **Custodian**

### Eligibility

62. Under Part IVA in the Amendment Ordinance<sup>30</sup>, an OFC must have a custodian to whom all the scheme property of the OFC must be entrusted for safe-keeping.
63. In view of the general support received during the prior OFC public consultation, the draft OFC Code has proposed that eligibility requirements for the custodian be essentially the same as those applicable to custodians of SFC-authorized funds in the SFC Products Handbook. These include, for example, that the custodian has to be a licensed bank in Hong Kong, a trust company which is a subsidiary of such a bank, or an overseas banking institution or its subsidiary acceptable to the SFC, and that such custodian meets relevant capital and internal control requirements.

### Appointment and removal

64. Under the OFC Rules, the first custodian of an OFC is the person named in the application for registration of the OFC. Subsequent appointments must be made by the directors of the

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<sup>29</sup> New section 112Z in the Amendment Ordinance.

<sup>30</sup> New section 112ZA in the Amendment Ordinance.



OFC. Appointment of the custodian will be subject to the SFC's approval and a contravention of this requirement would result in an offence and sanctions.

65. Under the proposed OFC Rules, the custodian must upon its cessation of office provide either a "statement of circumstances" if it considers there are circumstances to be brought to the attention of the OFC's shareholders or creditors, or a statement to the OFC that there are no such circumstances. This is in line with the UK's regulations and also similar to the mechanism applicable to auditors in the context of conventional companies under the CO.

### Duties

66. Part IVA in the Amendment Ordinance<sup>31</sup> specifies that all scheme property of the OFC must be entrusted to the custodian for safekeeping. The custodian is also required to take reasonable care, skill and diligence to ensure the safe-keeping of the scheme property of the OFC that is entrusted to it.
67. The proposed OFC Code provides further elaboration on the duties expected of the custodian, taking into account relevant IOSCO principles<sup>32</sup>. These include proper segregation and safekeeping of the OFC's assets.
68. The proposed OFC Code also requires the custodian to exercise due care in the selection, appointment and monitoring of its delegates, including sub-custodians. Taking into account comments received during the legislative process of the Amendment Ordinance, the proposed OFC Rules have included an explicit requirement that a sub-custodian of an OFC must take reasonable care, skill and diligence to ensure the safe-keeping of the scheme property of the OFC that is entrusted to it.

### Process agent

69. As discussed in the 2016 consultation conclusions, the proposed OFC Rules require a custodian incorporated outside Hong Kong to appoint a process agent, unless it is a registered non-Hong Kong company under Part 16 of the CO such that it would have an authorised representative to whom documents should be served.
70. Under the proposed OFC Rules, the same eligibility requirements and requirements regarding record-keeping and notification of changes in respect of the process agent of an overseas director apply to the process agent of an overseas custodian.

#### **Questions:**

5. Do you have any comments on the proposed requirements as to the eligibility, appointment and removal, and duties of the key operators of an OFC? Please explain your view.
6. What are your views on the proposed persons and entities which may serve as the process agent of an overseas director and overseas custodian of an OFC?

<sup>31</sup> New section 112ZA(2) in the Amendment Ordinance.

<sup>32</sup> The IOSCO's "Objectives and Principles of Securities Regulation" issued in May 2017, and the "Standards for the Custody of Collective Investment Schemes' Assets" issued in November 2015.



## **E. Corporate administration matters**

### **Share issuance, transfer, rights and register of shareholders**

71. The proposed OFC Rules include provisions on share issuance, transfer of shares, rights attached to shares, and register of shareholders and evidence of title. The provisions in this connection are substantially similar to those under the CO which contain baseline share entitlements for the protection of investors.
72. Under the proposed OFC Rules, an OFC can issue multiple classes of shares. We noted that during the prior OFC public consultation, some inquiries were made as to whether non-voting shares, management shares or other classes of shares can be created. Under the proposed OFC Rules, an OFC can provide for the creation of different classes of shares and provide for the rights attached to its shares in its OFC's instrument of incorporation.
73. A shareholder's title to the shares of an OFC will be evidenced by entry of the shareholder's particulars and holdings into the register of shareholders. No issuance of share certificate will be required. The transfer of shares will be conducted by lodging an instrument of transfer with the OFC, and the OFC has to register the transfer or send a notice of refusal to the transferee and transferor.
74. The register of shareholders must be kept at the registered office of the OFC or such other address as filed with the CR. A shareholder of an OFC shall have access to his or her own shareholding information in the register. Taking into account the nature of OFCs as investment funds, the register of shareholders will also be made available for inspection by the investment manager and custodian of the OFC, as well as relevant regulatory and public bodies including the SFC, CR and ORO.

## **F. Meetings and resolutions**

75. The proposed OFC Rules provide for fundamental matters relating to meetings and resolutions of the OFC. These include, for example, the notice period for holding meetings, the passage of resolutions and voting thresholds, and the rights of relevant parties (shareholders, custodian, investment manager and auditor) to attend meetings.
76. Detailed meeting logistics are generally expected to be set out in each OFC's instrument of incorporation. A public OFC should comply with the requirements in the SFC Products Handbook regarding meetings and notices<sup>33</sup>.

## **G. Filings with the Companies Registry**

77. The proposed OFC Rules include the CR's functions in relation to corporate filings by an OFC, its powers to request information or alter filings, to issue guidelines in relation thereto and to impose sanctions for non-compliance. These provisions are closely similar to those under the CO.

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<sup>33</sup> These include, for example, the requirement for a 21-day notice be given to investors in the case of a meeting at which a special resolution would be proposed.



78. There will be two types of filings with the CR. Filings which require the SFC's approval (Type 1 filing) will be submitted by the OFC to the SFC and the SFC will then pass the documents to the CR after approval. Filings which do not require the SFC's approval (Type 2 filing) will be submitted directly by the OFC to the CR. This provides a one-stop approach wherever the SFC's approval is involved.
79. The key filings and the party to which they should be submitted are set out below.

<b>Filing to CR</b>	<b>Type 1: Submission to SFC</b>	<b>Type 2: Direct submission to CR</b>
Application documents for incorporation: <ul style="list-style-type: none"> <li>• Incorporation form</li> <li>• Copy of instrument of incorporation</li> <li>• Notice for business registration</li> </ul>	Yes	N/A
Notice of change of name	Yes	N/A
Notice of alteration of instrument of incorporation (including alteration of OFC's objects)	Yes	N/A
Notice of change of address of registered office	N/A	Yes
Notice of location of registers and company records	N/A	Yes
Notice of appointment of director	Yes	N/A
Notice of cessation of director and/or change in particulars of directors	N/A	Yes
Notice of removal/ resignation of auditor	N/A	Yes
Statement of circumstances of the	N/A	Yes



Filing to CR	Type 1: Submission to SFC	Type 2: Direct submission to CR
auditor/ notice in relation to court's direction for such statement not to be sent		
Statement of circumstances of the custodian/ notice in relation to court's direction for such statement not to be sent	N/A	Yes
Notices pursuant to the C(WUMP)O winding-up regime applied by the draft OFC Rules <sup>34</sup>	N/A	Yes
Notice of appointment of receiver or manager/ Notice of mortgagee entering into possession of property	N/A	Yes
Court orders and resolutions of the OFC <sup>35</sup>	N/A	Yes

80. A number of filings which are applicable to conventional companies under the CO will not apply to an OFC, including the annual return, mortgages and charges, list of members, changes in share capital and information on the company secretary.

**Questions:**

7. Do you have any views on the proposals concerning the shares, meetings and resolutions of an OFC discussed above?
8. Do you agree with the proposed approach with regards to the filings with the CR? Please explain your view.

<sup>34</sup> In summary, these include notices relating to certificate of solvency; statement of voluntary winding up; notice of appointment, cessation of appointment, release of, or change in particulars of liquidator, receiver or manager; statement of affairs; abstract of receipts and payments; statement for liquidations not concluded within one year of commencement.

<sup>35</sup> In summary, these include a resolution of an open-ended fund company for the purpose of or in relation to the winding-up of the company under the C(WUMP)O, a resolution or court order varying the OFC's instrument of incorporation, or a court order which alters a resolution referred to in the foregoing.



## **H. Auditors and financial reports**

### **Auditor**

81. Under Part IVA in the Amendment Ordinance<sup>36</sup>, an OFC must appoint an auditor for each financial year. The draft OFC Rules specify that the appointment of the auditor must be made by the directors, unless the instrument of incorporation provides that the appointment is to be made at a general meeting. To afford protections for OFC investors in a way which is closely similar to those in conventional companies, the proposed OFC Rules set out the eligibility, rights, privileges and cessation of office of an auditor which are largely the same as the CO.
82. The proposed OFC Code clarifies that the auditor must be independent of the investment manager, the custodian, and the directors of the OFC.
83. Under the proposed OFC Rules, the auditor has the right to attend and be heard at general meetings, has the right of access to information and relevant qualified privileges. The remuneration of the auditor is to be fixed by the OFC.
84. The proposed OFC Rules provide that an auditor may either resign or be removed by ordinary resolution at a general meeting. Upon cessation, the auditor must give the OFC a statement of circumstances, similar to that for a custodian.

### **Financial reports**

85. An OFC must prepare an annual report for each financial year unless it has obtained approval from the SFC that a financial report is not required (for example in the case of a termination of an OFC). The accounts in the annual report must include the financial statements of the OFC, and the auditor's report on the financial statements.
86. An interim report must be prepared by a public OFC in accordance with the SFC Products Handbook. Taking into account relevant overseas regulatory requirements and soft consultation feedback, flexibility would be allowed for a private OFC to determine (having regard to its nature and investor requirements) whether an interim report would be prepared.
87. In accordance with the 2016 consultation conclusions, the proposed OFC Code provides that in preparing its accounts, the OFC may apply Hong Kong Financial Reporting Standards or International Financial Reporting Standards. Other accounting standards may be considered acceptable by the SFC having regard to the factors elaborated in the proposed OFC Code.

#### **Questions:**

9. Do you have any views on the proposed eligibility, appointment and removal, and rights and powers of the auditors in the draft OFC Rules?
10. Do you agree with the proposed requirements regarding the financial reports of an OFC? Please explain your view.

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<sup>36</sup> New section 112ZB in the Amendment Ordinance.



## **I. Segregated liability of sub-funds and cross sub-fund investments**

88. Part IVA in the Amendment Ordinance<sup>37</sup> provides for the segregation of liability of sub-funds (protected cell) for an OFC with an umbrella and sub-funds structure. To strengthen the protected cell regime, the proposed OFC Rules set out terms to be implied in the contracts and transactions entered into by an umbrella OFC. These implied terms, in summary, are that:
- (a) the party contracting with the OFC agrees not to seek, in any proceedings or by any other means, to have recourse to any assets of a sub-fund to discharge any liability not incurred on behalf of that sub-fund;
  - (b) if the contracting party with the OFC succeeds in having recourse to assets of a sub-fund in discharge of a liability not incurred on behalf of that sub-fund, the party is liable to pay to the OFC a sum equal to the value of the benefit thereby obtained by it; and
  - (c) if the contracting party with the OFC succeeds in seizing or attaching or otherwise levying execution against any assets of a sub-fund in respect of a liability which was not incurred on behalf of that sub-fund, it will hold those assets or the proceeds of the sale of such assets on trust for the OFC and will keep those assets or proceeds separate and identifiable as such trust property.
89. To ensure investors are aware of the protected cell feature, the proposed OFC Code requires the offering documents of the OFC to include (a) a statement on the segregated liability of the sub-funds, and (b) a warning that such protected cells may not be recognised in foreign courts. These disclosure requirements are substantially similar to those set out in the 2016 consultation conclusions.
90. Separately, taking into account the feedback received in the prior OFC public consultation, the proposed OFC Rules introduce a provision to enable cross sub-fund investments by an umbrella OFC.

### **Question:**

11. Do you have any comments on the proposed provisions for the segregated liability of sub-funds and cross sub-fund investments? Please explain your view.

## **J. Arrangements and compromises**

91. The proposed OFC Rules contain provisions on arrangements and compromises that are similar to the CO. In summary, an arrangement or compromise may be proposed to be entered into by an OFC with its creditors, its shareholders or both. The court may order a meeting of creditors or shareholders to be summoned, and require a notice for summoning the meeting to be accompanied with an explanatory statement.

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<sup>37</sup> New section 112S in the Amendment Ordinance.



92. Under the proposed OFC Rules, the court may sanction an arrangement or compromise if 75%<sup>38</sup> of the creditors, or shareholders, or both, with whom the arrangement or compromise is proposed to be entered into, agree to such arrangement or compromise.
93. The court has additional powers (for example transfer of properties or liabilities, appropriating interests, dissolution) to facilitate a reconstruction or amalgamation if (a) the arrangement or compromise is proposed for the purpose of, or in connection with, a scheme for the reconstruction of one or more OFCs, and (b) under the scheme, the property or undertaking of any OFC concerned in the scheme is to be transferred to another OFC.

**Question:**

12. Do you have any comments on the proposed draft OFC Rules regarding arrangements and compromises? Please explain your view.

## **K. Termination and winding-up**

### **Termination of an OFC by application to the SFC**

94. Under Part IVA in the Amendment Ordinance<sup>39</sup>, an OFC can be terminated by application to the SFC. The proposed OFC Code sets out the detailed requirements and procedures for such termination. The proposed requirements have taken into account relevant IOSCO recommendations<sup>40</sup> and overseas practices.
95. Amongst other things, in order to protect the interests of shareholders, the proposed OFC Code provides that the OFC and its key operators should ensure that the termination is carried out fairly, taking due account of the best interests of its shareholders. The directors, in conjunction with the investment manager, must ensure fair valuation of assets and seek to address any conflicts of interests. There should also be adequate disclosure of the termination process to investors at the same time and in an appropriate and timely manner.
96. The procedures for termination are set out in the proposed draft OFC Code which include, for example, providing the SFC with a termination proposal supported with justifications and a solvency statement as well as providing notices to shareholders. These are important to ensure that the OFC is conducting the termination in line with its instrument of incorporation, has enough assets to settle the liabilities of the OFC, and to keep shareholders informed of the termination process. After the OFC's assets have been fully distributed to shareholders, an application for termination can be made to the SFC.
97. In line with the one-stop approach, cancellation of the OFC's registration with the CR will automatically take place upon the cancellation of its registration by the SFC.

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<sup>38</sup> The creditors agree to the arrangement or compromise if, at a meeting of the creditors, a majority in number representing at least 75% in value of the creditors present and voting, in person or by proxy, agree to the arrangement or compromise. Shareholders agree to the arrangement or compromise if, at a meeting of the shareholders, shareholders representing at least 75% of the voting rights of the members present and voting, in person or by proxy, agree to the arrangement or compromise.

<sup>39</sup> New section 112ZH in the Amendment Ordinance.

<sup>40</sup> IOSCO's Consultation Report on "Good Practices for the Termination of Investment Funds" issued in August 2016.



## Termination of OFC by the SFC other than by receipt of application

98. Under Part IVA in the Amendment Ordinance, the SFC may cancel the registration of an OFC where the circumstances under section 112ZI in the Amendment Ordinance occur. These include, for example, when there is a breach of the SFO or a registration condition or where the SFC is not satisfied that the continued registration of the OFC is in the interest of the investing public.
99. The proposed OFC Rules provide that the OFC's registration with the CR will be automatically removed when the cancellation of its registration by the SFC takes effect. No separate application with the CR is necessary.

## Winding up

100. Under the proposed OFC Rules, the provisions of C(WUMP)O (including its subsidiary legislation) relating to the winding-up of an OFC would be applied to the OFC, with relevant modifications, having regard to the nature of the OFC and the 2016 consultation conclusions.
101. The relevant C(WUMP)O provisions will be applied to OFCs on a wholesale basis (save for minimal modifications). This approach recognises that the C(WUMP)O's disqualification and winding-up regime should be largely applicable to an OFC. It is also in line with legislation for similar corporate fund vehicles in the UK and Ireland.
102. The modifications in the application of the C(WUMP)O to OFCs mainly seek to:
  - (a) enable the SFC and the custodian to petition for the winding-up of the OFC or a stay of relevant proceedings;
  - (b) enable the SFC to receive winding-up related documents in a similar fashion to other parties (for example shareholders, creditors, the CR and ORO) currently entitled to receive such documents;
  - (c) disapply the grounds of winding-up which are only applicable to conventional companies (for example, when the OFC has no members or no company secretary);
  - (d) apply the relevant terms and definitions used in the context of an OFC (for example, references to "articles" of a company are to be read as "instrument of incorporation" of an OFC).
103. Upon completion of the winding-up process, the registration of the OFC with the SFC will be automatically cancelled. No separate application for cancellation of the OFC's registration with the SFC would be required.

### Questions:

13. What are your views on the proposed requirements and steps for termination by application to the SFC?
14. Do you agree with the proposed approach to applying the C(WUMP)O's winding-up regime to OFCs and the modifications suggested in the draft OFC Rules when



applying the winding-up regime? Are there any other modifications which you think should be included? Please explain your view.

## **L. Requirements applicable to private OFCs**

104. Section II of the proposed OFC Code sets out some basic investment restrictions and disclosure and operational requirements applicable to private OFCs in line with the 2016 consultation conclusions and IOSCO principles. All public OFCs should comply with the relevant requirements set out in the SFC Products Handbook instead of Section II.
105. As discussed above, we have adopted a principles-based rather than prescriptive approach in formulating the proposed OFC Code, in particular regarding the regulation of private OFCs to allow them flexibility to pursue their investment strategies as set out in their instrument of incorporation and offering documents.
106. Accordingly, under the proposed OFC Code, private OFCs are only required to comply with the General Principles as well as the basic requirements set out in Section II of the proposed OFC Code with respect to their investment scope, fund operations and disclosure. The investment manager should also comply with the relevant requirements under the Fund Manager Code of Conduct and the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission.

### **Investment scope**

107. As set out in the 2016 consultation conclusions, the investment scope of the private OFCs should be largely aligned with Type 9 (asset management) regulated activity so that SFC licensing, supervision and enforcement would apply to investment managers of OFCs. This proposed investment scope should be able to accommodate a very substantial part of the asset classes in which private OFCs actually invest. In practice, the investment scope of privately offered funds which seek to benefit from the existing profits tax exemption for offshore funds is already restricted.
108. In line with the 2016 consultation conclusions, and taking into account the feedback received during our soft consultation exercise, the draft OFC Code sets out the investment scope of private OFCs as follows:
  - (a) at least 90% of the OFC's gross asset value should consist of (1) those asset types the management of which would constitute a Type 9 regulated activity<sup>41</sup>, and (2) cash, bank deposits, certificates of deposit, foreign currencies and foreign exchange contracts;
  - (b) the OFC may invest in other asset classes of a value not exceeding a maximum of 10% of the gross asset value of the OFC (10% de minimis limit);
  - (c) in the case of an umbrella OFC, the 10% de minimis limit is applicable to each sub-fund as well as to the umbrella OFC as a whole; and

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<sup>41</sup> Such asset types currently include securities and futures contracts, and will also include OTC derivative products when the relevant provisions of the Securities and Futures (Amendment) Ordinance 2014 come into effect.



(d) the 10% de minimis limit must be set out in the OFC's instrument of incorporation.

109. Non-compliance with the 10% de minimis limit will result in a breach of the instrument of incorporation and the draft OFC Code. As compliance with the draft OFC Code is expected to be a registration condition for the OFC, the relevant intervention powers of the SFC under the SFO may apply in the case of a contravention. The SFC will take into account the extent and circumstances of the breach (including, for example, whether it results from events beyond the control of the OFC and the investment manager) as well as the remedial measures proposed when considering follow-up action.

### **Fund operations and disclosure**

110. Private OFCs should comply with the General Principles and basic requirements set out in the proposed OFC Code in respect of fund operations and disclosure, which reflect relevant IOSCO principles.

111. Fund operations, such as pricing, dealing arrangements, valuation, distribution policy, use of leverage and fees and charges should be clearly set out in a private OFC's instrument of incorporation and offering documents.

112. The offering documents of a private OFC are required to be filed with the SFC following the registration of the OFC, and after any changes are made.

### **Scheme changes**

113. Under the proposed OFC Code, material changes to a private OFC would require the approval of shareholders, and also the approval of the SFC where the change involves an alteration of the instrument of incorporation. This would include material changes to the OFC's investment objectives and policies.

114. The SFC generally expects that a streamlined approval approach would be taken for material scheme changes, where an application is supported by evidence of shareholders' approval, and a confirmation of compliance with statutory and regulatory requirements is provided by the directors and the investment manager.

115. Other changes which may reasonably be expected to affect investors' investment decisions would require reasonable prior notice to be provided by the private OFC to its shareholders. Examples of this type of scheme change include changes to the OFC's key operators, fee structure and dealing and pricing arrangements.

116. A private OFC should provide reasonable notification of other scheme changes to shareholders as soon as practicable.

#### **Questions:**

15. Do you have any comments on the wording in the proposed OFC Code in respect of the investment scope of private OFCs? Please explain your view.

16. Do you agree with the proposed approach and basic requirements concerning fund operations and disclosure by a private OFC? Do you think that there are



other requirements that should be included in the proposed OFC Code? Please explain your view.

17. Do you have any views on the proposed approach to the different types of scheme changes of a private OFC?

## **M. Supervision and Enforcement**

117. The Amendment Ordinance<sup>42</sup> has equipped the SFC with investigatory, supervisory and intervention powers so that the SFC may take effective action to protect the interests of investors where there is a breach of the SFO, OFC Rules or the OFC Code.
118. For example, the SFC will be able to investigate the affairs of an OFC if the SFC has reasonable suspicion of misconduct in connection with the management of the OFC, or the management or safe-keeping of the OFC's scheme property<sup>43</sup>. The SFC may also conduct inspections and make inquiries with the OFC's investment manager as to whether it is complying with the applicable legislative requirements and the relevant SFC codes and guidelines including the OFC Code<sup>44</sup>. Further, the SFC may cancel the registration<sup>45</sup> of an OFC for breach of any registration condition, the SFO or the OFC Rules.
119. In addition, pursuant to the Amendment Ordinance<sup>46</sup>, the SFC will be able to exercise disciplinary powers under Part IX of the SFO against the investment manager of an OFC for misconduct which is prejudicial to the interest of the investing public. The SFC may also take enforcement actions<sup>47</sup> against the OFC and its key operators by application to the court for various court orders (including removal of the key operators or an injunctive order to restrain continuance of a breach) upon non-compliance with the SFO, OFC Rules or a registration condition of the OFC.
120. As compliance with the OFC Code is intended to be one of the registration conditions, the SFC may apply the foregoing powers in case of non-compliance. The proposed OFC Rules also set out specific offences to provide for sanctions in case of contraventions of requirements such as filings with the CR and the SFC, the preparation of financial statements, and the making of false statements.

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<sup>42</sup> The relevant investigatory, supervisory and intervention powers have been extended under the Amendment Ordinance to cover OFCs and relevant key operators by amendments to sections 180, 182, 193 and 213 and under new sections 214A and 214B in the Amendment Ordinance.

<sup>43</sup> New section 182(1)(b)(viii) in the Amendment Ordinance.

<sup>44</sup> Section 180(2)(a) of the SFO and new section 180(2)(e) in the Amendment Ordinance.

<sup>45</sup> New section 112ZI in the Amendment Ordinance.

<sup>46</sup> In particular, section 193 of the SFO has been amended by the Amendment Ordinance to expand the definition of "misconduct" to take into account a breach of the OFC Code.

<sup>47</sup> Section 213 of the SFO as amended by the Amendment Ordinance.



## Section III – Other matters

### Proposed OFC Fees Rules

121. Under the Amendment Ordinance<sup>48</sup>, the Financial Secretary may make rules for the charging or collecting of fees by the CR, the ORO and the SFC in performing their respective functions, and for things done or services provided under the Amendment Ordinance and the OFC Rules.
122. The fees chargeable by the SFC and the other relevant authorities, namely the CR and the ORO, in connection with the OFC will be set out in the OFC Fees Rules.
123. The major fees proposed to be chargeable in respect of the registration, incorporation and winding-up of OFCs are set out in Appendix C to this paper.

#### SFC's fees

124. It is proposed that no new SFC fees will apply to public OFCs. They will only have to pay the existing application and authorisation fees applicable to funds seeking the SFC's authorisation under Part IV of the SFO, as well as post-authorisation annual fees<sup>49</sup>.
125. It is proposed that minimal registration fees, and fees for changes that require the SFC's approval, will be charged to private OFCs.

#### CR's and ORO's fees

126. On the basis of the Government's established policy that fees for services charged by the Government should be set, as far as possible, at levels adequate to recover the full cost of providing the services, the CR and ORO propose to charge the 44 fees and 31 fees, respectively, as set out in Appendix C to this paper.

### Implementation timeline

127. The proposals set out in this paper will be subject to a two-month public consultation. Taking into account the respondents' comments, a consultation conclusions paper will be issued together with the proposed OFC Rules and OFC Code revised as appropriate. The proposed OFC Rules will then be introduced into the Legislative Council to proceed with the legislative process.
128. Upon completion of the legislative process, and subject to any changes made during the process, the OFC Rules and the OFC Code will become effective upon a commencement date to be gazetted. It is currently envisaged that the new OFC regime will be implemented in 2018 after the OFC Rules and the OFC Code become effective.

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<sup>48</sup> New section 112ZQ in the Amendment Ordinance.

<sup>49</sup> As set out in Schedule 1 to the Securities and Futures (Fees) Rules (Cap.571AF).



## **Seeking comments**

129. The SFC welcomes any comments from the public and the industry on the proposals made in this consultation paper and on the proposed OFC Rules and OFC Code as set out in Appendix A and Appendix B. Please submit comments to the SFC in writing no later than 28 August 2017.



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## Part 1

### Preliminary

#### 1. Commencement

These Rules come into operation on a day to be appointed by the Secretary for Financial Services and the Treasury by notice published in the Gazette.

#### 2. Interpretation

In these Rules –

*Court* means the Court of First Instance;

*financial statements* (財務報表) means the statements required to be included in the annual report of an open-ended fund company under rule 152(1);

*financial year* (財政年度), in relation to an open-ended fund company, means a financial year of the company determined in accordance with Division 1 of Part 7;

*identity card* (身分證) means an identity card issued under the Registration of Persons Ordinance (Cap. 177);

*OFC code* (《開放式基金型公司守則》) means any code or guideline published by the Commission under section 112ZR of the Ordinance;

*OFC register* (開放式基金型公司登記冊) means the register of open-ended fund companies maintained by the Registrar under rule 24;

*offering document* (要約文件), in relation to an open-ended fund company, means a document inviting offers, or calculated to invite offers, to subscribe for or purchase for cash or other consideration shares in the company;

*ordinary resolution* (普通決議) – see rule 88;

*prescribed fee* (訂明費用) means a fee prescribed by regulations made under section 112ZQ of the Ordinance;

*Registrar* (處長) means the Registrar of Companies;

*special resolution* (特別決議) – see rule 89;

*specified form* (指明格式) means the form specified under rule 21.



## Part 2

### Company Formation and Related Matters

#### Division 1 — Registration and Incorporation etc.

##### 3. Application for registration

An application made under section 112D(1) of the Ordinance must –

- (a) contain the name of the proposed company;
- (b) contain the name and any other particulars required by the Commission of the persons who are to be –
  - (i) a director of the proposed company;
  - (ii) the investment manager of the proposed company; and
  - (iii) the custodian of the proposed company;
- (c) contain the address of the place that is to be the registered office of the proposed company;
- (d) be accompanied by –
  - (i) the proposed company's instrument of incorporation; and
  - (ii) the prescribed fee (if any).

##### 4. Requirements for application for incorporation

- (1) A person who proposes to incorporate an open-ended fund company under Part IVA of the Ordinance must deliver to the Registrar together with the documents specified in section 112C(1) of the Ordinance –
  - (a) the prescribed fee;
  - (b) a notice in the form specified by the Commissioner of Inland Revenue under section 5D(1) of the Business Registration Ordinance (Cap. 310); and
  - (c) the prescribed business registration fee and levy.
- (2) The documents and fees and levy referred to in subrule (1) are regarded as duly delivered for the purposes of this rule and section 112C(1) of the Ordinance if they are delivered to the Commission.
- (3) On registering a proposed company under section 112D(1) of the Ordinance, the Commission must, as soon as reasonably practicable, send to the Registrar the documents and fees and levy referred to in subrule (1).
- (4) In this rule –  
*levy* (徵費) and *prescribed business registration fee* (訂明的商業登記費) each has the meaning given by section 2(1) of the Business Registration Ordinance (Cap. 310).

##### 5. Content of incorporation form

An incorporation form must –

- (a) in relation to the proposed company, contain the particulars specified in section 1 of Schedule 1;
- (b) in relation to each person who is to be a director of the proposed company on the company's incorporation, contain the particulars specified in section 2 of Schedule 1 and the statement specified in section 3 of Schedule 1;



- (c) contain the statement relating to the instrument of incorporation of the proposed company specified in section 5 of Schedule 1; and
- (d) contain the statement of compliance specified in rule 7.

#### **6. Signing of incorporation form**

The incorporation form of a proposed company must be signed by any one of the first directors of the proposed company.

#### **7. Statement of compliance**

- (1) The statement of compliance specified for rule 5(d) is a statement certifying that –
  - (a) all the requirements in respect of the incorporation of the proposed company have been complied with; and
  - (b) the information, statements and particulars contained in the incorporation form are accurate and consistent with those in the proposed company's instrument of incorporation.
- (2) The Registrar may accept the statement of compliance as sufficient evidence that the requirements for incorporation prescribed by Part IVA of the Ordinance or these Rules are met with respect to the proposed company.

#### **8. Change of name of open-ended fund company**

- (1) An open-ended fund company must not change its name unless it has obtained the Commission's approval to the proposed change of name.
- (2) On an application in writing and payment of the prescribed fee (if any) by an open-ended fund company the Commission may approve a proposed change of name of the company.
- (3) The Commission must, as soon as reasonably practicable after granting the approval under subrule (2) inform the company in writing of the approval.
- (4) Within 15 days after the date of being informed by the Commission of the approval, the company must deliver to the Registrar for registration a notice in the specified form of the change of company name together with the prescribed fee.
- (5) The notice and fee referred to in subrule (4) are regarded as duly delivered to the Registrar for the purposes of subrule (4) if they are delivered to the Commission.
- (6) The Commission must, as soon as reasonably practicable after granting the approval under subrule (2), inform the Registrar of the approval and send to the Registrar the notice and fee referred to in subrule (4).
- (7) After receipt of the notice under subrule (4), if the Registrar is satisfied that the requirements for the change of name of the open-ended fund company are met, the Registrar must –
  - (a) register the notice in the specified form;
  - (b) enter the new name in the OFC register in place of the former name; and
  - (c) issue to the company a certificate of change of name.
- (8) The change of name has effect from the date on which the certificate of change of name is issued.



- (9) A change of name under this rule does not affect any rights or obligations of an open-ended fund company or render defective any legal proceedings by or against the company. Any legal proceedings that could have been commenced or continued by or against the company by its former name may be commenced or continued by or against it by its new name.
- (10) If an open-ended fund company contravenes subrule (4), the company commits an offence and is liable to a fine at level 3, and in the case of a continuing offence, to a further fine of \$300 for each day that the offence continues.

## **Division 2 — Capacity and Powers of Company**

### **9. Open-ended fund company's exercise of powers limited by instrument of incorporation**

- (1) An open-ended fund company must not do any act that it is not authorized to do by its instrument of incorporation.
- (2) If any power of an open-ended fund company is expressly modified or excluded by its instrument of incorporation, the company must not exercise the power contrary to that modification or exclusion.
- (3) A shareholder of an open-ended fund company may bring proceedings to restrain the company from doing any act, or exercising any power, in contravention of subrule (1) or (2).
- (4) Proceedings must not be brought under subrule (3) in respect of any act to be done, or any power to be exercised, in fulfillment of a legal obligation arising from a previous act of an open-ended fund company.
- (5) Subject to rule 11, an act done, or a power exercised, by an open-ended fund company is not invalid only because the company does the act or exercises the power in contravention of subrule (1) or (2).

### **10. Transaction or act binds open-ended fund company despite limitation in instrument of incorporation etc.**

- (1) In favour of a person dealing with an open-ended fund company in good faith, the power of the company's directors to bind the company, or authorize others to do so, is, subject to rule 11, to be regarded as free of any limitation under any relevant document of the company.
- (2) For the purposes of subrule (1) –
  - (a) A person deals with an open-ended fund company if the person is a party to any transaction or any other act to which the company is a party;
  - (b) A person dealing with an open-ended fund company –
    - (i) is presumed, unless the contrary is proven, to have acted in good faith;
    - (ii) is not to be regarded as acting in bad faith by reason of the person's knowing that an act is beyond the director's powers under any relevant document of the company;
    - (iii) is not required to inquire as to the limitations on the power of the company's directors to bind the company or authorize others to do so.



- (3) This rule does not affect the right of any shareholder of the company to bring proceedings to restrain the company from doing any act that is beyond the directors' powers.
- (4) Proceedings must not be brought under subrule (3) in respect of any act to be done in fulfilment of a legal obligation arising from a previous act of the company.
- (5) This rule does not affect any liability incurred by the directors, or any other person, by reason of the directors exceeding their powers.
- (6) In this rule –  
**relevant document** (有關文件), in relation to an open-ended fund company, means –
  - (a) the company's instrument of incorporation;
  - (b) any resolutions of the company or of any class of shareholders of the company;
  - (c) any agreements between the shareholders, or shareholders of any class of shareholders, of the company.

#### **11. Exception to rules 9(5) and 10(1)**

Rules 9(5) and 10(1) do not apply where an act done, or a power exercised, by an open-ended fund company or its directors is not authorized by or is for a purpose outside the scope of the company's object stated in the company's instrument of incorporation under rule 13(3).

#### **12. No constructive notice of matters disclosed in instrument of incorporation etc.**

Subject to rule 13(4), a person is not regarded as having notice of any matter merely because the matter is disclosed in –

- (a) the instrument of incorporation of an open-ended fund company kept by the Registrar; or
- (b) a return or resolution kept by the Registrar.

### **Division 3 — Instrument of Incorporation**

#### **13. Instrument of incorporation**

- (1) The instrument of incorporation of an open-ended fund company must be –
  - (a) in the English or Chinese language; and
  - (b) signed by each of the first directors of the company.
- (2) The instrument of incorporation of an open-ended fund company must contain provision as to the objects of the company.
- (3) The provision referred to in subrule (2) as to the objects of the company must include the following statements –
  - (a) a statement that the object of the company is the operation of the company as a collective investment scheme; and
  - (b) a statement that the company is formed for a lawful purpose.
- (4) The instrument of incorporation of an open-ended fund company is binding on the company's officers and custodian as well as its shareholders and all such persons are to be taken to have notice of its provisions.



#### **14. Alteration of instrument of incorporation**

- (1) Subject to subrules (3) and (4), the instrument of incorporation of an open-ended fund company may be altered in the circumstances specified in subrule (2).
- (2) The circumstances for subrule (1) are –
  - (a) the circumstances specified in the instrument of incorporation;
  - (b) the alteration has been approved by a resolution passed by such majority of shareholders as is specified in the instrument of incorporation in respect of the alteration; or
  - (c) the custodian of the company has certified in writing that the alteration –
    - (i) is necessary to make possible, compliance with statutory or regulatory requirements;
    - (ii) does not materially prejudice shareholders' interests; or
    - (iii) is necessary to correct a manifest error.
- (3) An open-ended fund company must not alter in its instrument of incorporation any statement required under –
  - (a) section 112K(2)(b),(e),(f),(g) or (h) of the Ordinance; or
  - (b) rule 13(3).
- (4) No alteration to the instrument of incorporation of an open-ended fund company resulting in a material change to the instrument of incorporation may be made without the Commission's approval in writing.
- (5) An open-ended fund company must give written notice to the Commission of any proposed alteration to the company's instrument of incorporation.
- (6) Any alteration to the instrument of incorporation of an open-ended fund company made in contravention of subrules (3) or (4) is of no effect.

#### **15. Notifying Registrar on alteration of instrument of incorporation**

- (1) If the instrument of incorporation of an open-ended fund company is altered under rule 14, the company must, within 15 days after the date on which the alteration takes effect, deliver to the Registrar for registration the documents specified in subrule (2).
- (2) The documents specified for subrule (1) are –
  - (a) a notice of the alteration in the specified form; and
  - (b) a copy, certified by a director of the company as correct, of the company's instrument of incorporation as altered.
- (3) If any provision of, or the effect of any provision of, the instrument of incorporation of an open-ended fund company is altered by an order of the Court, the company must, within 15 days after the date on which the alteration takes effect, deliver to the Registrar for registration the documents specified in subrule (4).
- (4) The documents specified for subrule (3) are –
  - (a) a notice of the alteration in the specified form;
  - (b) an office copy of the order; and
  - (c) a copy of the company's instrument of incorporation as altered.
- (5) The documents specified in subrule (2) are regarded as duly delivered to the Registrar for the purposes of subrule (1) if they are delivered to the Commission.



- (6) The documents specified in subrule (4) are regarded as duly delivered to the Registrar for the purposes of subrule (3) if they are delivered to the Commission.
- (7) The Commission must, as soon as reasonably practicable after receiving the documents under subrule (5) or (6) send the documents to the Registrar.
- (8) If an open-ended fund company contravenes subrule (1) or (3), the company commits an offence and is liable to a fine at level 3, and in the case of a continuing offence, to a further fine of \$300 for each day that the offence continues.

#### **Division 4 — Correspondence and Documents etc.**

##### **16. Name and particulars to appear in correspondence etc.**

- (1) An open-ended fund company must disclose the details specified in subrule (2) –
  - (a) in all letters of the company;
  - (b) in any agreement entered into by the company with another person;
  - (c) in all other documents issued by the company in the course of its business; and
  - (d) any website of the company.
- (2) The details are –
  - (a) the name of the company;
  - (b) the fact of the company's registration with the Commission;
  - (c) the number with which it is registered;
  - (d) the address of its registered office;
  - (e) the fact that it is an open-ended fund company with variable capital and limited liability; and
  - (f) in the case of a company with sub-funds, the fact that it is an open-ended fund company with segregated liability between sub-funds.

##### **17. Execution of documents**

- (1) An open-ended fund company may execute a document under its common seal.
- (2) If an open-ended fund company executes a document under its common seal, the seal must be affixed in accordance with the provisions of its instrument of incorporation.
- (3) An open-ended fund company may also execute a document by having it signed by at least one director on the company's behalf.
- (4) A document signed in accordance with subrule (3) and expressed (in whatever words) to be executed by the company has effect as if the document had been executed under the company's common seal.

##### **18. Execution of deeds**

- (1) An open-ended fund company may execute a document as a deed by –
  - (a) executing it in accordance with rule 17;
  - (b) having it expressed (in whatever words) to be executed by the company as a deed; and
  - (c) delivering it as a deed.



- (2) For the purposes of subrule (1)(c), a document is presumed, unless the contrary is proved, to be delivered as a deed on its being executed in accordance with rule 17.
- (3) An open-ended fund company may, either generally or in respect of any specific matter, by an instrument executed as a deed, empower any person as its attorney to execute a deed or any other document on its behalf in Hong Kong or elsewhere.
- (4) A deed or any other document executed by an attorney on behalf of the company binds the company and has effect as if it were executed by the company.
- (5) This rule does not affect the operation of any other Ordinance as to the execution of powers of attorney.

## **Division 5 — Registered Office**

### **19. Registered office**

The intended address of an open-ended fund company's registered office stated in the incorporation form registered in respect of the company is to be regarded as the address of its registered office with effect from the date of its incorporation until a notice of change in respect of the address is delivered to the Registrar under rule 20.

### **20. Change of address of registered office**

- (1) If the address of an open-ended fund company's registered office is changed, the company must deliver to the Registrar for registration a notice of change in the specified form within 15 days after the change.
- (2) If an open-ended fund company contravenes subrule (1), the company commits an offence and is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of \$1,000 for each day that the offence continues.



## **Part 3**

### **Registrar's Functions and OFC Register**

#### **Division 1 — Functions of Registrar**

##### **21. Registrar may specify form**

- (1) The Registrar may specify the form of any document, required for the purposes of Part IVA of the Ordinance or these Rules, to be delivered to the Registrar.
- (2) Subrule (1) does not apply to a document –
  - (a) the form of which is prescribed by Part IVA of the Ordinance; or
  - (b) the form of which is prescribed by these Rules.
- (3) In specifying the form of a document under subrule (1), the Registrar may specify more than one form of the document, whether as alternatives or to provide for different circumstances.

##### **22. Registrar may issue guidelines**

- (1) The Registrar may issue guidelines –
  - (a) indicating the manner in which the Registrar proposes to perform any function or exercise any power under any provision of Part IVA of the Ordinance or these Rules; or
  - (b) providing guidance on the operation of any provision of Part IVA of the Ordinance or these Rules to the extent that it relates to the performance of any function or the exercise of any power by the Registrar.
- (2) The Registrar –
  - (a) must publish the guidelines in a manner appropriate to bring them to the notice of persons affected by them; and
  - (b) must make copies of the guidelines available to the public (in hard copy form or electronic form).
- (3) Guidelines issued under this rule are not subsidiary legislation.
- (4) The Registrar may amend or revoke any of the guidelines. Subrules (2) and (3) apply to an amendment or revocation of guidelines in the same way as they apply to the guidelines.
- (5) A person does not incur any civil or criminal liability only because the person has contravened any of the guidelines. If, in any legal proceedings, the court is satisfied that a guideline is relevant to determining a matter that is in issue –
  - (a) the guideline is admissible in evidence in the proceedings; and
  - (b) proof that the person contravened or did not contravene the guideline may be relied on by any party to the proceedings as tending to establish or negate the matter.

##### **23. Registrar may authenticate document etc.**

- (1) If a document is required by Part IVA of the Ordinance or these Rules to be signed by the Registrar or to bear the Registrar's printed signature, the Registrar may authenticate it in any manner that the Registrar thinks fit.



- (2) If anything is authorized to be certified by the Registrar under Part IVA of the Ordinance or these Rules, the Registrar may certify it in any manner that the Registrar thinks fit.

## **Division 2 — OFC Register**

### **24. Registrar must keep records of open-ended fund companies**

- (1) The Registrar must keep records of –
  - (a) the information contained in every document that is delivered to the Registrar for registration and that the Registrar decides to register under Part IVA of the Ordinance or these Rules; and
  - (b) the information contained in every certificate that is issued by the Registrar under Part IVA of the Ordinance or these Rules.
- (2) The records kept under this rule are the OFC register.

### **25. Provisions supplementary to rule 24**

- (1) The records kept under rule 24 must be such that information relating to an open-ended fund company is associated with the company in a manner determined by the Registrar, so as to enable all the information relating to the company to be retrieved.
- (2) A record of information for the purposes of rule 24(1) must be kept in such form as to enable any person to inspect the information contained in the record and to make a copy of the information.
- (3) Subject to subrules (1) and (2), a record of information for the purposes of rule 24(1) may be kept in any form that the Registrar thinks fit.
- (4) If the Registrar keeps a record of information in a form that differs from the form in which the document containing the information was delivered to, or generated by, the Registrar, the record is presumed, unless the contrary is proved, to represent the information contained in the document as delivered or generated.
- (5) If the Registrar records the information contained in a document for the purposes of rule 24(1), the Registrar is to be regarded as having discharged any duty imposed by law on the Registrar to keep, file or register the document.

### **26. Registrar not required to keep certain documents etc.**

- (1) The Registrar may destroy or dispose of any document delivered to the Registrar for registration under Part IVA of the Ordinance or these Rules if the information contained in the document has been recorded by the Registrar in any other form for the purposes of rule 24(1).
- (2) If a document or certificate has been kept by the Registrar for at least 7 years for the purposes of rule 24(1), the Registrar may destroy or dispose of the document or certificate.
- (3) If the Registrar is required by rule 43 not to make any information available for public inspection, the Registrar is not required to keep a record of the information for any longer than appears to the Registrar to be reasonably necessary for the purpose for which the information was delivered to the Registrar.



## 27. Registrar must keep index of open-ended fund company names

The Registrar must keep an index of the names of every open-ended fund company.

### Division 3 — Registration of Document

## 28. Unsatisfactory document

- (1) For the purposes of this Division, a document delivered to the Registrar for registration is unsatisfactory if –
  - (a) the information contained in the document is not capable of being reproduced in legible form;
  - (b) the requirements specified in relation to the document under rule 29 are not complied with;
  - (c) the document is not delivered in accordance with an agreement made under rule 30 in relation to it;
  - (d) the applicable requirements of Part IVA of the Ordinance or these Rules under which the document is delivered are not complied with;
  - (e) the document is not accompanied by the fee payable for the registration;
  - (f) the document, or any signature on, or any digital or electronic signature accompanying, the document –
    - (i) is incomplete or incorrect; or
    - (ii) is altered without proper authority;
  - (g) the information contained in the document –
    - (i) is internally inconsistent; or
    - (ii) is inconsistent with other information on the OFC register or other information contained in another document delivered to the Registrar;
  - (h) the information contained in the document derives from anything that –
    - (i) is invalid or ineffective; or
    - (ii) has been done without the open-ended fund company's authority; or
  - (i) the document contains matters contrary to law.
- (2) In this rule –

**applicable requirements** (適用規定), in relation to a document, means the requirements as regards –

  - (a) the contents of the document;
  - (b) the form of the document;
  - (c) the authentication of the document; and
  - (d) the manner of delivery of the document.

## 29. Registrar may specify requirements for rule 28(1)

- (1) The Registrar may, in relation to any document required or authorized to be delivered to the Registrar under Part IVA of the Ordinance or these Rules –
  - (a) specify requirements for the purpose of enabling the Registrar to make copies or image records of the document and to keep records of the information contained in it;
  - (b) specify requirements as to the authentication of the document; and
  - (c) specify requirements as to the manner of delivery of the document.
- (2) The Registrar may, in relation to any document authorized to be delivered to the Registrar for registration under rule 37(3) for the purpose of rectification of an error, specify requirements as to –
  - (a) the delivery of the document in a form and manner enabling it to be associated with the document containing the error; and



- (b) the identification of the document containing the error.
- (3) For the purposes of subrules (1) and (2), the Registrar may specify different requirements for different documents or classes of documents, or for different circumstances.
- (4) For the purposes of subrule (1)(b), the Registrar may –
  - (a) require the document to be authenticated by a particular person or a person of a particular description;
  - (b) specify the means of authentication; and
  - (c) require the document to contain, or to be accompanied by, the name or registration number, or both, of the company to which it relates.
- (5) For the purposes of subrule (1)(c), the Registrar may –
  - (a) require the document to be in hard copy form, electronic form or any other form;
  - (b) require the document to be delivered by post or any other means;
  - (c) specify requirements as to the address to which the document is to be delivered; and
  - (d) in the case of a document to be delivered by electronic means, specify requirements as to the hardware and software to be used and the technical specifications.
- (6) This rule does not empower the Registrar –
  - (a) to require a document to be delivered to the Registrar by electronic means; or
  - (b) to specify any requirement that is inconsistent with any requirement prescribed by an Ordinance as to –
    - (i) the authentication of the document; and
    - (ii) the manner of delivery of the document to the Registrar.
- (7) Requirements specified under this rule are not subsidiary legislation.

**30. Registrar may agree to delivery by electronic means (for rule 28(1))**

- (1) The Registrar may enter into an agreement with an open-ended fund company to provide that any document, or any class of document, that relates to the company, and is required or authorized to be delivered to the Registrar under Part IVA of the Ordinance or these Rules –
  - (a) will be delivered by electronic means, except as provided for in the agreement; and
  - (b) will conform to the requirements –
    - (i) specified in the agreement; or
    - (ii) specified by the Registrar in accordance with the agreement.
- (2) An agreement with an open-ended fund company may also provide that any document, or any class of document, that relates to the company, and is required or authorized to be delivered by the Registrar to it under Part IVA of the Ordinance or these Rules, will be delivered by electronic means.
- (3) The Registrar may specify a standard form for an agreement and the extent to which the form is to be used.



### **31. Registrar may refuse to accept or register document**

- (1) If the Registrar is of the opinion that a document delivered for registration under Part IVA of the Ordinance or these Rules is unsatisfactory, the Registrar –
  - (a) may refuse to accept the document; or
  - (b) may, after having accepted the document, exercise the powers specified in subrule (2) or (3).
- (2) The Registrar may refuse to register the document and return the document to the person who delivered it for registration.
- (3) The Registrar may also advise that –
  - (a) the document be appropriately amended or completed, and be redelivered for registration with or without a supplementary document; or
  - (b) a fresh document be delivered for registration in its place.
- (4) If the Registrar –
  - (a) refuses to accept a document under subrule (1)(a);
  - (b) has not received a document; or
  - (c) refuses to register a document under subrule (2),the document is to be regarded as not having been delivered to the Registrar in satisfaction of the provision of Part IVA of the Ordinance or these Rules that requires or authorizes the document to be delivered to the Registrar.

### **32. Registrar may withhold registration of document pending further particulars etc.**

For the purpose of determining whether the powers specified in rule 31(2) and (3) are exercisable in relation to a document, the Registrar may –

- (a) withhold the registration of the document pending compliance with the request under paragraph (b); and
- (b) request the person who is required or authorized to deliver the document to the Registrar for registration under Part IVA of the Ordinance or these Rules to do any or all of the following within a period specified by the Registrar –
  - (i) to produce any other document, information or evidence that, in the Registrar's opinion, is necessary for the Registrar to determine the question as to whether the document is unsatisfactory;
  - (ii) to appropriately amend or complete the document, and redeliver it for registration with or without a supplementary document;
  - (iii) to apply to the court for any order or direction that the Registrar thinks necessary and to conduct the application diligently;
  - (iv) to comply with other directions of the Registrar.

### **33. Appeal against Registrar's decision to refuse registration**

- (1) If a person is aggrieved by a decision of the Registrar to refuse to register a document under rule 31(2), the person may, within 42 days after the decision, appeal to the Court against the decision.
- (2) The Court may make any order that it thinks fit, including an order as to costs.
- (3) If the Court makes an order as to costs against the Registrar under subrule (2), the costs are payable out of the general revenue, and the Registrar is not personally liable for the costs.



**34. Certain period to be disregarded for calculating daily penalty for failure to deliver document to Registrar**

- (1) This rule applies if –
  - (a) a document is delivered to the Registrar for registration under Part IVA of the Ordinance or these Rules; and
  - (b) the Registrar refuses to register the document under rule 31(2).
- (2) The Registrar must send a notice of the refusal, and the reasons for the refusal, to –
  - (a) the person who is required to deliver the document to the Registrar for registration under Part IVA of the Ordinance or these Rules or, if there is more than one person who is so required, any of those persons; or
  - (b) if another person delivers, on behalf of the person so required, the document to the Registrar for registration, that other person.
- (3) If a notice is sent to a person under subrule (2) with respect to a document, the period specified in subrule (4) is to be disregarded for the purpose of calculating the daily penalty under Part IVA of the Ordinance or these Rules that makes it an offence for failing to comply with a requirement to deliver the document and that imposes a penalty for each day during which the offence continues.
- (4) The period is one beginning on the date on which the document was delivered to the Registrar and ending with the fourteenth day after the date on which the notice is sent under subrule (2).

**Division 4 — Registrar’s Powers in relation to Keeping OFC Register**

**35. Registrar may require open-ended fund company to resolve inconsistency with OFC register**

- (1) If it appears to the Registrar that the information contained in a document registered by the Registrar in respect of an open-ended fund company is inconsistent with other information relating to the company on the OFC register, the Registrar may give notice to the company –
  - (a) stating in what respect the information contained in the document appears to be inconsistent with other information on the OFC register; and
  - (b) requiring the company to take steps to resolve the inconsistency.
- (2) For the purposes of subrule (1)(b), the Registrar may require the company to deliver to the Registrar within the period specified in the notice –
  - (a) information required to resolve the inconsistency; or
  - (b) evidence that proceedings have been commenced by the company in the Court for the purpose of resolving the inconsistency and that the proceedings are being conducted diligently.
- (3) If an open-ended fund company fails to comply with a requirement under subrule (1)(b), the company commits an offence, and is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of \$1000 for each day during which the offence continues.
- (4) If a person is charged with an offence under subrule (3) for failure to comply with a requirement, it is a defence to establish that the person took all reasonable steps to secure compliance with the requirement.



**36. Registrar may require further information for updating etc.**

- (1) For the purpose of ensuring that a person's information on the OFC register is accurate or bringing the information up to date, the Registrar may send a notice to the person requiring the person to give the Registrar, within a period specified by the Registrar, any information about the person, being information of the kind that is included on the OFC register.
- (2) If a person fails to comply with a requirement under subrule (1), the person commits an offence.
- (3) A person who commits an offence under subrule (2) is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of \$1000 for each day during which the offence continues.
- (4) If a person is charged with an offence under subrule (2) for failure to comply with a requirement, it is a defence to establish that the person took all reasonable steps to secure compliance with the requirement.

**37. Registrar may rectify typographical or clerical error in OFC register**

- (1) The Registrar may, on the Registrar's own initiative, rectify a typographical or clerical error contained in any information on the OFC register.
- (2) The Registrar may, on application by an open-ended fund company, rectify a typographical or clerical error contained in any information relating to the company on the OFC register.
- (3) If, in relation to an application for the purposes of subrule (2), a document showing the rectification is delivered to the Registrar for registration, the Registrar may rectify the error by registering the document.

**38. Registrar must rectify information on OFC register on order of Court**

- (1) The Court may, on application by any person, by order direct the Registrar to rectify any information on the OFC register or to remove any information from it if the Court is satisfied that –
  - (a) the information derives from anything that –
    - (i) is invalid or ineffective; or
    - (ii) has been done without the open-ended fund company's authority; or
  - (b) the information –
    - (i) is factually inaccurate; or
    - (ii) derives from anything that is factually inaccurate or forged.
- (2) If, in relation to an application for the purposes of subrule (1), a document showing the rectification is filed with the Court, the Court may require the Registrar to rectify the information by registering the document.
- (3) This rule does not apply if the Court is specifically empowered under any other provision of the Ordinance to deal with the rectification of the information on or the removal of the information from the OFC register.
- (4) The Court must not order the removal of any information from the OFC register under subrule (1) unless it is satisfied that –
  - (a) even if a document showing the rectification in question is registered, the continuing presence of the information on the OFC register will cause material damage to the company; and



- (b) the company's interest in removing the information outweighs the interest of other persons in the information continuing to appear on the OFC register.
- (5) If the Court makes an order for the rectification of any information on or the removal of any information from the OFC register under subrule (1), the Court may make any consequential order that appears to it to be just with respect to the legal effect (if any) to be accorded to the information by virtue of its having appeared on the OFC register.
- (6) If the Court makes an order for the removal of any information from the OFC register under subrule (1), it may direct –
  - (a) that a note made under rule 40(1) in relation to the information is to be removed from the OFC register;
  - (b) that the order is not to be made available for public inspection as part of the OFC register; and
  - (c) that –
    - (i) no note is to be made under rule 40(1) as a result of the order; or
    - (ii) any such note is to be restricted to providing information in relation to the matters specified by the Court.
- (7) The Court must not give a direction under subrule (6) unless it is satisfied that –
  - (a) any of the following may cause damage to the company –
    - (i) the presence on the OFC register of the note or an unrestricted note (as the case may be);
    - (ii) the availability for public inspection of the order; and
  - (b) the company's interest in non-disclosure outweighs the interest of other persons in disclosure.
- (8) If the Court makes an order under this rule, the person who made the application must deliver an office copy of the order to the Registrar for registration.

### **39. Registrar may appear in proceedings for rectification**

- (1) In any proceedings before the Court for the purposes of rule 38, the Registrar –
  - (a) is entitled to appear or be represented, and be heard; and
  - (b) must appear if so directed by the Court.
- (2) Whether or not the Registrar appears in those proceedings, the Registrar may submit to the Court a statement in writing signed by the Registrar, giving particulars of the matters relevant to the proceedings and within the Registrar's knowledge.
- (3) Unless otherwise directed by the Court, a statement submitted under subrule (2) is to be regarded as forming part of the evidence in the proceedings

### **40. Registrar may annotate OFC register**

- (1) The Registrar may make a note in the OFC register for the purpose of providing information in relation to –
  - (a) a rectification of an error contained in any information on the OFC register under rule 37;
  - (b) a rectification of any information on the OFC register under rule 38;
  - (c) a removal of any information from the OFC register under rule 38; or
  - (d) any other information on the OFC register.



- (2) For the purposes of Part IVA of the Ordinance or these Rules, a note made under subrule (1) is part of the OFC register.
- (3) The Registrar may remove a note if the Registrar is satisfied that it no longer serves any useful purpose.

## **Division 5 — Inspection of OFC Register**

### **41. Registrar must make OFC register available for public inspection**

- (1) The Registrar must make the OFC register available for public inspection at all reasonable times so as to enable any member of the public –
  - (a) to ascertain whether the member of the public is dealing with –
    - (i) an open-ended fund company or its directors, in matters of or connected with any act of the company;
    - (ii) a director of an open-ended fund company in matters of or connected with the administration of the company, or of its property;
    - (iii) a person against whom a disqualification order has been made by a court;
    - (iv) a person who has entered into possession of the property of an open-ended fund company as mortgagee;
    - (v) a person who is appointed as the provisional liquidator or liquidator in the winding up of an open-ended fund company; or
    - (vi) a person who is appointed as the receiver or manager of the property of an open-ended fund company; and
  - (b) to ascertain the particulars of the company, its directors, or its former directors (if any), or the particulars of any person mentioned in paragraph (a)(iv), (v) or (vi).
- (2) For the purposes of subrule (1), the Registrar must, on receiving the prescribed fee, allow a person to inspect any information on the OFC register in any form that the Registrar thinks fit.
- (3) For the purposes of subrule (1), the Registrar may, on receiving the prescribed fee, produce to a person a copy or a certified true copy of any document or information on the OFC register, in so far as the document or information may be made available for public inspection, in any form that the Registrar thinks fit.
- (4) In this rule –

**disqualification order** (取消資格令), in relation to a person, means an order that, for a period specified in the order beginning on the date of the order, the person must not, without the leave of the court –

  - (a) be a director, or a liquidator or provisional liquidator, of an open-ended fund company;
  - (b) be a receiver or manager of the property of such a company; or
  - (c) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of such a company.

### **42. Registrar's certified true copy admissible as evidence**

In any proceedings –

- (a) a document purporting to be a copy of any information produced under rule 41(3), and purporting to be certified by the Registrar as a true copy of the



information, is admissible in evidence on its production without further proof; and

- (b) on being admitted in evidence under paragraph (a), the document is proof of the information in the absence of evidence to the contrary.

**43. Information excluded from public inspection by law or court order**

The Registrar must not make available for public inspection under rule 41 any information excluded from public inspection by or under an Ordinance or by an order of the court.

**Division 6 — Miscellaneous**

**44. Registrar may issue certificates in any manner**

- (1) The Registrar may issue a certificate under Part IVA of the Ordinance or these Rules in any manner the Registrar thinks fit.
- (2) Without limiting the powers of the Registrar under subrule (1), the Registrar may issue a certificate in the form of an electronic record.

**45. Immunity**

- (1) Where, for the purposes of Part IVA of the Ordinance or these Rules, a protected person provides a service by means of which information in electronic form is supplied to the public, or supplies information by means of magnetic tapes or any electronic mode, the protected person is not personally liable for any loss or damage suffered by a user of the service or information by reason of an error or omission appearing in the information if the error or omission –
  - (a) was made in good faith and in the ordinary course of the discharge of the protected person’s duties; or
  - (b) has occurred or arisen as a result of any defect or breakdown in the service or any equipment used for the service or for supplying the information.
- (2) Where, for the purposes of Part IVA of the Ordinance or these Rules, a protected person provides a service or facility by means of which documents may be delivered to the Registrar by electronic means, the protected person is not personally liable for any loss or damage suffered by a user of the service or facility by reason of an error or omission appearing in a document delivered to the Registrar by means of the service or facility if the error or omission –
  - (a) was made in good faith and in the ordinary course of the discharge of the protected person’s duties; or
  - (b) has occurred or arisen as a result of any defect or breakdown in the service or facility or in any equipment used for the service or facility.
- (3) The protection given to a protected person by subrules (1) and (2) in respect of an error or omission does not affect any liability of the Government in tort for the error or omission.
- (4) In this rule –  
***protected person*** (受保障人) means a person authorized by the Registrar to supply the information or provide the service or facility.



## Division 7 — Enquiry by Registrar

### 46. Registrar may require production of records and documents etc.

- (1) For the purpose of enquiring into whether any specified act has been done, if each of the conditions specified in subrule (2) is satisfied, the Registrar may, by notice in writing, require a person –
  - (a) to produce, within the time and at the place specified in the notice, any record or document specified in the notice; and
  - (b) if the record or document is produced, to provide any information or explanation in respect of the record or document.
- (2) Subject to subrule (3), the conditions are –
  - (a) that the Registrar has reason to believe that –
    - (i) a specified act has been done;
    - (ii) the record, document, information or explanation is relevant to the enquiry; and
    - (iii) the person is in possession of the record or document; and
  - (b) that it is so certified in writing by the Registrar.
- (3) Subrule (2)(a)(iii) does not apply if the person who is to be required to produce the record or document is –
  - (a) the body corporate to which the act relates; or
  - (b) an officer of the body corporate.
- (4) The Registrar must not require an authorized financial institution to produce any record or document, or disclose any information, relating to the affairs of a customer of the institution under subrule (1) unless –
  - (a) the Registrar has reasonable grounds to believe that the customer may be able to provide information relevant to the enquiry; and
  - (b) the Registrar is satisfied that the production or disclosure is necessary for the purposes of the enquiry and so certifies in writing.
- (5) If an authorized financial institution produces a record or document relating to the affairs of its customer in compliance with a requirement imposed under subrule (1), the Registrar may also require that customer to provide any information or explanation in respect of the record or document.
- (6) If a person produces a record or document in compliance with a requirement imposed under subrule (1), the Registrar may make copies, or otherwise record the details, of the record or document.
- (7) In this rule –

*specified act* (指明作為) means the making of a statement in any document provided to the Registrar under Part IVA of the Ordinance or these Rules that would constitute an offence under rule 206(1).

### 47. Registrar may delegate powers under rule 46

The Registrar may delegate in writing any or all of the powers conferred under rule 46 to any public officer.

### 48. Offences for failing to comply with requirements of rule 46 etc.

- (1) A person commits an offence if the person, without reasonable excuse, fails to comply with any requirement imposed on the person under rule 46.



- (2) A person commits an offence if the person, with intent to defraud, fails to comply with any requirement imposed on the person under rule 46.
- (3) An officer or employee of a body corporate on which a requirement is imposed under rule 46 commits an offence if the officer or employee, with intent to defraud, causes or allows the body corporate to fail to comply with the requirement.
- (4) A person commits an offence if the person –
  - (a) in purported compliance with a requirement imposed on the person under rule 46 –
    - (i) produces any record or document that is false or misleading in a material particular; or
    - (ii) provides any information or explanation that is false or misleading in a material particular; and
  - (b) knows that, or is reckless as to whether or not, the record or document, or the information or explanation, is false or misleading in a material particular.
- (5) A person commits an offence if the person, with intent to defraud, in purported compliance with a requirement imposed on the person under rule 46 –
  - (a) produces any record or document that is false or misleading in a material particular; or
  - (b) provides any information or explanation that is false or misleading in a material particular.
- (6) An officer or employee of a body corporate on which a requirement is imposed under rule 46 commits an offence if the officer or employee, with intent to defraud, causes or allows the body corporate to, in purported compliance with the requirement –
  - (a) produce any record or document that is false or misleading in a material particular; or
  - (b) provide any information or explanation that is false or misleading in a material particular.
- (7) A person is not excused from complying with a requirement imposed on the person under rule 46 only on the ground that to do so might tend to incriminate the person.
- (8) A person who commits an offence under subrule (1) is liable –
  - (a) on conviction on indictment to a fine of \$150000 and to imprisonment for one year; or
  - (b) on summary conviction to a fine at level 5 and to imprisonment for 6 months.
- (9) A person who commits an offence under subrule (2), (3), (5) or (6) is liable –
  - (a) on conviction on indictment to a fine of \$1000000 and to imprisonment for 3 years; or
  - (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.
- (10) A person who commits an offence under subrule (4) is liable –
  - (a) on conviction on indictment to a fine of \$300000 and to imprisonment for 2 years; or
  - (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.



#### **49. Use of incriminating evidence in proceedings**

- (1) If the Registrar or a delegate of the Registrar requires a person, under rule 46, to provide any information or explanation in respect of any record or document produced, the Registrar or delegate must ensure that the person has first been informed or reminded of the limitations imposed by subrule (2) on the admissibility in evidence of the Registrar's or delegate's requirement and of the information or explanation provided by the person.
- (2) If the conditions specified in subrule (3) are satisfied, the Registrar's or delegate's requirement, as well as the information or explanation provided by the person, are not admissible in evidence against the person in criminal proceedings other than those in which the person is charged with an offence in respect of the information or explanation –
  - (a) under rule 48(4), (5) or (6);
  - (b) under Part V of the Crimes Ordinance (Cap. 200); or
  - (c) for perjury.
- (3) The conditions specified for the purposes of subrule (2) are –
  - (a) that the information or explanation might tend to incriminate the person; and
  - (b) that the person so claims before providing the information or explanation.

#### **50. Protection in relation to certain disclosures**

- (1) If –
  - (a) a person makes a disclosure to the Registrar or a delegate of the Registrar otherwise than in compliance with a requirement made by the Registrar or the delegate under rule 46; and
  - (b) the disclosure satisfies each of the conditions specified in subrule (2), the person is not liable in any proceedings relating to a breach of duty of confidentiality by reason only of the disclosure.
- (2) The conditions are –
  - (a) that the disclosure is of a kind that the person could be required to make under rule 46;
  - (b) that the person makes the disclosure in good faith and in the reasonable belief that the disclosure is capable of assisting the Registrar or the delegate in the enquiry under rule 46;
  - (c) that the information disclosed is not more than is reasonably necessary for the purpose of assisting the Registrar or the delegate in the enquiry under rule 46;
  - (d) that the disclosure is not prohibited by virtue of any enactment.
- (3) Subrule (1) does not apply to a disclosure made by a person in the capacity as a banker or lawyer in respect of information to which the person owes a duty of confidentiality in that capacity.

#### **51. Protection of informers etc.**

- (1) Any information concerning the identity of a protected person is not admissible in evidence in any proceedings before a court or tribunal.
- (2) In such proceedings, a witness is not obliged –
  - (a) to disclose the name or address of a protected person who is not a witness in those proceedings; or



- (b) to state any matter that would lead, or would tend to lead, to discovery of the name or address of a protected person who is not a witness in those proceedings.
- (3) If a book, document or paper that is in evidence, or liable to inspection, in such proceedings contains an entry –
  - (a) in which a protected person is named or described; or
  - (b) that might lead to discovery of a protected person,the court or tribunal (as the case may be) must cause all such entries to be concealed from view, or to be obliterated, so far as may be necessary to protect the identity of the protected person from discovery.
- (4) In such proceedings, the court or tribunal may, despite subrule (1), (2) or (3), permit inquiry, and require full disclosure, concerning a protected person if –
  - (a) it is of the opinion that justice cannot be fully done between the parties to the proceedings without disclosure of the name of the protected person; or
  - (b) it is satisfied that the protected person made a material statement that the person
    - (i) knew or believed to be false; or
    - (ii) did not believe to be true.
- (5) In this rule –
  - protected person** (受保障人士) means –
    - (a) an informer who has given information to the Registrar or a delegate of the Registrar with respect to an enquiry under rule 46; or
    - (b) a person who has assisted the Registrar or a delegate of the Registrar with respect to such an enquiry.

## 52. Production of information in information systems etc.

- (1) If –
  - (a) the Registrar or a delegate of the Registrar requires any record or document to be produced under rule 46; and
  - (b) any information or matter contained in the record or document is recorded otherwise than in a legible form but is capable of being reproduced in a legible form,the Registrar or the delegate may require the production of a reproduction of the recording of the information or matter, or the relevant part of the recording, in a legible form.
- (2) If –
  - (a) the Registrar or a delegate of the Registrar requires any record or document to be produced under rule 46; and
  - (b) any information or matter contained in the record or document is recorded in an information system,the Registrar or the delegate may require the production of a reproduction of the recording of the information or matter, or the relevant part of the recording, in a form that enables the information or matter to be reproduced in a legible form.

## 53. Lien claimed on records or documents

If a person claims a lien on any record or document in the person's possession that is required to be produced under rule 46–

- (a) the lien does not affect the requirement to produce the record or document;
- (b) no fee is payable for or in respect of the production; and
- (c) the production does not affect the lien.



#### **54. Destruction of documents**

- (1) A person commits an offence if –
  - (a) the person destroys, falsifies, conceals or otherwise disposes of, or causes or permits the destruction, falsification, concealment or disposal of, any record or document that is required to be produced under rule 46; and
  - (b) the person does so with intent to conceal, from the Registrar or a delegate of the Registrar by whom the requirement was imposed, facts or matters capable of being disclosed by the record or document.
- (2) A person who commits an offence under subrule (1) is liable –
  - (a) on conviction on indictment to a fine of \$1000000 and to imprisonment for 2 years; or
  - (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

#### **55. Inspection of records or documents seized etc.**

- (1) This rule applies if the Registrar or a delegate of the Registrar has taken possession of any record or document under rule 46.
- (2) The Registrar or the delegate must, subject to any reasonable conditions the Registrar or delegate may impose as to security or otherwise, permit any person who would be entitled to inspect the record or document had the officer not taken possession of it, at all reasonable times –
  - (a) to inspect it; and
  - (b) to make copies or otherwise record details of it.



## **Part 4**

### **Share Capital**

#### **Division 1 — Nature of Shares, Rights etc.**

##### **56. Shares**

- (1) An open-ended fund company may issue more than one class of shares.
- (2) The scheme property of an open-ended fund company belongs exclusively to the company and no shareholder has any interest in the scheme property of the company.
- (3) The rights which attach to each share of an open-ended fund company of any given class are –
  - (a) the right, in accordance with the company's instrument of incorporation, to participate in or receive profits, income or other returns arising from the acquisition, holding, management or disposal of the scheme property or any part of the scheme property, or sums represented to be paid or to be likely to be paid out of any such profits, income or other returns;
  - (b) the right, if provided in, and in accordance with, the company's instrument of incorporation, to vote at any general meeting of the company or at any relevant class meeting;
  - (c) such other rights as may be provided for, in relation to shares of that class, in the company's instrument of incorporation.

##### **57. Varying class rights**

Rights attached to shares in a class of shares in an open-ended fund company may be varied only in accordance with provisions in the company's instrument of incorporation for the variation of those rights.

##### **58. Nature and transferability of shares**

- (1) A share or other interest of a shareholder in an open-ended fund company is personal property.
- (2) A share or other interest of a shareholder of an open-ended fund company is transferable in accordance with the company's instrument of incorporation.

##### **59. Provision for different amounts to be paid on shares**

If authorized by its instrument of incorporation to do so, an open-ended fund company may –

- (a) make arrangements on the issue of shares for a difference between the shareholders in the amounts and times of payment of calls on their shares;
- (b) accept from any shareholder the whole or part of the amount remaining unpaid on any shares held by the shareholder, although no part of that amount has been called up; and
- (c) pay a dividend in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others.



## Division 2 — Transfer of Shares

### 60. Requirement for instrument of transfer

- (1) An open-ended fund company must not register a transfer of shares in the company unless a proper instrument of transfer has been delivered to the company.
- (2) Subrule (1) does not affect any power of an open-ended fund company to register as a shareholder a person to whom the right to shares has been transmitted by operation of law.

### 61. Registration of transfers

- (1) The transferee or transferor of shares in an open-ended fund company may lodge the transfer with the company.
- (2) Subject to rule 62, the company must, within 2 months after the instrument of transfer is lodged either –
  - (a) register the transfer; or
  - (b) send the transferee and the transferor notice of refusal to register the transfer.
- (3) If an open-ended fund company refuses registration, the transferee or transferor may request a statement of the reasons for the refusal.
- (4) Subject to rule 62, the company must, within 28 days after receiving a request under subrule (3) –
  - (a) send the person who made the request a statement of the reasons; or
  - (b) register the transfer.
- (5) If an open-ended fund company contravenes subrule (2) or (4), the company commits an offence and is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of \$700 for each day during which the offence continues.

### 62. Refusal to register transfer of shares

- (1) An open-ended fund company may, before the end of the period of 2 months commencing with the date of receipt of the instrument of transfer relating to any transfer of shares, refuse to register the transfer if –
  - (a) there exists a minimum requirement as to the number or value of shares that are to be held by any shareholder of the open-ended fund company and the transfer would result in either the transferor or transferee holding less than the required minimum, or
  - (b) the transfer would result in a contravention of any provision of the open-ended fund company's instrument of incorporation or would produce a result inconsistent with any provision of the company's offering documents.
- (2) Subject to subrule (3), an open-ended fund company must give the transferor and the transferee written notice of any refusal to register a transfer of shares.



- (3) An open-ended fund company is not required to register a transfer or give notice to any person of a refusal to register a transfer if registering the transfer or giving the notice would result in a contravention of any applicable laws.
- (4) If an open-ended fund company contravenes subrule (2), the company commits an offence and is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of \$700 for each day during which the offence continues.

### **63. Transfer by personal representative**

A transfer of a share or other interest of a deceased shareholder of an open-ended fund company by his or her personal representative is as valid as if the personal representative had been the registered holder of the share or interest immediately before the transfer.

### **64. Transmission of shares by operation of law**

- (1) This rule applies if –
  - (a) the right to shares in an open-ended fund company is transmitted to a person by operation of law; and
  - (b) the person notifies the company in writing that the person wishes to be registered as a shareholder of the company in respect of the shares.
- (2) Within 2 months after receiving the notification, the company must either –
  - (a) register the person, in its register of shareholders, as a shareholder of the company in respect of the shares; or
  - (b) send the person notice of refusal of registration.
- (3) If an open-ended fund company refuses registration, the person may request a statement of the reasons for the refusal.
- (4) If a person makes a request under subrule (3), the company must, within 28 days after receiving the request –
  - (a) send the person a statement of the reasons; or
  - (b) register the person, in its register of shareholders, as a shareholder of the company in respect of the shares.
- (5) If an open-ended fund company contravenes subrule (2) or (4), the company commits an offence and is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of \$700 for each day during which the offence continues.

### **65. Compensation regarding forged share transfers**

- (1) An open-ended fund company may –
  - (a) pay compensation to a person for loss arising from a transfer of shares in the company under a forged transfer or a transfer under a forged power of attorney;
  - (b) provide, by insurance, reservation of capital or accumulation of income, a fund to meet claims for compensation;
  - (c) borrow on the security of its property for the purpose of paying compensation; and
  - (d) impose any reasonable restrictions on the transfer of its shares or with respect to powers of attorney for the transfer of its shares that the company considers necessary to guard against losses arising from forgery.



- (2) An open-ended fund company that pays compensation to a person under this rule has the same rights and remedies against the person liable for the loss as the person compensated would have had.
- (3) If the shares in an open-ended fund company have, by amalgamation or otherwise, become shares in another open-ended fund company, the other company has the same powers under this rule as the first company would have had if it had continued.

#### **66. Treatment of redeemed shares**

Shares of an open-ended fund company which have been redeemed or bought back by or otherwise transferred to the company are to be regarded as cancelled and the amount of the issued share capital of the company is reduced by the amount of consideration paid by the company for the shares.

### **Division 3 — Register of Shareholders**

#### **67. Register of shareholders**

- (1) An open-ended fund company must keep in the English or Chinese language a register of shareholders.
- (2) An open-ended fund company must enter in the register of shareholders—
  - (a) the names and addresses of its shareholders;
  - (b) the date on which each person is entered in the register as a shareholder; and
  - (c) the date on which any person ceases to be a shareholder.
- (3) The following statements must be entered in the register of shareholders, with the names and addresses of the shareholders –
  - (a) a statement of the shares held by each shareholder, distinguishing each share by its number (if it has one), the sub-fund (if any) and share class (if any) of such sub-fund to which the share belongs; and
  - (b) a statement of the amount paid or agreed to be considered as paid on the shares of each shareholder.
- (4) If an open-ended fund company issues a share to any person and the name of the person is not already entered in the register of shareholders, the company must enter in the register in respect of the person, the particulars required under subrule (2) and (3).
- (5) The particulars required under subrule (2) and (3) must be entered in the register within 2 months after the company has received notice of the particulars concerned.
- (6) In the case of a person mentioned in subrule (2)(c), all entries in the register relating to that person on the date on which the person ceased to be a shareholder may be destroyed after the end of a period of 10 years from that date.
- (7) If subrule (1), (4) or (5) is contravened, the company commits an offence and is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of \$700 for each day during which the offence continues.



#### **68. Place where register must be kept**

- (1) An open-ended fund company must keep its register of shareholders –
  - (a) at the company's registered office; or
  - (b) at an alternative place in Hong Kong notified to the Registrar under subrule (2).
- (2) An open-ended fund company must notify the Registrar of the place at which the register of shareholders is kept.
- (3) A notice under subrule (2) must be in the specified form and delivered to the Registrar for registration within 15 days after the register is first kept at that place.
- (4) Subrule (2) does not require an open-ended fund company to notify the Registrar of the place where the register of shareholders is kept if the register has, at all times since it came into existence, been kept at the company's registered office.
- (5) An open-ended fund company must notify the Registrar of any change (other than a change of the address of the company's registered office) in the place at which the register of shareholders is kept.
- (6) A notice under subrule (5) must be in the specified form and delivered to the Registrar for registration within 15 days after the change.
- (7) If an open-ended fund company contravenes this rule, the company commits an offence, and is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of \$700 for each day during which the offence continues.

#### **69. Right to inspect and request copy**

- (1) A shareholder of an open-ended fund company is entitled, on request and without charge –
  - (a) to inspect entries in the register of shareholders of the company relating to the shareholder; and
  - (b) to be provided with a copy of the entries.
- (2) The persons specified in subrule (4) are entitled, on request and without charge, to inspect the register of shareholders of an open-ended fund company.
- (3) A person who is entitled to inspect the register of shareholders of an open-ended fund company under subrule (2) is entitled, on request and without charge, to be provided with a copy of the register, or any part of it.
- (4) The persons specified for subrule (2) are –
  - (a) the custodian of the company;
  - (b) the investment manager of the company;
  - (c) the Commission;
  - (d) any public body or public officer that needs to inspect the register in order to properly exercise the person's functions.

#### **70. Power to close register of shareholders**

An open-ended fund company may, on giving notice in accordance with the provisions of its instrument of incorporation, close its register of shareholders, or the part of it relating to shareholders holding shares of any class, for any period or periods not exceeding in the whole 30 days in each year.



## **71. Power of Court to rectify register**

- (1) If –
  - (a) the name of any person is, without sufficient cause, entered in or omitted from the register of shareholders of an open-ended fund company; or
  - (b) default is made or unnecessary delay takes place in entering in the register the fact of any person having ceased to be a shareholder,a person aggrieved, or any shareholder of the company, or the company, may apply to the Court for rectification of the register.
- (2) If an application is made under subrule (1), the Court may –
  - (a) refuse the application; or
  - (b) make the following orders –
    - (i) an order to rectify the register;
    - (ii) an order on the company to pay damages for any loss sustained by any party aggrieved.
- (3) On an application under subrule (1), the Court –
  - (a) may decide any question relating to the title of any person who is a party to the application to have the person's name entered in or omitted from the register, whether the question arises –
    - (i) between shareholders or alleged shareholders; or
    - (ii) between shareholders or alleged shareholders on the one hand and the open-ended fund company on the other hand; and
  - (b) generally may decide any question necessary or expedient to be decided for rectification of the register.

## **72. Register to be proof in the absence of contrary evidence**

In the absence of evidence to the contrary, the register of shareholders of an open-ended fund company is proof of any matters that are by these Rules required or authorized to be inserted in it.



## Part 5

### Meetings

#### Division 1 — General Meetings

##### 73. Interpretation

In this Part –

*accounting reference period* (會計參照期) has the meaning given by rule 149.

##### 74. Directors' power to call general meeting

The directors of an open-ended fund company may call a general meeting of the company.

##### 75. Shareholders' power to request directors to call general meeting

- (1) The shareholders of an open-ended fund company may request the directors to call a general meeting of the company.
- (2) The directors are required to call a general meeting if the company has received requests to do so from shareholders of the company representing at least 10% of the total voting rights of all the shareholders having a right to vote at general meetings.
- (3) The directors must call a meeting within 21 days after the date on which they become subject to the requirement under subrule (2).
- (4) A meeting called under subrule (3) must be held on a date not more than 28 days after the date of the notice convening the meeting.
- (5) If the requests received by the company identify a resolution that may properly be moved and is intended to be moved at the meeting, the notice of the meeting must include notice of the resolution and other contents as may be required under the instrument of incorporation of the company.
- (6) The business that may be dealt with at the meeting includes a resolution of which notice has been included in the notice of meeting in accordance with subrule (5).
- (7) If the resolution is to be proposed as a special resolution, the directors are to be regarded as not having duly called the meeting unless the notice of the meeting includes the text of the resolution and specifies the intention to propose the resolution as a special resolution.

##### 76. Calling of extraordinary general meetings by shareholders

- (1) If the directors are required under rule 75(2) to call a general meeting and do not do so in accordance with rule 75(3), the shareholders who requested the meeting, or any of them representing more than one half of the total voting rights of all of them, may themselves call a general meeting.
- (2) If the requests received by the company identify a resolution that may properly be moved and is intended to be moved at the meeting, the notice of the meeting



must include notice of the resolution.

- (3) The meeting must be called for a date not more than 3 months after the date on which the directors become subject to the requirement to call a meeting.
- (4) The meeting must be called in the same manner, as nearly as possible as that in which a meeting is required to be called by the directors.
- (5) The business that may be dealt with at the meeting includes a resolution of which notice has been included in the notice of meeting in accordance with subrule (2).
- (6) Any reasonable expenses incurred by the shareholders requesting the meeting by reason of the failure of the directors duly to call a meeting must be reimbursed by the company.
- (7) Any sum so reimbursed must be retained by the company out of any sum due or to become due from the company by way of fees or other remuneration in respect of the services of the directors who were in default.

**77. Shareholders' power to call general meeting when there is no director etc.**

- (1) If at any time an open-ended fund company does not have any director or does not have sufficient directors capable of acting to form a quorum, any director, or any 2 or more shareholders of the company representing at least 10% of the total voting rights of all the shareholders having a right to vote at general meetings, may call a general meeting in the same manner, as nearly as possible, as that in which general meetings may be called by the directors of the company.
- (2) Subrule (1) has effect in so far as the company's instrument of incorporation does not make other provision in that behalf.

**78. Power of Court to order meeting**

- (1) This rule applies if for any reason it is impracticable –
  - (a) to call a general meeting of an open-ended fund company in any manner in which general meetings of the company may be called; or
  - (b) to conduct the meeting in the manner prescribed by the company's instrument of incorporation or these Rules.
- (2) The Court may, either of its own motion or on application –
  - (a) by a director of the company; or
  - (b) by a shareholder of the company who would be entitled to vote at the meeting,order a general meeting of the company to be called, held and conducted in any manner the Court thinks fit.
- (3) If the order is made, the Court may give any ancillary or consequential directions that it thinks expedient.
- (4) Directions given under subrule (3) may include a direction that one shareholder of the company present at the meeting in person or by proxy is to be regarded as constituting a quorum.
- (5) A general meeting called, held and conducted in accordance with an order under subrule (2) is to be regarded for all purposes as a general meeting of the



company duly called, held and conducted.

- (6) The legal personal representative of a deceased shareholder of an open-ended fund company is to be regarded in all respects, for the purposes of this rule, as a shareholder of the company having the same rights with respect to attending and voting at a meeting of the company as the deceased shareholder would, if living, have had.

## **Division 2 — Notice of Meetings**

### **79. Notice of general meetings**

- (1) A general meeting of an open-ended fund company must be called in accordance with the company's instrument of incorporation.
- (2) A general meeting (other than an adjourned meeting) must be called by notice of at least 14 days, or such longer period as is specified in the company's instrument of incorporation.
- (3) Notice of a general meeting of an open-ended fund company must contain the particulars and be given in the manner set out in the company's instrument of incorporation.

### **80. Persons entitled to receive notice of general meeting**

- (1) Notice of a general meeting of an open-ended fund company must be given to –
  - (a) every shareholder of the company;
  - (b) every director of the company;
  - (c) the investment manager of the company; and
  - (d) the custodian of the company.
- (2) In subrule (1), the reference to a shareholder includes any person who is entitled to a share in consequence of the death or bankruptcy of a shareholder, if the company has been notified of that person's entitlement.

### **81. Duty to give notice of general meeting to auditor**

- (1) If notice of a general meeting of an open-ended fund company or any other document relating to the general meeting is required to be given to a shareholder, the company must give a copy of it to its auditor at the same time as the notice or the other document is given to the shareholder.
- (2) If an open-ended fund company contravenes subrule (1), the company commits an offence and is liable to a fine at level 3.

### **82. Contents of notice of general meeting**

- (1) An open-ended fund company must ensure that a notice of a general meeting of the company –
  - (a) specifies the date and time of the meeting;
  - (b) specifies the place of the meeting (and if the meeting is to be held in 2 or more places, the principal place of the meeting and the other place or places of the meeting);
  - (c) states the general nature of the business to be dealt with at the meeting;and



- (d) if a resolution is intended to be moved at the meeting –
  - (i) includes notice of the resolution; and
  - (ii) includes or is accompanied by a statement containing the information and explanation, if any, that is reasonably necessary to indicate the purpose of the resolution.
- (2) Subrule (1)(a), (b) and (c) has effect subject to any provision of the company's instrument of incorporation.
- (3) Subrule (1)(d) does not apply in relation to a resolution of which notice has been included in the notice of meeting under rule 75(5) or 76(2).
- (4) The validity of a resolution, if passed at a general meeting of an open-ended fund company, is not affected by a contravention of subrule (1)(d).
- (5) Subrule (4) does not affect any common law rules or equitable principles, or the provisions of any other Ordinance, as regards the validity of a resolution.

### **83. Resolution requiring special notice**

- (1) If by any provision of these Rules, special notice is required to be given of a resolution, the resolution is not effective unless notice of the intention to move it has been given to the open-ended fund company at least 28 days before the meeting at which it is moved.
- (2) The company must, if practicable, give its shareholders notice of the resolution at the same time and in the same manner as it gives notice of the meeting.
- (3) If that is not practicable, the company must give its shareholders notice of the resolution at least 14 days before the meeting-
  - (a) by advertisement in a newspaper circulating generally in Hong Kong; or
  - (b) in any other manner allowed by the company's instrument of incorporation.
- (4) If, after notice of the intention to move the resolution has been given to the company, a meeting is called for a date 28 days or less after the notice has been given, the notice is to be regarded as having been properly given, though not given within the time required.

### **84. Accidental omission to give notice of meeting or resolution**

- (1) If an open-ended fund company gives notice of –
  - (a) a general meeting; or
  - (b) a resolution intended to be moved at a general meeting,any accidental omission to give notice to, or any non-receipt of notice by, any person entitled to receive notice must be disregarded for the purpose of determining whether notice of the meeting or resolution is duly given.
- (2) Except in relation to notice given under rule 75 or 76, subrule (1) has effect subject to any provision of the company's instrument of incorporation.



## **Division 3 — Procedure at Meetings and Resolutions**

### **85. Representation of body corporate at meetings**

- (1) A body corporate may by resolution of its directors or other governing body if it is a shareholder or creditor of an open-ended fund company, authorize any person it thinks fit to act as its representative at any meeting of the company or at a meeting of creditors of the company.
- (2) A person authorized under subrule (1) is entitled to exercise the same powers on behalf of the body corporate as that body corporate could exercise if it were an individual shareholder or creditor of the company.

### **86. Representation of recognized clearing house at meetings**

- (1) A recognized clearing house may, if it or its nominee is a shareholder of an open-ended fund company, authorize any person it thinks fit to act as its representative at any meeting of the company.
- (2) If more than one person is authorized under subrule (1), the authorization must specify the number and class of shares in respect of which each person is so authorized.
- (3) A person authorized under subrule (1) is entitled to exercise the same powers on behalf of the recognized clearing house (or its nominee) as that clearing house (or its nominee) could exercise if it were an individual shareholder of the company.

### **87. Resolutions at meetings**

- (1) A resolution of an open-ended fund company is validly passed at a general meeting if –
  - (a) notice of the meeting and of the resolution is given;
  - (b) the meeting is held and conducted; and
  - (c) the resolution is passed,in accordance with this Part and the company's instrument of incorporation.
- (2) For the purposes of subrule (1), if there is any inconsistency between a provision of this Part and a provision of the company's instrument of incorporation, unless otherwise provided, the provision of this Part prevails over the provision of the instrument of incorporation to the extent of the inconsistency.

### **88. Ordinary resolution**

- (1) An ordinary resolution of the shareholders (or of a class of shareholders) of an open-ended fund company means a resolution that is passed by a simple majority.
- (2) A resolution passed at a general meeting on a show of hands is passed by a simple majority if it is passed by a simple majority of the total of the following –
  - (a) the number of the shareholders who (being entitled to do so) vote in person on the resolution;
  - (b) the number of the persons who vote on the resolution as duly appointed proxies of shareholders entitled to vote on it.



- (3) A resolution passed on a poll taken at a general meeting is passed by a simple majority if it is passed by shareholders representing a simple majority of the total voting rights of all the shareholders who (being entitled to do so) vote in person or by proxy on the resolution.
- (4) Anything that may be done by an ordinary resolution may also be done by a special resolution.

#### **89. Special resolution**

- (1) A special resolution of the shareholders (or of a class of shareholders) of an open-ended fund company means a resolution that is passed by a majority of at least 75%.
- (2) A resolution passed at a general meeting on a show of hands is passed by a majority of at least 75% if it is passed by at least 75% of the total of the following –
  - (a) the number of the shareholders who (being entitled to do so) vote in person on the resolution;
  - (b) the number of the persons who vote on the resolution as duly appointed proxies of shareholders entitled to vote on it.
- (3) A resolution passed on a poll taken at a general meeting is passed by a majority of at least 75% if it is passed by shareholders representing at least 75% of the total voting rights of all the shareholders who (being entitled to do so) vote in person or by proxy on the resolution.
- (4) If a resolution is passed at a general meeting –
  - (a) the resolution is not a special resolution unless the notice of the meeting included the text of the resolution and specified the intention to propose the resolution as a special resolution; and
  - (b) if the notice of the meeting so specified, the resolution may only be passed as a special resolution.

#### **90. Written resolutions**

- (1) Anything that may be done by a resolution passed at a general meeting of an open-ended fund company may be done, without a meeting and without any previous notice being required, by a written resolution of the shareholders of the company.
- (2) Anything that may be done by a resolution passed at a meeting of a class of shareholders of an open-ended fund company may be done, without a meeting and without any previous notice being required, by a written resolution of that class of shareholders of the company.
- (3) A resolution may be proposed as a written resolution by –
  - (a) the directors of an open-ended fund company; or
  - (b) shareholders of the company representing not less than the requisite percentage of the total voting rights of all the shareholders entitled to vote on the resolution.
- (4) The requisite percentage mentioned in subrule (3)(b) is 5% or a lower percentage specified for this purpose in the company's instrument of incorporation.



- (5) If a resolution is required by any Ordinance to be passed as an ordinary resolution or a special resolution, the resolution may be passed as a written resolution; and a reference in any Ordinance to an ordinary resolution or a special resolution includes a written resolution.
- (6) A reference in any Ordinance to the date of passing of a resolution or the date of a meeting is, in relation to a written resolution, the date on which the written resolution is passed under rule 92.
- (7) A written resolution of an open-ended fund company has effect as if passed by –
  - (a) the company at a general meeting; or
  - (b) a meeting of the relevant class of shareholders of the company,and a reference in any Ordinance to a meeting at which a resolution is passed or to shareholders voting in favour of a resolution is to be construed accordingly.
- (8) This rule does not apply to –
  - (a) a resolution removing an auditor before the end of the auditor's term of office; or
  - (b) a resolution removing a director before the end of the director's term of office.

#### **91. Company's duty to notify auditor and custodian of proposed written resolution**

- (1) If an open-ended fund company sends a resolution to a shareholder of the company as a written resolution, it must, on or before the circulation date, send to the auditor and the custodian of the company a copy of –
  - (a) the resolution; and
  - (b) any other document relating the resolution that is to be sent to a shareholder together with that resolution.
- (2) The validity of the resolution, if passed, is not affected by a contravention of subrule (1).

#### **92. Procedure for signifying agreement to proposed written resolution**

- (1) A written resolution is passed when all eligible shareholders of an open-ended fund company have signified their agreement to it.
- (2) A shareholder signifies agreement to a proposed written resolution when the company receives from the shareholder (or from someone acting on the shareholder's behalf) a document –
  - (a) identifying the resolution to which it relates; and
  - (b) indicating the shareholder's agreement to the resolution.
- (3) A shareholder's agreement to a written resolution, once signified, may not be revoked.

#### **93. Period for agreeing to proposed written resolution**

- (1) A proposed written resolution lapses if it is not passed before the end of –
  - (a) the period specified for this purpose in the open-ended fund company's instrument of incorporation; or
  - (b) if none is specified, the period of 28 days beginning on the circulation date.
- (2) The agreement of a shareholder to a proposed written resolution is ineffective if signified after the end of that period.



**94. Company’s duty to notify shareholders, auditor, investment manager and custodian that written resolution has been passed**

If a resolution of an open-ended fund company is passed as a written resolution, the company must, within 15 days after the resolution is passed, send a notice of this fact to –

- (a) every shareholder of the company;
- (b) the auditor of the company;
- (c) the investment manager of the company; and
- (d) the custodian of the company.

**95. Relationship between rules 90 to 94 and provisions of the company’s instrument of incorporation**

- (1) A provision of an open-ended fund company’s instrument of incorporation is void in so far as it would have the effect that a resolution that is required by or otherwise provided for in an Ordinance could not be proposed and passed as a written resolution.
- (2) Nothing in rules 90 to 94 affects any provision of an open-ended fund company’s instrument of incorporation authorizing the company to pass a resolution without a meeting, otherwise than in accordance with the rules.
- (3) Subrule (2) applies only if the resolution has been agreed to by all the shareholders of the company who are entitled to vote on the resolution.

#### **Division 4 — Records of Resolutions and Meetings**

**96. Records of resolutions and meetings**

- (1) An open-ended fund company must keep records comprising –
  - (a) copies of all resolutions of shareholders passed otherwise than at general meetings; and
  - (b) minutes of all proceedings of general meetings.
- (2) An open-ended fund company must keep the copies or minutes under subrule (1) for at least 10 years from the date of the resolution or meeting.
- (3) Records of a resolution of shareholders or the minutes kept under subrule (1) are evidence of the passing of the resolution or the relevant proceedings.

**97. Registration of and requirements relating to certain resolutions, etc.**

- (1) This rule applies to –
  - (a) a resolution of an open-ended fund company for the purpose of or in relation to the winding-up of the company under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) as applied by rule 174;
  - (b) a resolution varying any matter or provision in the instrument of incorporation of an open-ended fund company;
  - (c) an order of the Court which alters the instrument of incorporation of an open-ended fund company; and
  - (d) an order of the Court which alters a resolution referred to above.



- (2) An open-ended fund company must deliver a copy of a resolution or order under subrule (1) to the Registrar for registration within 15 days after it is passed or made.
- (3) The company must ensure that a copy of the resolution or order of the Court that is for the time being in force is included in or annexed to every copy of its instrument of incorporation issued –
  - (a) after the passing of the resolution; or
  - (b) after the making of the order of the Court.
- (4) If a resolution is not in writing, a reference to a copy of the resolution in subrules (2) and (3) is to be construed as a written memorandum setting out the terms of the resolution.
- (5) If an open-ended fund company contravenes subrule (2), the company commits an offence and is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of \$300 for each day during which the offence continues.
- (6) If an open-ended fund company contravenes subrule (3), the company commits an offence and is liable to a fine at level 3.
- (7) For the purposes of subrules (5) and (6), a liquidator or provisional liquidator of an open-ended fund company is to be regarded as an officer of the company.

#### **98. Place where records must be kept and right of inspection**

- (1) An open-ended fund company must keep its records of resolutions and meetings at the company's registered office or an alternative place in Hong Kong notified to the Registrar.
- (2) An open-ended fund company must notify the Registrar of the place at which the records mentioned in subrule (1) are kept. The notice must be in the specified form and delivered to the Registrar for registration within 15 days after the records are first kept at that place.
- (3) An open-ended fund company must notify the Registrar of any change (other than a change of the address of the company's registered office) in the place at which the records mentioned in subrule (1) are kept. The notice must be in the specified form and delivered to the Registrar for registration within 15 days after the change.
- (4) Subrule (2) does not require an open-ended fund company to notify the Registrar of the place at which the records mentioned in subrule (1) are kept if they have at all times been kept at the company's registered office.
- (5) If an open-ended fund company contravenes subrule (1), (2) or (3) the company commits an offence and is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of \$1000 for each day during which the offence continues.



## Part 6

### Operators

#### Division 1 — Preliminary

##### 99. Interpretation

In this Part –

**non-Hong Kong custodian** (非香港保管人) means a custodian incorporated outside Hong Kong;

**non-resident director** (非香港居民董事) means a director whose usual residential address is outside Hong Kong;

**process agent** (法律程序文件代理人) means –

- (a) an individual whose usual residential address is in Hong Kong;
- (b) a company; or
- (c) a firm of solicitors or certified public accountants (practising), that is authorized to accept on another person's behalf, service of any process or notice required to be served on the person.

**registered non-Hong Kong company** (註冊非香港公司) has the meaning given by section 2(1) of the Companies Ordinance (Cap. 622);

**required details** (所需細節), in relation to a process agent, means –

- (a) the name of the process agent;
- (b) if the process agent is an individual, the agent's residential address or business address;
- (c) if the process agent is a company, the address of the company's registered office;
- (d) if the process agent is a partnership, the principal place of business of the partnership;
- (e) the telephone number, facsimile number and electronic mail address of the process agent;

**solicitor** (律師) means a person who is qualified to act as a solicitor under the Legal Practitioners Ordinance (Cap.159).

#### Division 2 — Directors

##### Subdivision 1 — Appointment and Removal

##### 100. Eligibility for appointment

An open-ended fund company must ensure that the experience and expertise of the persons appointed as directors of the company, taken together, is such as is appropriate for the purposes of carrying on the business of the company.

##### 101. Appointment of directors

- (1) With effect from the date of incorporation of an open-ended fund company, the first directors of the company are the persons referred to in section 112U(2) of the Ordinance .
- (2) Any subsequent appointment as a director of an open-ended fund company must be made by the company-



- (a) by way of ordinary resolution passed at a general meeting, if the company is required to hold an annual general meeting under its instrument of incorporation, save that the directors may appoint a person to act as a director to fill any vacancy until the next annual general meeting; or
  - (b) by the directors of the company, where there is no requirement for an annual general meeting under the company's instrument of incorporation.
- (3) An appointment as a director under this rule or rule 103 must not be made unless the Commission has given its approval to the appointment.
  - (4) An appointment as a director in contravention of subrule (2) or rule 100 is of no effect.

#### **102. Non-resident director to have process agent**

- (1) A non-resident director of an open-ended fund company must have a process agent.
- (2) Any process or notice required to be served on a non-resident director is sufficiently served if it is addressed to the director's process agent and in the case of a process agent that is –
  - (a) an individual, it is left at, or sent by post, to the agent's last known business or residential address;
  - (b) a company, it is left at, or sent by post, to the company's registered office in Hong Kong;
  - (c) a partnership, it is left at, or sent by post, to the last known principal place of business of the partnership.
- (3) An open-ended fund company must keep a record of the required details of the process agent at the place where the register of directors of the company is kept under Rule 104(2).
- (4) Any person is entitled, on request made in the manner specified by the company and without charge, to inspect the record of the required details kept by the company under subrule (3) and on payment of such reasonable fee as determined by the company, to be provided with a copy of the record, or any part of it.
- (5) If there is any change in the required details of a process agent of a non-resident director, the director must notify the company of the change.
- (6) If a person contravenes subrule (1), (3) or (5), the person commits an offence and is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of \$700 for each day that the offence continues.

#### **103. Removal of directors**

- (1) An open-ended fund company may by ordinary resolution passed at a general meeting, remove a director before the end of the director's term of office, despite anything in its instrument of incorporation or in any agreement between it and the director.
- (2) Subrules (3), (4), (5) and (6) apply in relation to the removal by resolution of a director of an open-ended fund company.
- (3) Special notice is required of a resolution –
  - (a) to remove a director, or



- (b) to appoint a person in place of a director so removed at the meeting at which the director is removed.
- (4) A vacancy created by the removal of a director, if not filled at the meeting at which the director is removed, may be filled as a casual vacancy.
- (5) A person appointed in place of a removed director is to be regarded, for the purpose of determining the time at which that person or any other director is to retire, as if that person had become director on the day on which the person removed was last appointed a director.
- (6) In relation to a resolution to remove a director before the end of the director's term of office, no share may, on a poll, carry a greater number of votes than it would carry in relation to the generality of matters to be voted on at a general meeting of the company.
- (7) This rule is not to be regarded as depriving a person of compensation or damages payable to the person in respect of the termination of –
  - (a) the person's appointment as director; or
  - (b) any appointment terminating with that as director.
- (8) An open-ended fund company must, within 14 days after passing a resolution to remove a director, notify the Commission in writing of the resolution.

## **Subdivision 2 — Register and Index of Directors**

### **104. Register of directors**

- (1) An open-ended fund company must keep in the English or Chinese language a register of directors.
- (2) An open-ended fund company must keep the register of directors at
  - (a) the company's registered office; or
  - (b) an alternative place in Hong Kong notified to the Registrar under subrule (3).
- (3) An open-ended fund company must notify the Registrar of the place at which the register of directors is kept. The notice must be in the specified form and delivered to the Registrar for registration within 15 days after the register is first kept at that place.
- (4) An open-ended fund company must notify the Registrar of any change (other than a change of the address of the company's registered office) in the place at which the register of directors is kept. The notice must be in the specified form and delivered to the Registrar for registration within 15 days after the change.
- (5) Subrule (3) does not require an open-ended fund company to notify the Registrar of the place at which the register of directors is kept if it has at all times been kept at the company's registered office.
- (6) An open-ended fund company must enter in the register of directors the following particulars of each person who is a director of the company:
  - (a) the present forename and surname, former forename or surname (if any) and aliases (if any)



- (b) the usual residential address; and
  - (c) the number of the identity card or, if the director does not have an identity card, the number and issuing country of any passport held by the director.
- (7) In subrule (6) –
- forename** (名字) includes a Christian or given name;
  - residential address** (住址) –
    - (a) does not include an address at a hotel unless the person to whom it relates is stated, for the purposes of this section, to have no other permanent address; and
    - (b) does not include a post office box number;
  - surname** (姓氏), for a person usually known by a title different from the person's surname, means that title.
- (8) In this rule, a reference to a former forename or surname does not include –
- (a) in relation to a person
    - (i) a forename or surname that was changed or ceased to be used before the person attained the age of 18 years; and
    - (ii) a forename or surname that has been changed or ceased to be used for a period of at least 20 years;
  - (b) in relation to a person usually known by a title different from the person's surname, the name by which the person was known before the adoption of or succession to the title; and
  - (c) in relation to a married woman, a name or surname by which she was known before her marriage.
- (9) If an open-ended fund company contravenes subrule (1), (2), (3), (4) or (6), the company commits an offence and is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of \$700 for each day during which the offence continues.

#### **105. Right to inspect and request copy**

- (1) A shareholder of an open-ended fund company is entitled, on request made in the manner specified in the instrument of incorporation of the company and without charge, to inspect the register of directors of the company.
- (2) Any other person is entitled, on request and on payment of such reasonable fee as determined by the company, to inspect the register.
- (3) A person is entitled, on request and on payment of such reasonable fee as determined by the company, to be provided with a copy of the register, or any part of it.

#### **106. Duty to notify Registrar of appointment of director**

- (1) If a person is appointed as director of an open-ended fund company otherwise than under section 112U(2) of the Ordinance, the company must, within 15 days after the appointment, deliver to the Registrar for registration a notice in the specified form containing –
  - (a) the director's particulars specified in its register of directors;
  - (b) a statement that the person has accepted the appointment; and
  - (c) a statement that the person has attained the age of 18 years.
- (2) The notice specified in subrule (1) is regarded as duly delivered to the Registrar for the purposes of subrule (1) if the notice is delivered to the Commission.



- (3) The Commission must, as soon as reasonably practicable after receiving the notice specified in subrule (1) send the notice to the Registrar.
- (4) If an open-ended fund company contravenes subrule (1), the company commits an offence and is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of \$700 for each day during which the offence continues.

#### **107. Duty to notify Registrar of cessation of appointment etc.**

- (1) If a person ceases to be a director of an open-ended fund company or there is any change in the particulars contained in the register of directors of the company, the company must, within 15 days after the cessation or change, deliver to the Registrar for registration a notice in the specified form containing –
  - (a) the particulars of cessation or change and the date on which it occurred; and
  - (b) other matters that are specified in the form.
- (2) If a director of the company resigns as director and has reasonable grounds for believing that the company will not deliver the notice under subrule (1), the director resigning must deliver to the Registrar for registration a notice of the resignation in the specified form.
- (3) The notice required to be delivered under subrule (2) must state –
  - (a) whether the director resigning is required by the instrument of incorporation of the company or by any agreement with the company to give notice of the resignation to the company; and
  - (b) if notice is so required, whether the notice has been given in accordance with the requirement.
- (4) If an open-ended fund company contravenes subrule (1), the company commits an offence and is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of \$700 for each day during which the offence continues.

#### **108. Duty of director to make disclosure**

- (1) A director of an open-ended fund company must give notice to the company of matters relating to the director that are required for the purposes of Rules 104(6), 106 and 107.
- (2) A person who contravenes subrule (1) commits an offence and is liable to a fine at level 4.

#### **109. Registrar to keep an index of directors**

- (1) The Registrar must keep an index of every person who is a director of an open-ended fund company.
- (2) The particulars contained in the index must, in respect of each director, include –
  - (a) the name and address of the director;
  - (b) the latest particulars sent to the Registrar in respect of the director; and
  - (c) the name of each open-ended fund company of which the director can be identified as a director.
- (3) The index kept under this rule must be open for inspection by any person on payment of the prescribed fee.



### **Subdivision 3 — Material Interests and Directors' Meetings**

#### **110. Director must declare material interests**

- (1) If a director of an open-ended fund company is in any way, directly or indirectly, interested in a transaction, arrangement or contract, or a proposed transaction, arrangement or contract, with the company that is significant in relation to the company's business, and the director's interest is material, the director must declare the nature and extent of the director's interest to the other directors in accordance with rule 111 and the provisions of its instrument of incorporation.
- (2) This rule does not require a director to declare an interest –
  - (a) if the director is not aware of the interest or the transaction, arrangement or contract in question; or
  - (b) if, or to the extent that, the interest concerns the terms of the director's service contract that have been or are to be considered by –
    - (i) a meeting of the directors; or
    - (ii) a committee of the directors appointed for the purpose under the company's instrument of incorporation.
- (3) For the purposes of subrule (2)(a), a director is to be regarded as being aware of matters of which the director ought reasonably to be aware.
- (4) This rule does not affect the operation of any other Ordinance or rule of law restricting a director of an open-ended fund company from having any interest in a transaction, arrangement or contract with the company.
- (5) A director who contravenes subrule (1) commits an offence and is liable to a fine at level 6.

#### **111. Declaration to directors**

- (1) A declaration of interest under rule 110 in a transaction, arrangement or contract that has been entered into must be made as soon as reasonably practicable.
- (2) A declaration of interest under rule 110 in a proposed transaction, arrangement or contract must be made before the company enters into the transaction, arrangement or contract.
- (3) A declaration of interest under rule 110 must be –
  - (a) made at a directors' meeting;
  - (b) made by notice in writing and sent by the director to the other directors; or
  - (c) made by notice in writing sent to the company.
- (4) If a declaration to directors under rule 110 is made by notice in writing –
  - (a) the making of the declaration is to be regarded as forming part of the proceedings at the next directors' meeting after the notice is given; and
  - (b) rule 112 applies as if the declaration had been made at the meeting.

#### **112. Minutes of directors' meetings**

- (1) An open-ended fund company must cause minutes of all proceedings at meetings of its directors to be recorded.
- (2) An open-ended fund company must keep the records under subrule (1) for at least 10 years from the date of the meeting.



### **113. Minutes as evidence**

- (1) Minutes recorded in accordance with rule 112, if purporting to be signed by the chairperson of the meeting or by the chairperson of the next directors' meeting, are evidence of the proceedings at the meeting.
- (2) If minutes have been recorded in accordance with rule 112 of the proceedings at a meeting of directors, then, until the contrary is proved –
  - (a) the meeting is to be regarded as having been duly held and convened;
  - (b) all proceedings at the meeting are to be regarded as having duly taken place; and
  - (c) all appointments at the meeting are to be regarded as valid.
- (3) Subrule (2)(c) is subject to sections 112V(2) and 112W(2) of the Ordinance.

## **Division 3 — Custodians and Sub-custodians**

### **Subdivision 1 — Appointment and Rights**

#### **114. Custodian – appointment**

- (1) With effect from the date of incorporation of an open-ended fund company, the person named in the application made under section 112D of the Ordinance in respect of the company as custodian of the company is deemed to be appointed as the company's custodian for the purposes of section 112ZA(1) of the Ordinance.
- (2) Any subsequent appointment as a custodian of an open-ended fund company must be made by the directors of the company.
- (3) An appointment as a custodian under subrule (2) must not be made unless the Commission has given its approval to the appointment.
- (4) An appointment as a custodian in contravention of subrule (3) is of no effect.
- (5) A person who makes an appointment in contravention of subrule (3) commits an offence and is liable –
  - (a) on conviction on indictment to a fine of \$1000000 and to imprisonment for 2 years; or
  - (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

#### **115. Non-Hong Kong custodian to have process agent**

- (1) A non-Hong Kong custodian of an open-ended fund company must have a process agent.
- (2) Any process or notice required to be served on a non-Hong Kong custodian is sufficiently served if it is addressed to the custodian's process agent and in the case of a process agent that is –
  - (a) an individual, it is left at, or sent by post, to the agent's last known business or residential address;
  - (b) a company, it is left at, or sent by post, to the company's registered office in Hong Kong;



- (c) a partnership, it is left at, or sent by post, to the last known principal place of business of the partnership.
- (3) An open-ended fund company must keep a record of the required details of the custodian's process agent at the place where the register of directors of the company is kept under Rule 104(2).
- (4) Any person is entitled, on request made in the manner specified by the company and without charge, to inspect the record of the required details kept by the company under subrule (3) and on payment of such reasonable fee as determined by the company, to be provided with a copy of the record, or any part of it.
- (5) If there is any change in the required details of the process agent of a non-Hong Kong custodian, the custodian must notify the company of the change.
- (6) This rule does not apply to a non-Hong Kong custodian that is a registered non-Hong Kong company.
- (7) If a person contravenes subrule (1), (3) or (5), the person commits an offence and is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of \$700 for each day that the offence continues.

**Note –**

For the service of process or notice on a non-Hong Kong custodian that is a registered non-Hong Kong company, see section 803 of the Companies Ordinance (Cap. 622).

**116. Rights of custodian**

The custodian of an open-ended fund company is entitled –

- (a) to receive all notices of, and other communications relating to, any general meeting of the company as a shareholder of the company is entitled to receive;
- (b) to attend any general meeting of the company;
- (c) to be heard at any general meeting which it attends on any part of the business of the meeting which concerns it as custodian;
- (d) to request directors in writing to convene a general meeting of the company when it sees fit;
- (e) to require from the company's officers such information and explanations as it thinks necessary for the performance of its functions as custodian; and
- (f) to have access, except in so far as they concern its appointment or removal, to any reports, statements or other papers which are to be considered at any meeting held by the directors of the company (when acting in their capacity as such), at any general meeting of the company or at any meeting of holders of shares of any particular class.

**117. Sub-custodians**

A sub-custodian of an open-ended fund company must take reasonable care, skill and diligence to ensure the safe keeping of the scheme property of the company that is entrusted to it.



## **Subdivision 2 — Change of Custodian**

### **118. Resignation etc. of custodian**

- (1) A person may resign as custodian of an open-ended fund company by giving the company a notice in writing that is accompanied by a statement required to be given under rule 119(1).
- (2) If a person ceases to be a custodian of an open-ended fund company, other than by virtue of an order of the Court under section 213 of the Ordinance, the company must, within 15 days after the cessation, notify the Commission in writing of the cessation.
- (3) If an open-ended fund company contravenes subrule (2), the company commits an offence and is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of \$700 for each day that the offence continues.

### **119. Statement by custodian ceasing to hold office**

- (1) If a person ceases to hold office as custodian of an open-ended fund company, for any reason other than by virtue of an order of the Court made under section 213 of the Ordinance, the person must, give the company –
  - (a) if the person considers that there are circumstances connected with it ceasing to hold office that should be brought to the attention of the company's shareholders or creditors, a statement of those circumstances;  
or
  - (b) if the person considers that there are no such circumstances, a statement to that effect.
- (2) The person giving the statement must send a copy of the statement to the Commission at the same time that the person gives the statement to the company under subrule (1).
- (3) The person giving the statement has, notwithstanding that it has ceased to hold office as custodian, the rights conferred by rule 116(a) to (c) in relation to the general meeting of the company next following the date on which the statement was given under subrule (1).
- (4) The reference in rule 116(c) to business concerning the custodian as custodian is to be construed in relation to a custodian who has ceased to hold office as a reference to business concerning it as former custodian.

### **120. Open-ended fund company's and aggrieved person's responses to statement of circumstances**

- (1) If an open-ended fund company is given a statement of circumstances under rule 119(1)(a), the company must, within 14 days beginning on the date on which it receives the statement –
  - (a) send a copy of the statement to every shareholder of the company; or
  - (b) apply to the Court for an order directing that copies of the statement are not to be sent under paragraph (a).
- (2) If an open-ended fund company makes an application under subrule (1)(b), it must give notice of the application to the custodian who has given the statement of circumstances to the company.



- (3) A person who claims to be aggrieved by a statement of circumstances may, within 14 days beginning on the date on which the company receives the statement, apply to the Court for an order directing that copies of the statement are not to be sent under subrule (1)(a).
- (4) If a person makes an application under subrule (3), the person must give notice of the application to –
  - (a) the company; and
  - (b) the person who has given the statement of circumstances to the company.
- (5) If, within 21 days beginning on the date on which the person gives the company the statement, the person has not received notice of an application under subrule (2) or (4), the person who gives the open-ended fund company a statement of circumstances under rule 119(1)(a) must within the next 7 days deliver a copy of the statement to the Registrar for registration.
- (6) If an open-ended fund company contravenes subrule (1), the company commits an offence and is liable –
  - (a) on conviction on indictment to a fine of \$150000 and to imprisonment for 2 years; or
  - (b) on summary conviction to a fine at level 5 and to imprisonment for 6 months.
- (7) If a person contravenes subrule (5), the person commits an offence and is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of \$300 for each day during which the offence continues.
- (8) If a person is charged with an offence under subrule (7), it is a defence to establish that the person took all reasonable steps to secure compliance with subrule (5).

#### **121. Court may order statement of circumstances not to be sent**

- (1) This rule applies if an application is made under rule 120(1)(b) or (3) in relation to a statement of circumstances given by a person to an open-ended fund company.
- (2) If the Court is satisfied that the person has abused the use of the statement of circumstances or is using the statement to secure needless publicity for defamatory matter, the Court –
  - (a) must direct that copies of the statement are not to be sent under rule 120(1)(a); and
  - (b) may order the person, though not a party to the application, to pay the applicant's costs on the application in whole or in part.
- (3) If the Court gives directions under subrule (2)(a), the company must, within 15 days beginning on the date on which the directions are given –
  - (a) send a notice setting out the effect of the directions to –
    - (i) every shareholder of the company; and
    - (ii) unless already named as a party to the proceedings, the person who has given the statement of circumstances to the company; and
  - (b) deliver a copy of the notice to the Registrar for registration.
- (4) If the Court decides not to grant the application, the company must, within 15 days beginning on the date on which the decision is made or on which the proceedings are discontinued for any reason –



- (a) give notice of the decision to the person who has given the statement of circumstances to the company; and
  - (b) send a copy of the statement of circumstances to every shareholder of the company and to that person.
- (5) Within 7 days beginning on the date on which a person receives a notice under subrule (4)(a), the person must deliver a copy of the statement of circumstances to the Registrar for registration.

#### **122. Offences relating to rule 121**

- (1) If an open-ended fund company contravenes rule 121(3) or (4), the company commits an offence and is liable –
  - (a) on conviction on indictment to a fine of \$150000 and to imprisonment for 2 years; or
  - (b) on summary conviction to a fine at level 5 and to imprisonment for 6 months.
- (2) A person who contravenes rule 121(5) commits an offence and is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of \$300 for each day during which the offence continues.
- (3) If a person is charged with an offence under subrule (2) for contravening rule 121(5), it is a defence to establish that the person took all reasonable steps to secure compliance with that rule.

#### **123. Qualified privileges**

- (1) In the absence of malice, a person is not liable to any action for defamation at the suit of any person in respect of the making of a statement of circumstances and giving the statement to an open-ended fund company under rule 119.
- (2) This rule does not limit or affect any other right, privilege or immunity that a custodian of an open-ended fund company, or any other person, has as defendant in an action for defamation.

### **Division 4 — Investment Manager**

#### **124. Appointment of investment manager**

- (1) With effect from the date of incorporation of an open-ended fund company, the person named in the application made under section 112D of the Ordinance in respect of the company as investment manager is deemed to be appointed as the company's investment manager for the purposes of section 112Z(1) of the Ordinance.
- (2) Any subsequent appointment of an investment manager of an open-ended fund company must be made by the directors of the company.
- (3) An appointment as an investment manager under subrule (2) must not be made unless the Commission has given its approval to the appointment.
- (4) An appointment as an investment manager in contravention of subrule (3) is of no effect.



### 125. Rights of investment manager

An investment manager of an open-ended fund company is entitled –

- (a) to receive all such notices of, and other communications relating to, any general meeting of the company as a shareholder of the company is entitled to receive;
- (b) to attend any general meeting of the company; and
- (c) to be heard at any general meeting which it attends on any part of the business of the meeting which concerns it as investment manager.

### 126. Resignation etc. of investment manager

- (1) If a person ceases to be investment manager of an open-ended fund company, other than by virtue of an order of the Court under section 213 or 214A of the Ordinance, the company must, within 15 days after the cessation, notify the Commission in writing of the cessation.
- (2) If an open-ended fund company contravenes subrule (1), the company commits an offence and is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of \$700 for each day that the offence continues.

## Division 5 — Auditor

### Subdivision 1 — Preliminary

#### 127. Interpretation

In this Division –

**appointment period** (委任期), in relation to a financial year, means the period of 28 days beginning on whichever is the earlier of the following –

- (a) the date on which a copy of the financial statements for the previous financial year and the auditor's report on the financial statements is sent or provided to every shareholder of the company;
- (b) the last date on which a copy of the financial statements for the previous financial year and the auditor's report on the financial statements must be sent or provided to every shareholder of the company.

### Subdivision 2 — Appointment of Auditor

#### 128. Eligibility for appointment

- (1) Only a practice unit is eligible for appointment as auditor of an open-ended fund company.
- (2) The following are disqualified for appointment as auditor of an open-ended fund company –
  - (a) a person who is an officer or employee of the company;
  - (b) a person who is a partner or employee of a person mentioned in paragraph (a).
- (3) In this rule –
  - (a) a reference to an officer or employee of an open-ended fund company excludes an auditor of the company;
  - (b) **practice unit** (執業單位) has the meaning given by section 2(1) of the Professional Accountants Ordinance (Cap. 50).



### **129. Effect of appointing a firm as auditor**

If a firm is appointed, by the firm name, as auditor of an open-ended fund company, the appointment is to be regarded as an appointment of those persons who are –

- (a) the partners in the firm from time to time during the currency of the appointment; and
- (b) eligible, and not disqualified, for appointment as auditor of the company under this subdivision.

### **130. Appointment of auditor by directors**

Subject to any provision in the instrument of incorporation of an open-ended fund company for the appointment of an auditor of the company, the directors of an open-ended fund company must appoint the auditor for the company.

### **131. Appointment to fill casual vacancy**

- (1) The directors may appoint a person to fill a casual vacancy in the office of auditor of an open-ended fund company.
- (2) If the directors have not done so within one month after the casual vacancy occurs, the shareholders may, by a resolution passed at a general meeting, appoint a person to fill the casual vacancy.

### **132. Auditor's remuneration**

- (1) The remuneration of an auditor of an open-ended fund company must be fixed by the directors when making the appointment.
- (2) The remuneration of an auditor of an open-ended fund company appointed by the shareholders of the company may be fixed –
  - (a) by a resolution passed at a general meeting; or
  - (b) in the manner as specified in such a resolution.
- (3) *remuneration* (酬金), in relation to an auditor of an open ended fund company, includes any sum paid by the company in respect of the expenses of the auditor.

## **Subdivision 3 — Auditor's Rights and Privileges, etc.**

### **133. Rights of auditor in relation to general meeting**

- (1) A person appointed as auditor of an open-ended fund company is entitled –
  - (a) to attend any of the company's general meetings; and
  - (b) to be heard, at any of the company's general meetings, on any part of the business of the meeting that concerns the person as auditor of the company.
- (2) A person's entitlement under subrule (1)(a) or (b) is, if the person is a firm or body corporate, exercisable by a natural person authorized by the person to act as the person's representative at the meeting.

### **134. Rights of auditor in relation to information**

- (1) An auditor of an open-ended fund company has a right of access to the company's accounting records.



- (2) An auditor of an open-ended fund company may require a person that is a related entity of the company, or was a related entity of the company at the time to which the information or explanation relates, to provide the auditor with any information or explanation that the auditor reasonably requires for the performance of the duties as auditor of the company.
- (3) If an auditor has required a person to provide any information or explanation under subrule (2), the person must provide the information or explanation as soon as practicable after being required.
- (4) A statement made by a person in response to a requirement under subrule (2) may not be used in evidence against the person in any criminal proceedings except proceedings for an offence under rule 135.
- (5) This rule does not compel a person to disclose information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.
- (6) In this rule, **related entity** (有關連實體), in relation to an open-ended fund company, means –
  - (a) an officer of the company;
  - (b) the custodian of the company; or
  - (c) a person holding or accountable for any of the accounting records of the company.

#### **135. Offences relating to rule 134**

- (1) A person who contravenes rule 134(3) commits an offence and is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of \$700 for each day during which the offence continues.
- (2) If a person is charged with an offence under subrule (1), it is a defence to establish that it was not reasonably practicable for the person to provide the information or explanation.
- (3) A person commits an offence if –
  - (a) the person makes a statement to an auditor of an open-ended fund company that conveys or purports to convey any information or explanation that the auditor requires, or is entitled to require, under rule 134(2);
  - (b) the statement is misleading, false or deceptive in a material particular; and
  - (c) the person knows that, or is reckless as to whether or not, the statement is misleading, false or deceptive in a material particular.
- (4) A person who commits an offence under subrule (3) is liable –
  - (a) on conviction on indictment to a fine of \$150000 and to imprisonment for 2 years; or
  - (b) on summary conviction to a fine at level 5 and to imprisonment for 6 months.
- (5) This rule does not affect an auditor's right to apply for an injunction to enforce any of the auditor's rights under rule 134.

#### **136. Auditor may provide information to incoming auditor without contravening duties**

- (1) A person who is or has been an auditor of an open-ended fund company does not contravene any duty owed by the person as such auditor in law by reason only that the person gives work-related information to another person –



- (a) who is an auditor of the company;
  - (b) who has been appointed as auditor of the company but whose term of office has not yet begun; or
  - (c) to whom the company has offered the position as auditor but who has not yet been appointed.
- (2) Subrule (1) does not apply unless the person who gives work-related information to another person –
- (a) does so in good faith; and
  - (b) reasonably believes that the information is relevant to the performance of that other person's duties as auditor of the company.
- (3) In this rule –
- work-related information*** (工作資料), in relation to a person who is or has been an auditor of an open-ended fund company, means information of which the person became aware in the capacity of auditor.

### **137. Qualified privileges**

- (1) In the absence of malice, an auditor of an open-ended fund company is not liable to any action for defamation at the suit of any person in respect of any statement made by the auditor in the course of performing duties as auditor of the company.
- (2) In the absence of malice, a person is not liable to any action for defamation at the suit of any person in respect of the publication of any document –
- (a) prepared by an auditor of an open-ended fund company in the course of performing duties as auditor of the company; and
  - (b) required by the Ordinance –
    - (i) to be delivered to the Registrar; or
    - (ii) to be sent to any shareholder of the company or any other person.
- (3) This rule does not limit or affect any other right, privilege or immunity that an auditor of an open-ended fund company, or any other person, has as defendant in an action for defamation.
- (4) In this rule, a reference to performing duties as auditor of an open-ended fund company includes –
- (a) making a cessation statement, giving the statement to the company, and requesting the company to comply with the requirement specified in rule 143(5) in relation to the statement; and
  - (b) making a statement of circumstances, and giving the statement to the company.

## **Subdivision 4 — Termination of Auditor's Appointment**

### **138. Resignation**

- (1) A person may resign from the office of auditor of an open-ended fund company by giving the company a notice in writing that is accompanied by a statement required to be given under rule 144.
- (2) The person's term of office expires –
- (a) at the end of the day on which notice is given to the company under subrule (1); or
  - (b) if the notice specifies a time on a later day for the purpose, at that time.



- (3) Within 15 days beginning on the date on which an open-ended fund company receives a notice of resignation, the company must deliver a notification in specified form of that fact to the Registrar for registration.
- (4) If an open-ended fund company contravenes subrule (3), the company commits an offence and is liable to a fine at level 5 and to imprisonment for 6 months and, in the case of a continuing offence, to a further fine of \$1000 for each day during which the offence continues.

### **139. Cessation of office**

- (1) If, while holding office as auditor of an open-ended fund company, a person ceases to be eligible, or becomes disqualified, for appointment as auditor of the company under this Division, the person –
  - (a) immediately ceases to be auditor of the company; and
  - (b) must notify the company of the cessation in writing within 14 days from the date of the cessation.
- (2) A person who contravenes subrule (1)(b) commits an offence and is liable to a fine at level 4.
- (3) If a person is charged with an offence under subrule (2), it is a defence to establish that the person did not know, and had no reason to believe, that the person had ceased to be eligible, or had become disqualified, for appointment as auditor of the company under this Division.

### **140. Removal of auditor**

- (1) An open-ended fund company may by an ordinary resolution passed at a general meeting remove a person from the office of auditor despite –
  - (a) anything in any agreement between the person and the company; or
  - (b) anything in the company's instrument of incorporation.
- (2) Special notice is required for an ordinary resolution proposed for the purposes of subrule (1).
- (3) On receipt of a special notice, the company must send a copy of it to the person proposed to be removed.
- (4) If an ordinary resolution for the removal is passed, the company must deliver a notice of that fact in specified form to the Registrar for registration within 15 days beginning on the date on which it is passed.
- (5) If an open-ended fund company contravenes subrule (4), the company commits an offence and is liable to a fine at level 3, and in the case of a continuing offence, to a further fine of \$300 for each day during which the offence continues.

### **141. Removed auditor not deprived of compensation, etc.**

Rule 140 does not deprive a person of compensation or damages payable to the person in respect of the person ceasing –

- (a) to hold office as auditor of an open-ended fund company; or
- (b) to hold any appointment that is terminated with the termination of the person's appointment as auditor.



## **Subdivision 5 — Outgoing Auditor’s Right to Requisition General Meeting**

### **142. Resigning auditor may requisition meeting**

- (1) If a person gives under rule 138 a notice of resignation that is accompanied by a statement of circumstances given under rule 144(a), the person may, by another notice given to the company with the notice of resignation, require the directors to convene a general meeting of the company for receiving and considering the explanation of the circumstances connected with the resignation that the person places before the meeting.
- (2) Within 21 days beginning on the date on which the company receives that other notice, the directors must convene a general meeting for a date falling within 28 days after the date on which the notice convening the meeting is given.
- (3) If the directors of an open-ended fund company contravene subrule (2), every director who failed to take all reasonable steps to secure that a general meeting was convened as required by that subrule commits an offence and is liable –
  - (a) on conviction on indictment to a fine of \$150000 and to imprisonment for 2 years; or
  - (b) on summary conviction to a fine at level 5 and to imprisonment for 6 months.

### **143. Cessation statement in relation to, and attendance at, general meeting**

- (1) If a general meeting is convened under rule 142, the person who resigns from the office of auditor –
  - (a) may give the company a statement by the person that sets out in reasonable length the circumstances surrounding the resignation;
  - (b) may request the company to comply with the requirement specified in subrule (4) in relation to the statement; and
  - (c) is entitled –
    - (i) to be given every notice of, and every other item of communication, relating to the general meeting, that a shareholder of the company is entitled to be given;
    - (ii) to attend the general meeting; and
    - (iii) to be heard at the general meeting on any part of the business of the meeting that concerns the person as auditor or former auditor of the company.
- (2) If special notice is given under rule 140(2) for an ordinary resolution for removing a person from the office of auditor, the person –
  - (a) may give the company a statement by the person that sets out in reasonable length the circumstances surrounding the proposed removal; and
  - (b) may request the company to comply with the requirement specified in subrule (4) in relation to the statement.
- (3) A person’s entitlement under subrule (1)(c)(ii) or (iii) is, if the person is a firm or body corporate, exercisable by a natural person authorized by the person to act as the person’s representative at the meeting.
- (4) The requirement specified for the purposes of subrules (1) and (2) is –
  - (a) if the company receives the statement on a date that is more than 2 days before the last day on which notice may be given under rule 79 to call the general meeting, the requirement –



- (i) to state, in every notice of the meeting given to the shareholders, that the statement has been made; and
    - (ii) to send a copy of the statement to every shareholder to whom a notice of the meeting is or has been given; or
  - (b) if the company has not sent a copy of the statement to every shareholder to whom a notice of the meeting is or has been given, the requirement to ensure that the statement is read out at the meeting.
- (5) Unless exempted by an order under subrule (6), the company must comply with a request made under subrules (1) or (2) to comply with subrule (4).
- (6) On application by the company or by anyone who claims to be aggrieved, the Court may order that the company is exempted from complying with the request, if it is satisfied that the person who has given a statement and made a request under subrules (1)(a) and (b) or (2) –
- (a) has abused the right to do so; or
  - (b) has used such a right to secure needless publicity for defamatory matter.
- (7) If an open-ended fund company contravenes subrule (5), the company commits an offence and is liable to a fine at level 5.

### **Subdivision 6 — Outgoing Auditor’s Statement of Circumstances**

#### **144. Duty of resigning auditor to give statement**

A person who resigns from office under rule 138(1) must, on the resignation, give the company –

- (a) if the person considers that there are circumstances connected with the resignation that should be brought to the attention of the company’s shareholders or creditors, a statement of those circumstances; or
- (b) if the person considers that there are no such circumstances, a statement to that effect.

#### **145. Open-ended fund company’s and aggrieved person’s responses to statement of circumstances**

- (1) If an open-ended fund company is given a statement of circumstances, the company must, within 14 days beginning on the date on which it receives the statement –
- (a) send a copy of the statement to every shareholder of the company; or
  - (b) apply to the Court for an order directing that copies of the statement are not to be sent under paragraph(a).
- (2) If an open-ended fund company makes an application under subrule (1)(b), it must give notice of the application to the person who has given the statement of circumstances to the company.
- (3) A person who claims to be aggrieved by a statement of circumstances may, within 14 days beginning on the date on which the company receives the statement, apply to the Court for an order directing that copies of the statement are not to be sent under subrule (1)(a).
- (4) If a person makes an application under subrule (3), the person must give notice of the application to –
- (a) the company; and



- (b) the person who has given the statement of circumstances to the company.
- (5) If –
  - (a) a person gives an open-ended fund company a statement of circumstances; and
  - (b) within 21 days beginning on the date on which the company receives the statement, the person has not received notice of an application under subrule (2) or (4),the person must within the next 7 days deliver a copy of the statement to the Registrar for registration.
- (6) If an open-ended fund company contravenes subrule (1), the company commits an offence and is liable –
  - (a) on conviction on indictment to a fine of \$150000 and to imprisonment for 2 years; or
  - (b) on summary conviction to a fine at level 5 and to imprisonment for 6 months.
- (7) If a person contravenes subrule (5), the person commits an offence and is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of \$300 for each day during which the offence continues.
- (8) If a person is charged with an offence under subrule (7), it is a defence to establish that the person took all reasonable steps to secure compliance with subrule (5).

#### **146. Court may order statement of circumstances not to be sent**

- (1) This rule applies if an application has been made under rule 145(1)(b) or (3) in relation to a statement of circumstances given by a person to an open-ended fund company.
- (2) If the Court is satisfied that the person has abused the use of the statement of circumstances or is using the statement to secure needless publicity for defamatory matter, the Court –
  - (a) must direct that copies of the statement are not to be sent under rule 145(1)(a); and
  - (b) may order the person, though not a party to the application, to pay the applicant's costs on the application in whole or in part.
- (3) If the Court gives directions under subrule (2)(a), the company must, within 15 days beginning on the date on which the directions are given –
  - (a) send a notice setting out the effect of the directions to –
    - (i) every shareholder of the company; and
    - (ii) unless already named as a party to the proceedings, the person who has given the statement of circumstances to the company; and
  - (b) deliver a copy of the notice to the Registrar for registration.
- (4) If the Court decides not to grant the application, the company must, within 15 days beginning on the date on which the decision is made or on which the proceedings are discontinued for any reason –
  - (a) give notice of the decision to the person who has given the statement of circumstances to the company; and
  - (b) send a copy of the statement of circumstances to every shareholder of the company and to that person.



- (5) Within 7 days beginning on the date on which a person receives a notice under subrule (4)(a), the person must deliver a copy of the statement of circumstances to the Registrar for registration.

**147. Offences relating to rule 146**

- (1) If an open-ended fund company contravenes rule 146(3) or (4), the company commits an offence and is liable –
  - (a) on conviction on indictment to a fine of \$150000 and to imprisonment for 2 years; or
  - (b) on summary conviction to a fine at level 5 and to imprisonment for 6 months.
- (2) A person who contravenes rule 146(5) commits an offence and is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of \$300 for each day during which the offence continues.
- (3) If a person is charged with an offence under subrule (2) for contravening rule 146(5), it is a defence to establish that the person took all reasonable steps to secure compliance with that rule.



## Part 7

### Financial Statements and Financial Reports

#### Division 1 — Financial Year

##### 148. Financial year

- (1) An open-ended fund company's first financial year begins on the first day of its first accounting reference period and ends on the last day of that period.
- (2) Every subsequent financial year of an open-ended fund company begins on the date immediately following the end of the previous financial year and ends on the last day of the accounting reference period immediately following the one by reference to which the previous financial year is determined.

##### 149. Accounting reference period

- (1) An open-ended fund company's first accounting reference period begins on the date of its incorporation and ends on its primary accounting reference date.
- (2) Every subsequent accounting reference period of an open-ended fund company is the period of 12 months beginning immediately after the end of the previous accounting reference period and ending on its accounting reference date, unless the accounting reference period is shortened or extended by the directors after consultation with the auditors and custodian of the company.

##### 150. Primary accounting reference date

- (1) An open-ended fund company's primary accounting reference date is –
  - (a) a date specified by the company's directors before the relevant date for the purposes of this rule; or
  - (b) in the absence of such a specified date, the relevant date.
- (2) A date specified for the purposes of subrule (1)(a) must fall within 18 months after the date of the company's incorporation.
- (3) In this rule –  
*relevant anniversary* (有關周年日), in relation to an open-ended fund company's incorporation, means the anniversary of the company's incorporation;  
*relevant date* (有關日期) means the last day of the month in which the relevant anniversary of the company's incorporation falls.

#### Division 2 — Financial Statements and Reports

##### 151. Annual report

- (1) An open-ended fund company's directors must prepare a report (annual report) for each financial year.
- (2) The company must, publish the annual report and provide a copy free of charge on request to any shareholder.



- (3) The Commission may, if it considers it appropriate in the circumstances upon application by the company, exempt the directors from the requirement in subrule (1) and the company from the requirement in subrule (2).

#### **152. Accounts in annual report**

- (1) The annual report of an open-ended fund company must, in respect of the financial year to which it relates, contain –
  - (a) the financial statements of the company; and
  - (b) the auditor’s report on the financial statements.
- (2) The financial statements for a financial year must –
  - (a) give a true and fair view of the financial position and financial performance of the company as at the end of the financial year; and
  - (b) comply with the accounting standards applicable to the financial statements; and
  - (c) if, in relation to any financial statements, compliance with paragraph (b) would be insufficient to give a true and fair view under paragraph (a), the financial statements must contain all additional information necessary for that purpose; and
  - (d) if, in relation to any financial statements, compliance with paragraph (b) would be inconsistent with a requirement to give a true and fair view under paragraph (a), the financial statements must –
    - (i) depart from paragraph (b) to the extent necessary for it to give a true and fair view; and
    - (ii) contain the reasons for, and the particulars and effect of, the departure.
- (3) The accounting standards applicable to the financial statements for the purposes of subrule (2), are the accounting standards specified for this purpose in the OFC Code.

### **Division 3 — Auditor’s Reports and Accounting Records**

#### **153. Auditor’s report**

- (1) An open-ended fund company’s auditor must prepare a report for the shareholders of the company on any financial statements prepared by the directors and included in the annual report of the company during the auditor’s term of office.
- (2) An auditor’s report must state, in the auditor’s opinion, whether the financial statements have been properly prepared in compliance with the accounting standards applicable to the financial statements.

#### **154. Auditor’s opinion on other matters**

- (1) In preparing an auditor’s report, the auditor must carry out an investigation that will enable the auditor to form an opinion as to –
  - (a) whether adequate accounting records have been kept by the company; and
  - (b) whether the financial statements are in agreement with the accounting records.
- (2) An open-ended fund company’s auditor must state the auditor’s opinion in the auditor’s report if the auditor is of the opinion that –



- (a) adequate accounting records have not been kept by the company; or
  - (b) the financial statements are not in agreement with the accounting records in any material respect.
- (3) If an open-ended fund company's auditor fails to obtain all the information or explanations that, to the best of the auditor's knowledge and belief, are necessary and material for the purpose of the audit, the auditor must state that fact in the auditor's report.

#### **155. Offences relating to contents of auditor's report**

- (1) Every person specified in subrule (2) commits an offence if the person knowingly or recklessly causes a statement required to be contained in an auditor's report under rule 154(2)(b) or (3) to be omitted from the report.
- (2) The persons are –
- (a) if the auditor who prepares the auditor's report is a natural person –
    - (i) the auditor; and
    - (ii) every employee and agent of the auditor who is eligible for appointment as auditor of the open-ended fund company;
  - (b) if the auditor who prepares the auditor's report is a firm, every partner, employee and agent of the auditor who is eligible for appointment as auditor of the open-ended fund company; or
  - (c) if the auditor who prepares the auditor's report is a body corporate, every officer, shareholder, employee and agent of the auditor who is eligible for appointment as auditor of the open-ended fund company.
- (3) A person who commits an offence under subrule (1) is liable to a fine of \$150000.

#### **156. Auditor's reports to be signed**

- (1) An auditor's report must be signed –
- (a) if the auditor is a natural person, by the auditor; or
  - (b) if the auditor is a firm or body corporate, by a natural person authorized to sign the auditor's name on the auditor's behalf.
- (2) An auditor's report must state the auditor's name.
- (3) An open-ended fund company must ensure that every copy of an auditor's report laid before the company in general meeting, or otherwise circulated, published or issued by the company, states the auditor's name.
- (4) If an open-ended fund company contravenes subrule (3), the company commits an offence and is liable to a fine at level 4.

#### **157. Open-ended fund company must keep accounting records**

- (1) An open-ended fund company must keep accounting records that comply with subrules (2) and (3).
- (2) The accounting records must be sufficient –
- (a) to show and explain the company's transactions;
  - (b) to disclose with reasonable accuracy the company's financial position and financial performance; and



- (c) to enable the directors to ensure that the financial statements comply with these Rules.
- (3) In particular, the accounting records must contain –
  - (a) daily entries of all sums of money received and expended by the company, and the matters in respect of which the receipt and expenditure takes place; and
  - (b) a record of the company's assets and liabilities.
- (4) A director of an open-ended fund company who fails to take all reasonable steps to secure compliance with subrule (1) commits an offence and is liable to a fine of \$300000.
- (5) A director of an open-ended fund company who wilfully fails to take all reasonable steps to secure compliance with subrule (1) commits an offence and is liable to a fine of \$300000 and to imprisonment for 12 months.
- (6) If a person is charged with an offence under subrule (4), it is a defence to establish that the person had reasonable grounds to believe, and did believe, that a competent and reliable person –
  - (a) was charged with the duty of ensuring that subrule (1) was complied with; and
  - (b) was in a position to discharge that duty.



## Part 8

### Sub-funds — Requirements and Other Matters

#### 158. Implied terms implied in contracts with open-ended fund company with sub-funds

The following terms are implied in every contract, agreement, arrangement or transaction entered into by an open-ended fund company with sub-funds –

- (a) a party contracting with the company agrees not to seek, in any proceedings or by any other means, to have recourse to any assets of any sub-fund of the company in the discharge of all or any part of a liability which was not incurred on behalf of the sub-fund;
- (b) if a party contracting with the company succeeds by any means in having recourse to any assets of any sub-fund of the company in the discharge of all or any part of a liability which was not incurred on behalf of that sub-fund, the party is liable to the company to pay a sum equal to the value of the benefit thereby obtained by it;
- (c) if a party contracting with the company succeeds in seizing or attaching by any means, or otherwise levying execution against, any assets of a sub-fund of the company in respect of a liability which was not incurred on behalf of that sub-fund, the party will hold those assets or the direct or indirect proceeds of the sale of such assets on trust for the company and will keep those assets or proceeds separate and identifiable as such trust property.

#### 159. Cross sub-fund investment

Notwithstanding any rule of law which prohibits or restricts a corporation from acquiring its own shares, an open-ended fund company with sub-funds may, for the account of any of its sub-funds, acquire by subscription or transfer for consideration, shares of any class or classes, however described, representing other sub-funds of the same open-ended fund company.



## Part 9

### Arrangements and Compromises

#### 160. Interpretation

In this Part –

**arrangement** (安排) includes a reorganization of a company's share capital by consolidation of shares of different classes, or by division of shares into different classes, or both;

**company** (公司) means an open-ended fund company.

#### 161. Application

This Part applies if an arrangement or compromise is proposed to be entered into by a company with either or both of the following –

- (a) the creditors, or any class of the creditors, of the company;
- (b) the shareholders, or any class of the shareholders, of the company.

#### 162. Court may order meeting of creditors or shareholders to be summoned

- (1) The Court may, on application made for the purposes of this subrule, order a meeting specified in subrule (2)(a), or a meeting specified in subrule (2)(b), or both to be summoned in any manner that the Court directs.
- (2) The meeting is –
  - (a) if the arrangement or compromise is proposed to be entered into –
    - (i) with the creditors of the company, a meeting of those creditors; or
    - (ii) with a class of the creditors of the company, a meeting of that class of creditors; and
  - (b) if the arrangement or compromise is proposed to be entered into –
    - (i) with the shareholders of the company, a meeting of those shareholders; or
    - (ii) with a class of the shareholders of the company, a meeting of that class of shareholders.
- (3) Subject to subrule (4), an application for the purposes of subrule (1) may be made only by –
  - (a) in the case of a meeting of creditors, the company or any of the creditors;
  - (b) in the case of a meeting of a class of creditors, the company or any creditor of that class;
  - (c) in the case of a meeting of shareholders, the company or any of the shareholders; or
  - (d) in the case of a meeting of a class of shareholders, the company or any shareholder of that class.
- (4) If the company is being wound up, an application for the purposes of subrule (1) may be made only by the liquidator or provisional liquidator.
- (5) An application for the purposes of subrule (1) must be made in a summary way.



### **163. Explanatory statements to be issued or made available to creditors or shareholders**

- (1) If a meeting is summoned under rule 162 –
  - (a) every notice summoning the meeting that is sent to a creditor or shareholder must be accompanied by an explanatory statement complying with subrules (3) and (4); and
  - (b) every notice summoning the meeting that is given by advertisement—
    - (i) must include an explanatory statement complying with subrules (3) and (4); or
    - (ii) must state where and how a creditor or shareholder entitled to attend the meeting may obtain a copy of the explanatory statement.
- (2) If a notice given by advertisement states that a creditor or shareholder entitled to attend the meeting may obtain a copy of an explanatory statement, the company must provide a copy of the statement, free of charge, to a creditor or shareholder applying in the manner specified in the notice.
- (3) An explanatory statement –
  - (a) must explain the effect of the arrangement or compromise; and
  - (b) must state –
    - (i) any material interests of the company’s directors, whether as directors or as shareholders or as creditors of the company or otherwise, under the arrangement or compromise; and
    - (ii) the effect of the arrangement or compromise on those interests, in so far as the effect is different from the effect on the like interests of other persons.
- (4) If the arrangement or compromise affects the rights of the company’s debenture holders, explanatory statement must give the like explanation as respects the trustees of any deed for securing the issue of the debentures as it is required to give as respects the directors.
- (5) If subrule (1) or (2) is contravened, all of the following commit an offence –
  - (a) the company;
  - (b) every officer of the company who authorizes or permits, participates in, or fails to take all reasonable steps to prevent, the contravention;
  - (c) a liquidator or provisional liquidator of the company who authorizes or permits, participates in, or fails to take all reasonable steps to prevent, the contravention;
  - (d) a trustee of a deed for securing the issue of the company’s debentures who authorizes or permits, participates in, or fails to take all reasonable steps to prevent, the contravention.
- (6) A person who commits an offence under subrule (5) is liable to a fine at level 5.
- (7) If a person is charged with an offence under subrule (5) for a contravention of subrule (1), it is a defence to establish that the contravention was due to the refusal of another person, who was a director of the company or a trustee for debenture holders of the company, to supply the necessary particulars of that other person’s interests.

### **164. Directors and trustees must notify open-ended fund company of interest under arrangement or compromise etc.**

- (1) If a meeting is summoned under rule 162, a director of the company, or a trustee for its debenture holders, must give notice to the company of any matter relating to the director or trustee that may be necessary for the purposes of rule 163.



- (2) A person who contravenes subrule (1) commits an offence and is liable to a fine at level 5.

#### **165. Court may sanction arrangement or compromise**

- (1) This rule applies if the creditors or the class of creditors, or the shareholders or the class of shareholders, or both, with whom the arrangement or compromise is proposed to be entered into, agree or agrees to the arrangement or compromise.
- (2) The Court may, on application made for the purposes of this subrule, sanction the arrangement or compromise.
- (3) Subject to subrule (4), an application for the purposes of subrule (2) may be made only by –
  - (a) in the case of an arrangement or compromise proposed to be entered into with the creditors of a company, the company or any of the creditors;
  - (b) in the case of an arrangement or compromise proposed to be entered into with a class of creditors of a company, the company or any creditor of that class;
  - (c) in the case of an arrangement or compromise proposed to be entered into with the shareholders of a company, the company or any of the shareholders; or
  - (d) in the case of an arrangement or compromise proposed to be entered into with a class of shareholders of a company, the company or any shareholder of that class.
- (4) If the company is being wound up, an application for the purposes of subrule (2) may be made only by the liquidator or provisional liquidator.
- (5) An arrangement or compromise sanctioned by the Court under subrule (2) is binding –
  - (a) on the company or, if the company is being wound up, on the liquidator or provisional liquidator and contributories of the company; and
  - (b) on the creditors or the class of creditors, or the shareholders or the class of shareholders, or both, with whom the arrangement or compromise is proposed to be entered into.
- (6) An order made by the Court under subrule (2) has no effect until an office copy of the order is registered by the Registrar under Part 3.
- (7) If the order of the Court amends the company's instrument of incorporation, or any resolution or agreement to which rule 97 applies, the office copy of that order delivered to the Registrar for registration for the purposes of subrule (6) must be accompanied by a copy of the instrument of incorporation, or the resolution or agreement, as amended.
- (8) If subrule (7) is contravened, the company commits an offence and is liable to a fine at level 3.

#### **166. Provision supplementary to rule 165(1): agreement to arrangement or compromise**

For the purposes of rule 165(1) –

- (a) the creditors agree to the arrangement or compromise if, at a meeting of the creditors summoned under rule 162, a majority in number representing at least 75% in value of the creditors present and voting, in person or by proxy, agree to the arrangement or compromise;



- (b) a class of creditors agrees to the arrangement or compromise if, at a meeting of the class of creditors summoned under rule 162, a majority in number representing at least 75% in value of the class of creditors present and voting, in person or by proxy, agree to the arrangement or compromise;
- (c) the shareholders agree to the arrangement or compromise if, at a meeting of the shareholders summoned under rule 162 –
  - (i) shareholders representing at least 75% of the voting rights of the shareholders present and voting, in person or by proxy, agree to the arrangement or compromise; and
  - (ii) unless the Court orders otherwise, a majority in number of the shareholders present and voting, in person or by proxy, agree to the arrangement or compromise; and
- (d) a class of shareholders agrees to the arrangement or compromise if, at a meeting of the class of shareholders summoned under rule 162 –
  - (i) shareholders representing at least 75% of the voting rights of the class of shareholders present and voting, in person or by proxy, agree to the arrangement or compromise; and
  - (ii) unless the Court orders otherwise, a majority in number of the class of shareholders present and voting, in person or by proxy, agree to the arrangement or compromise.

#### **167. Court's additional powers to facilitate reconstruction or amalgamation**

- (1) This rule applies if –
  - (a) an application is made for the purposes of rule 165(2) to sanction the arrangement or compromise; and
  - (b) it is shown to the Court that –
    - (i) the arrangement or compromise is proposed for the purpose of, or in connection with, a scheme for the reconstruction of one or more companies, or for the amalgamation of 2 or more companies; and
    - (ii) under the scheme, the property or undertaking of any company concerned in the scheme, or any part of that property or undertaking, is to be transferred to another company.
- (2) If the Court sanctions the arrangement or compromise, it may, by the order or a subsequent order, make provision for any or all of the following –
  - (a) the transfer of the transferor's property, undertaking or liabilities, or any part of it or them, to the transferee;
  - (b) the allotting or appropriation by the transferee of any shares, debentures, policies, or other like interests in the transferee which, under the arrangement or compromise, are to be allotted or appropriated by the transferee to or for any person;
  - (c) the continuation by or against the transferee of any legal proceedings pending by or against the transferor;
  - (d) the dissolution, without winding up, of the transferor;
  - (e) the provision to be made for any person, who within the time, and in the manner, that the Court directs, dissents from the arrangement or compromise;
  - (f) the transfer or allotting of any interest in property to any person concerned in the arrangement or compromise;
  - (g) any incidental, consequential and supplemental matters that are necessary to ensure that the reconstruction or amalgamation is fully and effectively carried out.



- (3) If an order provides for the transfer of property under subrule (2) –
  - (a) the property is, by virtue of the order, transferred to, and vests in, the transferee; and
  - (b) where the order so directs, the property vests freed from any charge that is to cease to have effect by virtue of the arrangement or compromise.
- (4) If an order provides for the transfer of liabilities under subrule (2), the liabilities are, by virtue of the order, transferred to, and become liabilities of, the transferee.
- (5) If the Court, by an order, makes provision for any matter under subrule (2), the order has no effect to the extent to which it purports to make the provision until an office copy of the order is registered by the Registrar under Part 3.
- (6) If the order of the Court amends the company's instrument of incorporation, or any resolution to which rule 97 applies, the office copy of that order delivered to the Registrar for registration for the purposes of subrule (5) must be accompanied by a copy of the instrument of incorporation, or the resolution, as amended.
- (7) If subrule (6) is contravened, the company commits an offence and is liable to a fine at level 3.
- (8) In this rule –
  - liabilities* (法律責任) includes –
    - (a) duties of a personal character and incapable of being assigned or performed vicariously under the law; and
    - (b) duties of any other description;
  - property* (財產) includes –
    - (a) rights and powers of a personal character and incapable of being assigned or performed vicariously under the law; and
    - (b) rights and powers of any other description;
  - transferee* (受讓人), in relation to an arrangement or compromise proposed for the purpose of a scheme of reconstruction or amalgamation, means the company to which another company's property, undertaking or liabilities, or any part of it or them, is to be transferred under the scheme;
  - transferor* (出讓人), in relation to an arrangement or compromise proposed for the purpose of a scheme of reconstruction or amalgamation, means the company whose property, undertaking or liabilities, or any part of it or them, is to be transferred to another company under the scheme.

#### **168. Instrument of incorporation to be accompanied by order of Court**

- (1) Every copy of the company's instrument of incorporation issued by the company after an order is made for the purposes of rule 165 or 167 must be accompanied by a copy of the order, unless the effect of the order, and the effect of the arrangement or compromise to which the order relates, has been incorporated into the instrument of incorporation by alteration to that instrument of incorporation.
- (2) If subrule (1) is contravened, the company commits an offence and is liable to a fine at level 3.



## Part 10

### Disqualification Orders

#### 169. Disqualification orders – application

- (1) Subject to the necessary modifications and the modifications specified in rules 170 and 171, the applicable provisions apply in relation to the disqualification of a person –
  - (a) from being a director of an open-ended fund company;
  - (b) from being a provisional liquidator or liquidator of an open-ended fund company;
  - (c) from being a receiver or manager of any property of an open-ended fund company; or
  - (d) from being in any way, whether directly or indirectly, concerned or taking part in the promotion, formation or management of an open-ended fund company.
  
- (2) In this Part –

**applicable provisions** (適用條文) means–

  - (a) Part IVA of Cap. 32; and
  - (b) the other provisions of Cap. 32 relating to the disqualification of a person –
    - (i) from being a director of a company;
    - (ii) from being a provisional liquidator or liquidator of a company;
    - (iii) from being a receiver or manager of any property of a company; or
    - (iv) from being in any way, whether directly or indirectly, concerned or taking part in the promotion, formation or management of a company;

**Cap. 32** (第32章) means the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32).

#### 170. Disqualification orders – modifications to Part IVA of Cap. 32

- (1) A reference to a member of a company is to be read as a reference to a shareholder of an open-ended fund company.
  
- (2) In section 168C, the definition of **company** is to be read as including an open-ended fund company and any references to company in Part IVA of Cap. 32 are to be read as including an open-ended fund company.
  
- (3) In section 168E(4), the reference to the Official Receiver is to be read as a reference to the Official Receiver or the Commission.
  
- (4) Section 168F(3)(b) is to be read as if –
  - (a) in paragraph (i), “or” is omitted after “306;”;
  - (b) there is added after “that Ordinance” in paragraph (ii) –  
“; or  
  
(iii) in the case of a specified provision of the Securities and Futures Ordinance (Cap. 571), rule 207 of the Securities and Futures (Open-ended Fund Companies) Rules 201[ ]”.
  
- (5) In section 168F (4A), specified provision is to be read as including a provision of this Ordinance.



- (6) In section 168G(1)(a), the reference to section 275 is to be read as including section 112ZT of this Ordinance.
- (7) In section 168IB(3)(a), the reference to section 349 is to be read as including a reference to rule 206.
- (8) In section 168O(1), the reference to section 480(1) of the Companies Ordinance (Cap 622) is to be read as a reference to section 112X of the Ordinance.
- (9) Sections 168P(2)(b) and (3) are to be read as if “the Commission,” is added after “the Official Receiver,”.
- (10) Section 168Q is to be read as if “the Commission,” is added after “the Official Receiver,” in both places where it appears.

**171. Matters for determining unfitness of directors – Schedule 15**

Paragraph 3 of Part 1 of Schedule 15 of Cap. 32 is to be read as if –

- (a) in sub-paragraph (b)(xx), “and” is deleted; and
- (b) after “section 664” in sub-paragraph (b)(xxi) there is added –  
“; and
- (c) any of the following provisions of these Rules –
  - (i) rule 67;
  - (ii) rule 68;
  - (iii) rule 98;
  - (iv) rule 104;
  - (v) rule 106; and
  - (vi) rule 157”.



## Part 11

### Winding Up of Open-ended Fund Companies

#### Division 1 — Preliminary

##### 172. Interpretation

In this Part –

**applicable provisions** (適用條文) means –

- (a) Part V of Cap. 32;
- (b) Part VI of Cap. 32; and
- (c) the other provisions of Cap. 32 relating to –
  - (i) the winding up of a company;
  - (ii) receivers and managers;

**Cap. 32** (第32章) means the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32).

##### 173. Modifications to general references in applicable provisions

In the applicable provisions, unless the context otherwise requires –

- (a) any reference to a company is to be read as a reference to an open-ended fund company;
- (b) any reference to a member of a company is to be read as a reference to a shareholder of an open-ended fund company;
- (c) any reference to the articles of a company is to be read as a reference to the instrument of incorporation of an open-ended fund company;
- (d) any reference to a private company is to be read as excluding an open-ended fund company;
- (e) any reference to officer is to be read as a reference to officer as defined in section 1 of Part 1 of Schedule 1 to the Ordinance.

##### 174. Application

- (1) Part V of Cap. 32 and the other applicable provisions relating to the winding up of a company apply, subject to the necessary modifications and the modifications specified in rule 173 and Division 2, to an open-ended fund company as if it were a company.
- (2) Part VI of Cap. 32 and the other applicable provisions relating to receivers and managers apply, subject to the necessary modifications and the modifications specified in rule 173, to an open-ended fund company as if it were a company.

#### Division 2 — modifications

##### 175. Circumstances in which open-ended fund company may be wound up by Court

- (1) Section 177 of Cap. 32 is to be read as if -
  - (a) paragraph (c) of subsection (1) does not apply;
  - (b) paragraphs (c) and (d) of subsection (2) do not apply;
  - (c) in subsection (7), specified obligation means an obligation under Cap. 32 or the Ordinance.
- (2) The Registrar must consult the Commission before making an application under section 177(2) of Cap. 32 in respect of an open-ended fund company.



#### **176. Provisions as to applications for winding up of open-ended fund company**

- (1) A petition for the winding up of an open-ended fund company may be presented by the custodian of the company as well as any of the parties referred to in section 179(1) of Cap. 32 and the reference to all or any of those parties in section 179(1) of Cap. 32 is to be read as including the custodian.
- (2) On the hearing of a petition for the winding up of an open-ended fund company, the Commission may appear and has a right to be heard in connection with the making of a winding-up order.

#### **177. Power to stay or restrain proceedings against open-ended fund company**

The reference in section 181 of Cap. 32 to the company or any creditor or contributory is to be read as a reference to the company, the custodian, the Commission, or any creditor or contributory.

#### **178. Provisions relating to Official Receiver and Liquidators**

- (1) Section 190(2) of Cap. 32 is to be read as if the words “and by the person who is at that date the company secretary of the company” are omitted.
- (2) Section 190(6) of Cap. 32 is to be read as if the Commission is also entitled to inspect and to obtain a copy of or extract from a statement of affairs of an open-ended fund company or a supplementary affidavit in relation to the statement.
- (3) The liquidator of an open-ended fund company required to submit a preliminary report to the Court under section 191(1) of Cap. 32 must, as soon as reasonably practicable, provide a copy of the report to the Commission.
- (4) If the Official Receiver or the liquidator of an open-ended fund company makes a further report under section 191(2) of Cap. 32, the person making the further report must, as soon as reasonably practicable, provide a copy of the further report to the Commission.
- (5) The reference in section 201 of Cap. 32 to creditor or contributory is to be read as a reference to creditor or contributory or the Commission.
- (6) A liquidator of an open-ended fund company must, as soon as reasonably practicable, send to the Commission, a copy of an account of the liquidator’s receipts and payments as liquidator of the company required to be filed with the Official Receiver under section 203(4) of Cap. 32.
- (7) The references in section 203(5) and (6) of Cap. 32 to every creditor and contributory are to be read as references to every creditor and contributory and the Commission.

#### **179. Power to stay winding up of open-ended fund company**

The reference in section 209(1) of Cap. 32 to the liquidator, or the Official Receiver, or any creditor or contributory is to be read as a reference to the liquidator, or the Official Receiver, or the custodian, or the Commission, or any creditor or contributory.

#### **180. Order for inspection of books of open-ended fund company**

The references in section 219 of Cap. 32 to creditors and contributories are to be read as references to creditors, contributories and the Commission.



### **181. Dissolution of open-ended fund company otherwise than by order of Court**

The references in section 226A(2) and (3) to the Official Receiver or the liquidator are to be read as references to the Official Receiver or the liquidator, or the Commission.

### **182. Compromises and arrangements with creditors**

In section 227D of Cap. 32 –

- (a) the reference in subsection (1) to section 670 of the Companies Ordinance (Cap 622) is to be read as a reference to rule 162;
- (b) the reference in subsection (2) to section 673 of the Companies Ordinance (Cap 622) is to be read as a reference to rule 165 and the reference to section 670(1) of that Ordinance is to be read as a reference to rule 162(1);
- (c) the reference in subsection (3) to the Companies Ordinance (Cap 622) is to be read as a reference to the Ordinance;
- (d) the reference in subsection (4) to section 668(1) of the Companies Ordinance (Cap 622) is to be read as a reference to rule 160.

### **183. General meeting to fill vacancy in office of liquidators**

In section 236(3) of Cap. 32, the reference to the Companies Ordinance (Cap 622) is to be read as a reference to the Ordinance.

### **184. Liquidator to notify Commission of general meeting at end of year**

The liquidator of an open-ended fund company must, within 7 days of summoning a general meeting of the company under section 238(1) or 247(1) of Cap. 32, notify the Commission in writing of the meeting.

### **185. Final meeting and dissolution of open-ended fund company**

- (1) The liquidator of an open-ended fund company must, within 7 days of calling a general meeting of the company under section 239(1) or 248(1) of Cap. 32, notify the Commission in writing of the meeting.
- (2) The reference in section 239(4) and 248(4) of Cap. 32 to the liquidator is to be read as the liquidator or of the Commission.

### **186. Power to apply to Court to have questions determined or powers exercised**

The reference in section 255(1) of Cap. 32 to the liquidator or any contributory or creditor is to be read as a reference to the liquidator or the Commission or any contributory or creditor.

### **187. Persons disqualified from being appointed etc. as provisional liquidator or liquidator of open-ended fund company, etc.**

- (1) Section 262B (3) of Cap. 32 is to be read as if there is added after “(f) a receiver or manager of the property of the company” –  
“  
,  
(g) the investment manager of the company, or a person who has been an investment manager of the company;  
(h) the custodian of the company, or a person who has been a custodian of the company”.
- (2) Section 262D(2)(a) of Cap. 32 is to be read as if –
  - (a) “or” is omitted after “subsidiary;” in paragraph (viii); and



- (b) there is added after paragraph (ix) –
  - “(x) an investment manager of the company, its holding company or its subsidiary; or
  - (xi) a custodian of the company, its holding company or its subsidiary;”.

**188. Liability where proper records not kept**

In section 274(1) of Cap. 32, the reference to section 373(2) and (3) of the Companies Ordinance (Cap. 622) is to be read as a reference to rule 157.

**189. Criminal liability for fraudulent trading**

Section 275 of Cap. 32 is to be read as if subsection (3) is disappplied.

**Note –**

As to criminal liability where any business of an open-ended fund company is carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, see section 112ZT of the Ordinance.

**190. Enforcement of duty of liquidator to make returns, etc.**

In section 279(1) of Cap. 32, the reference to the Registrar is to be read as a reference to the Registrar or the Commission.

**191. Power to order public examination of promoters, directors, etc.**

The references in section 286A(5)(b) and (10)(b) of Cap. 32 to any creditor or contributory of the company are to be read as references to any creditor or contributory of the Company or the Commission.

**192. Self-incrimination in relation to direction or requirement under section 286A, 286B or 286C**

In section 286D(3)(a) of Cap. 32, the reference to section 349 is to be read as including rule 206.

**193. Meetings to ascertain wishes of creditors or contributories**

In section 287(3) of Cap. 32 the reference to the Companies Ordinance (Cap 622) is to be read as a reference to the Ordinance.

**194. Power of Court to declare dissolution of open-ended fund company void**

In sections 290(1) and (1A) of Cap. 32, the references to the liquidator of the company are to be read as references to the liquidator of the company or the Commission.

**195. Electronic communications by liquidators**

Section 296B(2)(d) is to be read as if –

- (a) “or” is omitted in paragraph (v); and
- (b) there is added after “Companies” in paragraph (vi) “; or (vii) the Commission”.

**196. Statement of affairs submitted to receiver**

Section 300B(2) of Cap. 32 is to be read as if the words “and by the person who is at that date the company secretary of the company” are omitted.

**197. Enforcement of duty of receiver to make returns, etc.**

In section 302(2) of Cap. 32, the reference to the Registrar is to be read as a reference to the Registrar or the Commission.



### **198. Companies (Winding Up) Rules etc.**

- (1) In Item 3(d), Schedule 1 to the Companies (Fees and Percentages) Order (Cap. 32C), the reference to section 673 of the Companies Ordinance (Cap 622) is to be read as a reference to rule 165 of these Rules.
- (2) In the Companies (Winding Up) Rules (Cap. 32 H) –
  - (a) the reference in rule 23A to the Official Receiver and the Chief Bailiff is to be read as a reference to the Official Receiver, the Chief Bailiff and the Commission;
  - (b) the reference in rule 58(1)(d) to section 904(1) of the Companies Ordinance (Cap 622) is to be read as a reference to section 112ZE of the Ordinance;
  - (c) the references in rule 117 to section 670 of the Companies Ordinance (Cap 622) and section 671 of the Companies Ordinance (Cap 622) are to be read as references to rules 162 and 163 of these Rules respectively;
  - (d) the reference in rule 131 to section 285A of the Ordinance, or section 606 or 607 of the Companies Ordinance (Cap 622) is to be read as a reference to section 285A of Cap. 32, section 606 or 607 of the Companies Ordinance (Cap. 622), or rules 85 or 86 of these Rules.

## **DIVISION 3 — MISCELLANEOUS**

### **199. Notice of appointment of receiver or manager, etc.**

- (1) If a person obtains an order for the appointment of a receiver or manager of the property of an open-ended fund company or appoints such a receiver or manager under the powers contained in an instrument, the person must within 7 days after the date of the order or of the appointment under the powers, deliver a statement of that fact to the Registrar for registration.
- (2) A statement under subrule (1) must include –
  - (a) the name and address of the person appointed as receiver or manager; and
  - (b) the number of the person's identity card, or if the person does not have an identity card, the number and issuing country of any passport held by the person.
- (3) If a person enters into possession of the property of an open-ended fund company, as mortgagee, the person must within 7 days after the date of entering into possession, deliver a statement of that fact to the Registrar for registration.
- (4) A statement under subrule (3) must include –
  - (a) if the person is a natural person –
    - (i) the person's name and address; and
    - (ii) the number of the person's identity card, or if the person does not have an identity card, the number and issuing country of any passport held by the person; or
  - (b) if the person is a body corporate, its name and the address of its registered or principal office.
- (5) A statement under subrule (1) or (3) –
  - (a) must be in the specified form; and
  - (b) must be accompanied by the prescribed fee.



- (6) If a person contravenes subrule (1) or (3), the person commits an offence and is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of \$300 for each day during which the offence continues.

#### **200. Notice of cessation of appointment, etc.**

- (1) If a person mentioned in rule 199(1) ceases to act as receiver or manager, the person must, within 7 days after the date of the cessation, deliver a statement of the cessation to the Registrar for registration.
- (2) If a person mentioned in rule 199(3) goes out of possession of the property, the person must, within 7 days, after going out of possession, deliver a statement of that fact to the Registrar for registration.
- (3) If there is any change to the particulars of the person included in a statement delivered to the Registrar under rule 199 (1) or (3), the person must, within 15 days after the date of the change, deliver a statement of the change to the Registrar for registration.
- (4) Subrule (3) does not apply to –
  - (a) a person mentioned in rule 199(1) who has ceased to act as receiver or manager and has delivered a statement of the cessation to the Registrar under subrule (1);
  - (b) a person mentioned in rule 199(3) who has gone out of possession of the property and has delivered a statement of that fact to the Registrar under subrule (2).
- (5) A statement under subrule (1), (2) or (3) must be in the specified form.
- (6) If a person contravenes subrule (1), (2) or (3), the person commits an offence and is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of \$300 for each day during which the offence continues.

#### **201. Official Receiver may provide information to the Commission**

The Official Receiver may disclose to the Commission any information concerning an open-ended fund company or a sub-fund of an open-ended fund company obtained or received by the Official Receiver in the course of performing the Official Receiver's functions under these Rules or under Cap. 32.

#### **202. Registration of open-ended fund company cancelled on dissolution**

The registration of an open-ended fund company is regarded as cancelled upon dissolution of the company under sections 226A, 227, 239 and 248 of Cap. 32 as applied under rule 174(1).

### **DIVISION 4 — WINDING UP OF SUB-FUNDS**

#### **203. Winding up of a sub-fund of an open-ended fund company**

- (1) Subject to subrules (2), (3) and (4), a sub-fund of an open-ended fund company may be wound up under this Part as if it were an open-ended fund company.
- (2) A sub-fund of an open-ended fund company is to be treated as a separate legal person for the purposes of winding-up of the sub-fund.



- (3) The appointment of the Official Receiver or liquidator or any provisional liquidator and the powers and duties of the liquidator or any provisional liquidator are confined to the sub-fund which is being wound up and its affairs, business and property.
- (4) The provisions of the applicable provisions, as applied under rule 174, with respect to staying and restraining actions and proceedings against an open-ended fund company at any time after the presentation of a petition for winding up and before the making of a winding up order extend, in the case of a sub-fund of an open-ended fund company, where the application to stay or restrain is by a creditor, to actions and proceedings against the company, or any other sub-funds of the company, in respect of the liability of the sub-fund.
- (5) For the purposes of subrule (1) –
  - (a) the following references in rule 173 are to be read as follows –
    - (i) a reference to a company is to be read as a reference to the sub-fund; and
    - (ii) a reference to members is to be read as a reference to holders of shares in the sub-fund.
  - (b) the following references in the applicable provisions are to be read as follows –
    - (i) a reference to creditors is to be read as a reference to the creditors of the sub-fund;
    - (ii) a reference to contributories is to be read as a reference to the contributories of the sub-fund.
- (6) Subject to subrule (7), an open-ended fund company with sub-funds may not sue or be sued in respect of a sub-fund of the company or exercise any rights of set-off in relation to the sub-fund after the appointment of a liquidator or provisional liquidator in respect of the winding-up of the sub-fund.
- (7) When an order has been made for the winding-up of a sub-fund of an open-ended fund company or where a provisional liquidator has been appointed, no action or proceeding may be commenced or proceeded with against the company or the sub-fund in respect of any liability of the sub-fund, except by leave of the Court and subject to such terms as the Court may impose.

## **DIVISION 5 — CANCELLATION OF REGISTRATION OF OPEN-ENDED FUND COMPANY**

### **204. Dissolution of open-ended fund company on cancellation of registration under section 112ZH**

- (1) This rule applies if the Commission cancels the registration of an open-ended fund company under section 112ZH of the Ordinance.
- (2) The company is dissolved on the date of the cancellation of the registration of the company or such later date specified by the Commission in a notice of cancellation under section 112ZH.

### **205. Dissolution of open-ended fund company on cancellation of registration under section 112ZI**

- (1) This rule applies if the Commission cancels the registration of an open-ended fund company under section 112ZI of the Ordinance.



- (2) The company is dissolved on –
  - (a) the date on which the cancellation has taken effect as a specified decision under section 232 of the Ordinance; or
  - (b) such later date specified by the Commission in a notice of cancellation under section 112ZI of the Ordinance.



## **Part 12**

### **Miscellaneous**

#### **206. Offence for false statement**

- (1) A person commits an offence if, in any return, report, financial statements, certificate or any other document, required by or for the purposes of Part IVA of the Ordinance or these Rules, the person knowingly or recklessly makes a statement that is misleading, false or deceptive in a material particular.
- (2) Subrule (1) does not apply to the making of a statement that is misleading, false or deceptive in a material particular if the making of the statement would, apart from subrule (1), also constitute an offence under any of the relevant provisions.
- (3) A person who commits an offence under subrule (1) is liable –
  - (a) on conviction on indictment to a fine of \$300000 and to imprisonment for 2 years;
  - (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.
- (4) This section does not affect the operation of –
  - (a) Part V of the Crimes Ordinance (Cap. 200); or
  - (b) section 19, 20 or 21 of the Theft Ordinance (Cap. 210).

#### **207. Enforcement of requirements by order of the Court**

- (1) This section applies if an open-ended company or an officer of an open-ended fund company contravenes a requirement of these Rules –
  - (a) to send, deliver, supply, forward or produce a document to the Registrar; or
  - (b) to give notice to the Registrar of any matter.
- (2) The Registrar, or a shareholder or creditor of the company, may serve a notice on the company or officer requiring the company or officer to comply with the requirement.
- (3) If the company or officer fails to make good the contravention within 14 days after service of the notice, the Court may, on application by the Registrar, or by a shareholder or creditor of the company, make an order –
  - (a) in the case of a contravention by the company, directing the company and any officer of the company to make good the contravention within the time specified in the order; or
  - (b) in the case of a contravention by the officer, directing the officer to make good the contravention within the time specified in the order.
- (4) An order may provide that all costs of and incidental to the application are to be borne –
  - (a) in the case of a contravention by the company, by the company or by any officer of the company responsible for the contravention; or
  - (b) in the case of a contravention by the officer, by that officer.
- (5) This section does not affect the operation of any Ordinance imposing penalties on a company or any officer of a company in respect of the contravention.



**Schedule 1**  
**Content of Incorporation Form**  
**Part 1**  
**Particulars of Proposed Company**

**1. Particulars relating to proposed company**

The particulars specified for the purposes of rule 5(a) are –

- (a) the name of the proposed company; and
- (b) the address of the proposed company's registered office.

**Part 2**  
**Particulars and Statement of Proposed Directors**

**2. Particulars of directors**

The particulars specified for the purposes of rule 5(b) are –

- (a) the person's present forename and surname, former forename or surname (if any), and aliases (if any);
- (b) the person's usual residential address; and
- (c) the number of the person's identity card or, if the person does not have an identity card, the number and issuing country of any passport held by the person.

**3. Statement relating to directors**

The statement specified for the purposes of rule 5(b) is a statement by the person that the person has consented to be a director of the OFC and has attained the age of 18 years.

**4. Definitions**

- (1) In this part –

*forename* (名字) includes a Christian or given name;

*residential address* (住址) –

- (a) does not include an address at a hotel unless the person to whom it relates is stated, for the purposes of this rule, to have no other permanent address; and
- (b) does not include a post office box number;

*signatory* (簽署人), in relation to an incorporation form, means a director who signs the form for the purposes of rule 6;

*surname* (姓氏), for a person usually known by a title different from the person's surname, means that title.

- (2) In this part, a reference to a former forename or surname does not include –

- (a) in relation to a person –

- (i) a forename or surname that was changed or ceased to be used before the person attained the age of 18 years; and
- (ii) a forename or surname that has been changed or ceased to be used for a period of at least 20 years;



- (b) in relation to a person usually known by a title different from the person's surname, the name by which the person was known before the adoption of or succession to the title; and
- (c) in relation to a married woman, a name or surname by which she was known before her marriage.

### **Part 3**

## **Statements relating to Instrument of Incorporation**

### **5. Statements relating to instrument of incorporation**

The statements specified for rule 5(c) are –

- (a) a statement that the proposed company's instrument of incorporation has been signed by every person who is to be a director of the proposed company on the company's incorporation; and
- (b) a statement that the contents of the copy of the proposed company's instrument of incorporation, with or without the part showing the signature and the date of signing as they appear on the original document, are the same as those of the instrument of incorporation.



SECURITIES AND FUTURES COMMISSION  
證券及期貨事務監察委員會

## Code on Open-Ended Fund Companies

[ ]



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## General matters

### Chapter 1: Introduction and administrative matters

#### Introduction

- 1.1 This Code on Open-Ended Fund Companies (“OFC Code”) is made under section 112ZR of the SFO and establishes guidelines in respect of matters relating to the registration, management, and operation of OFCs and their business.
- 1.2 The Commission is empowered under section 112D of the SFO to register a proposed company as an OFC. By virtue of section 112D(6), the registration may be granted subject to such conditions as the Commission considers appropriate.
- 1.3 An OFC seeking registration with the Commission under section 112D of the SFO is expected to comply with the applicable provisions of the SFO, OFC Rules and the OFC Code in order to be registered with the Commission.
- 1.4 The Commission may review the registration of an OFC at any time, may withdraw such registration and may amend or revoke conditions imposed or impose new conditions as it considers appropriate.
- 1.5 The Commission may modify or relax the application of a requirement in the OFC Code if it considers that, in particular circumstances, strict application of the requirement would operate in an unduly burdensome or unnecessarily restrictive manner. Applications for registration which seek waivers of any of the provisions in the OFC Code must give detailed reasons why waivers are sought.

#### Effect of breach of the OFC Code

- 1.6 Failure by any person to comply with any applicable provision of the OFC Code:
  - (a) does not by itself render the person liable to any judicial or other proceedings, but in any proceedings under the SFO before any court, the OFC Code may be admissible in evidence, and if any provision set out in the OFC Code appears to the court to be relevant to any question arising in the proceedings, it may be taken into account in determining the question;
  - (b) may cause the Commission to consider whether such failure adversely reflects on the person’s fitness and properness (in so far as the relevant person is licensed or registered under the SFO);
  - (c) may cause the Commission to consider whether such failure adversely reflects on whether the OFC should remain registered;
  - (d) may cause the Commission to consider whether such failure adversely reflects on whether further OFCs managed and/ or proposed by such person should be granted registration in the interest of the investing public (i.e. where there is a serious breach, the Commission may refuse to register new OFCs to be managed and/ or proposed by the person in breach for a stated period); and
  - (e) may cause the Commission to impose additional registration condition(s).



- 1.7 Section I of the OFC Code applies to both public and private OFCs. Section II of the OFC Code applies only to private OFCs. Public OFCs and their key operators are also required to comply with all applicable requirements in the SFC Products Handbook.
- 1.8 The provisions in the OFC Code apply to each sub-fund of an umbrella OFC as if each sub-fund were an OFC to the extent applicable.
- 1.9 Nothing in the OFC Code shall be interpreted in a manner that alters or imposes any restriction upon the exercise by the Commission of any power or discretion conferred upon it under the SFO. The OFC Code shall not be interpreted in a way that will override the provision of any law.

### **Data privacy**

- 1.10 The information requested under the OFC Code may result in the applicant providing the Commission with personal data as defined in the Personal Data (Privacy) Ordinance. The data supplied will only be used by the Commission to perform its functions, in the course of which it may match, compare, transfer or exchange personal data with data held or obtained by the Commission, government bodies, other regulatory authorities, corporations, organizations or individuals in Hong Kong or overseas for the purpose of verifying those data. Subject to the limits in section 378 of the SFO, the Commission may disclose personal data to other regulatory bodies. You may be entitled under the Personal Data (Privacy) Ordinance to request access to or to request the correction of any data supplied to the Commission, in the manner and subject to the limitations prescribed. All enquiries should be directed to the Data Privacy Officer at the Commission.



## Chapter 2: Interpretation

- 2.1 “Applicable laws” means the SFO, its subsidiary legislation including the OFC Rules, and other applicable laws.
- 2.2 “Applicable codes and guidelines” means the codes and guidelines issued by the Commission, including without limitation the SFC Products Handbook (in the case of public OFCs), the Fund Manager Code of Conduct and the Code of Conduct.
- 2.3 “Applicable regulatory requirements” means the applicable laws, applicable codes and guidelines and the requirements of any regulatory authority which are applicable.
- 2.4 “Bank” means a bank as defined in section 1 of Part 1 of Schedule 1 to the SFO.
- 2.5 “Bank deposit” means a deposit of money made with a bank, and the term “deposit” has the meaning given in section 2(1) of the Banking Ordinance (Chapter 155 of the Laws of Hong Kong).
- 2.6 “Certificate of deposit” means a certificate of deposit as defined in section 1 of Part 1 of Schedule 1 to the SFO.
- 2.7 “CO” means the Companies Ordinance (Chapter 622 of the Laws of Hong Kong).
- 2.8 “Code of Conduct” means the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission.
- 2.9 “Commission” or “SFC” means the Securities and Futures Commission referred to in section 3(1) of the SFO.
- 2.10 “Foreign exchange contract” means a contract under which the parties to the contract agree to exchange different currencies on a particular date.
- 2.11 “Key operators” means the director(s), investment manager and custodian of an OFC.
- 2.12 “Open-ended fund company”, “OFC” or “Company” means an open-ended fund company as defined in section 112A of the SFO.
- 2.13 “OFC Fees Rules” means the Securities and Futures (Open-ended Fund Companies – Fees) Rules which set out the fees chargeable by the SFC and the other relevant authorities, namely that the Companies Registry and the Official Receiver’s Office, in connection with the OFC made by the Financial Secretary under section 112ZQ of the SFO.
- 2.14 “OFC Rules” means the Securities and Futures (Open-ended Fund Companies) Rules made under section 112ZK, 112ZL and 112ZM of the SFO.
- 2.15 “Offering document”, in relation to an OFC, means a document inviting offers, or calculated to invite offers, to subscribe for or purchase for cash or other consideration shares in the company.
- 2.16 “Private OFC” means a proposed company or an OFC which is not a public OFC.



- 2.17 “Proposed company” means a company intended to be registered by the SFC and incorporated as an OFC under Part IVA of the SFO.
- 2.18 “Public OFC” means a proposed company or an OFC intended to apply for an authorization by the SFC under section 104 of the SFO or which has obtained such authorization by the SFC.
- 2.19 “Registered non-Hong Kong company” means a registered non-Hong Kong company as defined in section 2(1) of the CO.
- 2.20 “Regulated activity” means any of the regulated activities specified in Part 1 of Schedule 5 to the SFO.
- 2.21 “Scheme property” means the scheme property of the OFC as defined in section 112A of the SFO.
- 2.22 “SFC Products Handbook” means the SFC Handbook for Unit Trusts and Mutual Funds, Investment-Linked Assurance Schemes and Unlisted Structured Investment Products.
- 2.23 “SFO” means the Securities and Futures Ordinance (Chapter 571 of the Laws of Hong Kong).
- 2.24 “Sub-fund” means a sub-fund as defined in section 112R of the SFO.
- 2.25 “Umbrella OFC” means an OFC with sub-funds.
- 2.26 “UT Code” means the Code on Unit Trusts and Mutual Funds administered by the SFC as set out in Section II of the SFC Products Handbook.



## Section I: Requirements applicable to all OFCs

### Chapter 3: General principles

In formulating the principles in this Chapter, the Commission has taken into account principles developed by the International Organisation of Securities Commissions and other principles that the Commission believes to be fundamental for the regulation of collective investment schemes in the form of OFCs.

An OFC and its key operators shall comply with the spirit of these principles when administering, managing or dealing with any matters relating to the operation of an OFC.

**GP 1. Acting fairly:** Key operators shall act honestly, fairly and professionally.

**GP 2. Diligence and competency:** Key operators shall discharge their functions with due skill, care and diligence. Where a delegate is appointed by a key operator, the key operator shall exercise due care in the selection, appointment and ongoing monitoring of its delegate.

**GP 3. Proper protection of assets:** All the scheme property of an OFC shall be entrusted to the custodian and shall be properly protected.

**GP 4. Managing conflicts of interest:** Key operators shall avoid situations where conflicts of interest may arise including any actual or potential conflicts that may arise between different parties in respect of an OFC. Where conflicts of interests cannot be avoided, and provided that investors' interests can be sufficiently protected, the conflict shall be managed and minimized by appropriate safeguards, measures and product structure, which shall be properly disclosed to investors. The board of directors shall uphold good corporate governance principles and standards for its activities conducted in relation to the OFC.

**GP 5. Disclosure:** Disclosure shall be clear, concise and effective, containing information necessary for investors to be able to make an informed judgement and be kept up-to-date. Where ongoing disclosure is required, information shall be disseminated in a timely and efficient manner.

**GP 6. Regulatory compliance:** The OFC and its key operators shall ensure compliance with all applicable regulatory requirements, and shall respond to enquiries from regulators in an open and co-operative manner. They should also inform the Commission promptly should there be any material breach of the OFC Code.

**GP 7. Compliance with constitutive documents:** Key operators shall comply with the instrument of incorporation and offering documents of the OFC.



## Chapter 4: Registration and name

### Registration

- 4.1 An application for registration of an OFC must be made in the specified form and be accompanied by the payment of such fees in accordance with the OFC Fees Rules as published on the website of the Commission from time to time, and include the following information:
- (a) the instrument of incorporation of the OFC;
  - (b) profile of the key operators;
  - (c) address of the registered office of the OFC; and
  - (d) the letter of consent to appointment as a custodian and latest audited report of the custodian.
- 4.2 The following disclosures must be included in the offering documents of the OFC:
- (a) whether the OFC is a private OFC, or a public OFC;
  - (b) that it is an open-ended fund company with variable capital with limited liability, and segregated liability between sub-funds (where applicable in the case of an umbrella OFC only);
  - (c) the following statement(s), which must be set out prominently:
    - (i) For all OFCs: *“SFC registration is not a recommendation or endorsement of an OFC nor does it guarantee the commercial merits of an OFC or its performance. It does not mean the OFC is suitable for all investors nor is it an endorsement of its suitability for any particular investor or class of investors.”*
    - (ii) For private OFCs only: *“This is not an OFC authorized under section 104 of the Securities and Futures Ordinance (“SFO”) and its offering documents have not been authorized by the SFC under section 105 of the SFO.”*
  - (d) in the case of an umbrella OFC, the warning statement below, which shall be stated prominently:

*“Important - while section 112S of the SFO provides for segregated liability between sub-funds, the concept of segregated liability is relatively new. Accordingly, where claims are brought by local creditors in foreign courts or under foreign law contracts, it is not yet known how those foreign courts will react to section 112S of the SFO.”*
- 4.3 The OFC must inform the SFC as to the details of any process agent appointed by an overseas director or custodian as required under the OFC Rules upon registration of the OFC, and within 14 days of any change in such process agent or its details.



## **Name of an OFC**

- 4.4 The name of an OFC must be compliant with the SFO. The name of an OFC must:
- (a) in the opinion of the Commission, not be misleading or otherwise undesirable;
  - (b) not be the same as the name of another existing OFC; and
  - (c) end with “Open-ended Fund Company” or “OFC”.
- 4.5 In considering whether the name of an OFC is misleading or undesirable for purpose of compliance with 4.4, the SFC may take into account whether the proposed name of the OFC:
- (a) is inconsistent with the nature, investment objectives or policy of the OFC;
  - (b) is substantially similar to the name of another OFC;
  - (c) would give investors a sense of assurance or security not justified by the underlying features of the OFC;
  - (d) might lead investors into inferring or might otherwise create the impression that persons other than the directors are responsible for the OFC; and
  - (e) might lead investors into inferring or might otherwise create the impression that the directors are not responsible for the OFC.
- 4.6 Any application to the SFC for a change to the name of an OFC must be supported with explanations having regard to the requirements in the SFO and this Chapter.



## Chapter 5: Board of directors

- 5.1 Each of the directors of an OFC must be of good repute, appropriately qualified, experienced and proper for the purpose of carrying out the business of the OFC.

*Note: In determining whether a person satisfies 5.1, the Commission may have regard factors including but not limited to the following:*

- (a) whether the person has relevant industry qualifications and/ or experience; and*
- (b) whether the person, or any business with which the person has been involved, has been held by any court or competent authority to have breached any company, securities or financial markets laws and regulations, have been held for fraud or other misfeasance; or has been disciplined by, or disqualified from, any professional body.*

- 5.2 The board of directors of an OFC must have at least one independent director, who must not be a director or employee of the custodian.

- 5.3 The board of directors must have in place at all times a delegation agreement in writing for the delegation of the investment management functions of the OFC to the investment manager. Such investment management functions should include, at a minimum, the investment management, valuation and pricing of the scheme property of the OFC.

- 5.4 The circumstances under which the directors must cease to hold office and the procedures of removal from office should be included in the instrument of incorporation of the OFC and disclosed in its offering documents.

- 5.5 The OFC should put in place appropriate arrangements as far as reasonably practicable for the purpose of complying with the applicable regulatory requirements for the OFC to have at least two individual directors including at least one independent director.

*Note: For example, there should be a termination notice requirement of sufficient length of time to enable the OFC to effect a replacement to meet the applicable regulatory requirements. The OFC should also establish appropriate procedures to prepare for and facilitate a replacement in the event of any retirement or removal of director. Early consultation with the Commission is encouraged in the case of a change or intended change of directors where such change may impact on the OFC's compliance with the applicable regulatory requirements.*



## Chapter 6: Investment manager

- 6.1 An investment manager of an OFC must be and remain fit and proper at and after the time of registration of the OFC.

*Note: The Commission may take into account relevant guidance issued by the Commission relating to the fitness and properness of licensed and/ or registered intermediaries when considering the acceptability of the investment manager for the purpose of the registration of an OFC.*

- 6.2 The investment manager must carry out the investment management functions of the OFC in accordance with the OFC's instrument of incorporation and delegation agreement, in the best interests of the OFC and its shareholders.
- 6.3 The circumstances under which the appointment of the investment manager must cease to hold office and the procedures of removal from office should be included in the delegation agreement and disclosed in the offering documents of the OFC.
- 6.4 The OFC should put in place appropriate arrangements as far as reasonably practicable for the purpose of complying with the applicable regulatory requirements for the OFC to have at least one investment manager licensed or registered for Type 9 regulated activity.

*Note: For example, there should be a termination notice requirement of sufficient length of time to enable the OFC to effect a replacement to meet the applicable regulatory requirements. The OFC should also establish appropriate procedures to prepare for and facilitate a replacement in the event of any retirement or removal of the investment manager. Early consultation with the Commission is encouraged in the case of a change or intended change of investment manager.*

- 6.5 The investment manager must retire:
- (a) when it ceases to meet the eligibility requirements under the applicable regulatory requirements; or
  - (b) in such other cases as provided for in the OFC's instrument of incorporation.



## Chapter 7: Custodian and custody of assets

- 7.1 The custodian of an OFC should meet the same eligibility requirements as set out in the UT Code for SFC-authorized funds.
- 7.2 Where the custodian is an overseas entity and is not a registered non-Hong Kong company, it must have a process agent at all times in Hong Kong for the purpose of accepting the service of notices and documents in Hong Kong.

*Notes: (1) In accordance with the OFC Rules, the following persons/ entities may act as a process agent: (a) an individual whose usual residential address is in Hong Kong, (b) a company formed and registered under the CO in Hong Kong, or (c) a firm of solicitors or certified public accountants in Hong Kong.*

*(2) If the custodian is a registered non-Hong Kong company, service of process should be made to the authorized representative of the company as is required to be appointed under the CO.*

- 7.3 The custodian must:
- (a)
    - (i) hold in its custody all assets which can be so held, whether by the delivery of physical assets and/ or documents of title, or by way of registration in book entry form in the account of the OFC in the custodian's books;
    - (ii) maintain a record of all other assets of the OFC which by their nature cannot be held in custody in the account of the OFC in the custodian's books;
  - (b) maintain proper and up-to-date records of all assets belonging to the OFC in the custodian's books, which should include frequent reconciliations;
- Note: It is generally expected that there should be reconciliations with the statement of accounts provided by other financial institutions on a regular basis where appropriate.*
- (c) put in place appropriate measures for the verification of ownership of assets of the OFC;
  - (d) segregate the assets of the OFC from:
    - (i) the assets of the investment manager;
    - (ii) the assets of the custodian/ sub-custodian throughout the custody chain; and
    - (iii) the assets of other clients of the custodian throughout the custody chain and the assets of the investment manager's affiliates, unless held in an omnibus client account with adequate safeguards to ensure that assets of the OFC are properly recorded;
  - (e) not reuse the assets of the OFC without prior consent from the OFC; and



(f) put in place adequate risk management measures to ensure that it can properly carry out the above functions.

7.4 The custody arrangements in respect of the scheme property of the OFC and any material risks associated with the arrangements should be disclosed in its offering document.

7.5 The circumstances under which the custodian must cease to hold office and the procedures of removal from office should be included in the custody agreement and disclosed in the offering documents of the OFC.

7.6 The OFC should put in place appropriate arrangements as far as reasonably practicable for the purpose of complying with the applicable regulatory requirements for the OFC to have at least one custodian.

*Note: For example, there should be a termination notice requirement of sufficient length of time to enable the OFC to effect a replacement to meet the applicable regulatory requirements. The OFC should also establish appropriate procedures to prepare for and facilitate a replacement in the event of any retirement or removal of the custodian. Early consultation with the Commission is encouraged in the case of a change or intended change of custodian.*



## Chapter 8: Corporate administrative matters

- 8.1 The instrument of incorporation of the OFC shall provide as to the corporate administrative matters of an OFC, including but not limited to:
- (a) procedures and notices for holding general meetings and directors' meetings, exercise of votes, quorum required, matters which require approval, as well as the thresholds for and manner of approval and record-keeping;
  - (b) creation of shares and share classes (if any), rights attached to the shares, terms of issuance and cancellation of shares.

*Note: An indicative template for the OFC's instrument of incorporation which reflects the mandatory and optional provisions is available on the SFC's website for reference.*

- 8.2 The instrument of incorporation of an OFC must provide the following:
- (a) a minimum of 2 members present in person or by proxy constitutes a quorum of a general meeting of the OFC; and
  - (b) in the case of an OFC which provides in its instrument of incorporation that it would hold annual general meetings, the notice period for holding such meeting should be of at least 21 days.

*Note: Public OFCs should comply with the additional requirements in respect of quorum in the UT Code.*

- 8.3 The manner in which shareholders may obtain relevant information in relation to the OFC and make enquiries with the OFC should be disclosed in the offering documents of the OFC.

- 8.4 Corporate filings the subject matter of which is subject to approval by the SFC should be filed with the SFC for onward transmission to CR after approval by the SFC of the subject matter.

*Note: An OFC should refer to the further guidance published on the SFC's website as to the types of filings which should be made to the CR by way of submission to the SFC.*



## Chapter 9: Auditor and accounting requirements

### Auditor

- 9.1 The auditor appointed by an OFC must be independent of the investment manager, the custodian and the directors of the OFC.

*Note: The procedures and requirements for appointment and removal of a person from the office of auditor must be included in the instrument of incorporation of the OFC and must be compliant with the applicable regulatory requirements.*

### Financial reports

- 9.2 All accounts must be prepared in a manner compliant with Hong Kong Financial Reporting Standards or International Financial Reporting Standards. The acceptability of other accounting standards may be considered by the Commission on a case-by-case basis.

*Note: The Commission may consider such other accounting standards as acceptable having regard to for example, the following factors:*

- (a) *whether the standards are of high and robust quality and the extent to which they are internationally recognized; and*
  - (b) *whether the standard setting process is accountable and subject to appropriate consultation and whether the accounting standards setters are independent.*
- 9.3 The annual reports of the OFC are expected to contain information on the investment portfolio, assets, liabilities, income and expenses of the OFC to enable shareholders to make an informed judgement on the development of the activities and the results of the OFC's performance.
- 9.4 The annual reports of the OFC must disclose the items as required for observance of the applicable accounting standards and include (without limitation) the following:
- (a) total value of investments, bank balances, dividends and other receivables as at the end of the financial period;
  - (b) income generated/ earned by the OFC during the financial period, including investment income, interest income and dividend income;
  - (c) expenses borne by the OFC, including the fees paid to the directors, investment manager, and the custodian during the financial period;
  - (d) number of shares in issue, and net asset value per share, at the beginning and at the end of the financial period, respectively; and
  - (e) details of any distribution declared and/ or paid during the financial period should be set out in the notes to the accounts.



- 9.5 The interim report (if any) of the OFC must apply the same accounting policies and method of computation as are applied in the annual reports of the OFC, and disclose a statement to this effect or a description of the nature and effect for any change in these policies or methods.
- 9.6 For OFCs that are formed as umbrella OFCs, the financial reports must show the respective financial positions and results of the umbrella OFCs and those of the individual sub-fund(s) of the OFC.

### **Auditor's report**

- 9.7 The auditor's report included in the annual report must state whether in the auditor's opinion, the accounts prepared for that period have been properly prepared in accordance with the relevant provisions of the OFC's instrument of incorporation, the applicable financial standards, applicable regulatory requirements, and the OFC Code.

### **Publication**

- 9.8 Annual reports must be published within four months of the end of the OFC's financial year. Interim reports (if any) must be published within two months of the end of the period they cover.



## Chapter 10: Termination, and cancellation of registration

### General

10.1 This Chapter provides for the matters in relation to an application for a voluntary termination of an OFC pursuant to section 112ZH of the SFO, and the cancellation of registration of an OFC.

*Note: Sub-funds of an umbrella OFC can similarly apply for termination pursuant to this Chapter, and the references hereunder to shareholders, resolution, scheme property, assets and liability should be read as those of or attributable to the particular sub-fund.*

10.2 Any decision to terminate an OFC should take due account of the best interests of the shareholders of the OFC. The directors and the investment manager should ensure that the termination process of an OFC is carried out in an orderly manner, and that the OFC's shareholders are treated fairly.

10.3 A proposal for a termination of an OFC under this Chapter may be submitted by the OFC to the Commission and should include:

- (a) a solvency statement under 10.4
- (b) reasons for the OFC's termination;
- (c) proposed key procedures for such termination;
- (d) consequences of such termination; and
- (e) effect on its shareholders.

10.4 Before a submission is made under 10.3, the board of directors must make a full enquiry into the affairs of the OFC to determine whether it could give a confirmation that the OFC will be able to meet all its liabilities within 12 months from the date of that confirmation ("**solvency statement**").

10.5 This solvency statement must:

- (a) relate to the OFC's affairs within 5 weeks immediately preceding the date of submission of the termination proposal to the Commission;
- (b) be approved by the board of directors and signed on their behalf by one director; and
- (c) contain the confirmation referred to in 10.4.

10.6 The solvency statement must annex a statement addressed to the directors by the auditor of the OFC, to the effect that, in the auditor's opinion, the confirmation by the directors as to the matters mentioned in 10.4 is not unreasonable in all the circumstances.



## **Procedures and notice of termination**

- 10.7 The instrument of incorporation of an OFC must clearly disclose the circumstances and procedures to be followed for conducting the termination and arrangements for distribution of assets to shareholders, including a reasonable notice to its shareholders containing relevant and key particulars and procedures of the termination and impact on shareholders. There should be adequate disclosure of the termination process to investors at the same time and in an appropriate and timely manner.
- 10.8 The OFC should note that with effect from the date of the notice to its shareholders on its proposed termination:
- (a) the OFC must no longer be marketed and must not accept subscription from new investors; and
  - (b) the corporate powers of the OFC and the powers of the directors may continue solely for carrying on business operations that are essential for closing down its business.
- 10.9 During the termination process and in valuing the assets of the terminating OFC, the directors in conjunction with the investment manager must ensure that fair valuation of the assets will apply, and seek to address conflicts of interest arising.
- 10.10 The offering document of an OFC must disclose:
- (a) a summary of the circumstances under which an OFC can be terminated;
  - (b) parties who may apply for termination of the OFC; and
  - (c) the extent to which approval or consent from the OFC's shareholders is required to effect termination.

## **Cancellation of registration**

- 10.11 Once the OFC's assets have been fully realised, all liabilities have been settled, and proceeds have been distributed to shareholders, the board of directors may apply to the Commission for cancellation of registration under section 112ZH of the Ordinance together with:
- (a) the final accounts of the OFC accompanied by the auditor's report;
  - (b) a declaration signed by the board of directors and the investment manager confirming completion of realization of assets and distribution of proceeds in accordance with the OFC's instrument of incorporation, and that the OFC has no outstanding liabilities; and
  - (c) an application for withdrawal of authorization (in the case of public OFCs only).
- 10.12 Written notification to investors must be made prior to and upon cancellation of registration, with explanation as to the reasons for the OFC's termination and cancellation of registration.



## **Winding up**

- 10.13 In the case of a termination of an OFC by way of conducting a statutory winding-up, the OFC shall comply with the OFC Rules. The registration of the OFC will be automatically cancelled upon the completion of the winding-up. The OFC shall keep the SFC informed as to the material progress of the winding-up, comply with information requests of the SFC as to the winding-up, and provide such notifications to the SFC as are required under the OFC Rules.



## Section II: Requirements applicable to private OFCs only

### Chapter 11: Investment scope

- 11.1 At least 90% of the gross asset value of a private OFC must consist of (1) those asset types the management of which would constitute a Type 9 regulated activity, and/ or (2) cash, bank deposits, certificates of deposit, foreign currencies and foreign exchange contracts.
- 11.2 A private OFC may invest in other asset classes not set out in 11.1 of a value not exceeding a maximum of 10% of the gross asset value of the OFC (“10% de minimis limit”), such 10% de minimis limit shall be set out in the instrument of incorporation of the OFC.
- 11.3 In the case of an umbrella OFC, the 10% de minimis limit is applicable to the gross asset value of each sub-fund as well as to the gross asset value of the umbrella OFC as a whole.

*Note: The investment manager is expected to manage and monitor its investments on an on-going basis and in a prudent manner to ensure compliance with the 10% de minimis limit.*

- 11.4 The investment scope and investment strategies adopted by the investment manager, including the restriction of the 10% de minimis limit, must be clearly disclosed in the offering documents of the OFC.



## Chapter 12: Scheme changes

12.1 No material change to an OFC may be made without shareholders' approval.

*Note: The changes under 12.1 are generally expected to include the following:*

- (a) material changes to the OFC's investment objectives and policy (e.g. significant changes to asset class);*
- (b) changes to the OFC's maximum leverage limit; or*
- (c) other changes which may materially prejudice shareholders' rights.*

12.2 Where any change under 12.1 involves an amendment to the instrument of incorporation of an OFC, it must be submitted to the SFC for prior approval.

12.3 For changes to an OFC which may reasonably be expected to affect investors' investment decisions, reasonable prior notice should be provided to shareholders.

*Note: The changes under 12.3 are generally expected to include the following:*

- (a) changes to key operators;*
- (b) changes in fee structure; or*
- (c) changes in dealing and pricing arrangements.*

12.4 For changes to the OFC other than those referred in 12.1 and 12.3, reasonable notification should be provided to shareholders as soon as practicable.



## Chapter 13: Fund operations and disclosure

### Fund operations

- 13.1 Fund operations including pricing, dealing, issue and redemption of shares, valuation, distribution policy, use of leverage, fees and charges in respect of a private OFC should be clearly set out in its instrument of incorporation and offering documents.
- 13.2 In particular, the following principles must be complied with at all times:
- (a) the General Principles;
  - (b) scheme property should be regularly valued in good faith;
  - (c) there should be a proper and disclosed basis for asset valuation, pricing and redemption of shares; and
  - (d) offer and redemption prices should be carried out at forward prices.

### Disclosure

- 13.3 The offering documents and other disclosure of an OFC must comply with the General Principles.
- 13.4 The offering document must be filed with the Commission (a) following the registration of the OFC and (b) in the case of changes, within one week from date of issuance.



## Appendix C: Fees proposed to be charged in respect of an OFC

### (I) Proposed fees chargeable by the SFC in respect of an OFC

		Public OFC*	Private OFC
<b>Single OFC</b>		<b>Application fee: <u>\$20,000</u></b> <b>Authorisation fee: <u>\$10,000</u></b> <b>Post-authorisation:</b> Annual fee: <u>\$6,000</u>	<b>Application and registration fee: <u>\$5,000</u></b> <b>Post-registration:</b> Per application for each change: <u>\$300</u>
<b>Umbrella OFC</b>	<b>For the umbrella</b>	<b>Application fee: <u>\$40,000</u></b> <b>Authorisation fee: <u>\$20,000</u></b> <b>Post-authorisation:</b> Annual fee: <u>\$7,500</u>	<b>Application and registration fee: <u>\$10,000</u></b> <b>Post-registration:</b> Per application for each change: <u>\$300</u>
	<b>For each sub-fund</b>	<b>Application fee: <u>\$5,000</u></b> <b>Authorisation fee: <u>\$2,500</u></b> <b>Post-authorisation:</b> Annual fee: <u>\$4,500</u>	<b>Application and registration fee: <u>\$1,250</u></b> <b>Post-registration:</b> Per application for each change: <u>\$300</u>

*\*In respect of public OFCs, no additional new fees would apply. The above is a recap of fees applicable to SFC-authorized publicly offered funds under the existing Securities and Futures (Fees) Rules (Cap.571AF).*



**(II) Proposed fees chargeable by the CR in respect of an OFC**

Table A: Overall fees (44 fees)

Item no.	Fee particulars	Fee payable
<b><i>Incorporation of an OFC</i></b>		
1.	For incorporation of an OFC under section 112C of the SFO	\$2,555
2.	For lodging of an incorporation form and a copy of the instrument of incorporation delivered under section 112C of the SFO	\$479 (non-refundable)
<b><i>Change of name</i></b>		
3.	For lodging of a notice of change of name delivered under the proposed OFC Rules	\$160 (non-refundable)
4.	For issuing a certificate of change of name under the OFC Rules	\$1,245
<b><i>Appointment of receiver or manager</i></b>		
5.	For registering a notice of appointment of a receiver or manager/ a notice of mortgagee entering into possession of property	\$40
<b><i>Inspecting or obtaining documents or information</i></b>		
6.	34 fees on the inspection or obtaining of documents relating to the incorporation or particulars of OFCs (see <b>Table B</b> below)	ranging from \$9 to \$500
7.	(a) On an inspection of a liquidator's statement sent to the Registrar of Companies ("the Registrar") under section 284 of the C(WUMP)O as applied to the winding up of an OFC by virtue of the OFC Rules	\$26



Item no.	Fee particulars	Fee payable
	(b) For a copy of or extract from any such statement – (i) if the copy is made by photographic means – for each page or portion of a page Provided that, where any copy exceeds in size 210 x 297 mm, such additional fee, not exceeding \$5, shall be paid as the Registrar may direct; (ii) if the copy is made by other means – per page (uncertified) per page (certified)	\$13  \$4 \$8
<b>Miscellaneous</b>		
8.	For certifying a copy of or an extract from a document, or a copy of information contained in a record, per copy or extract	\$130



**Table B: Fees on the inspection or obtaining of documents relating to the incorporation or particulars of OFCs**

<b>Item no.</b>	<b>Fee particulars</b>	<b>Fee payable by unregistered online user</b>	<b>Fee payable by registered online user</b>	<b>Fee payable by on-site user</b>
1.	For inspecting the index of directors kept by the Registrar – (a) for each inspection of the list of directors of an OFC (b) for each inspection of the particulars of a director of an OFC (c) for each inspection of all the directorships held by a person in any OFCs	\$11 \$11 \$22	\$11 \$11 \$22	\$11 \$11 \$22
2.	For obtaining, by way of downloading through online medium, an image record of the following documents kept by the Registrar – (a) each incorporation form (b) instrument of incorporation (c) the accounts made up by a liquidator in respect of an OFC being wound up under the OFC Rules (d) any other document	\$18 \$23 \$23 \$10	\$16 \$21 \$21 \$9	Not applicable Not applicable Not applicable Not applicable
3.	For obtaining, at the office for the registration of OFCs, a copy of an image record of the following documents kept by the Registrar – (a) each incorporation form (b) instrument of incorporation (c) the accounts made up by a liquidator in respect of an OFC being wound up under the OFC Rules (d) any other document	Not applicable Not applicable Not applicable Not applicable	Not applicable Not applicable Not applicable Not applicable	\$30 \$35 \$35 \$20
4.	For online inspection of, and obtaining an image record of the following documents kept by the Registrar – (a) each incorporation form (b) instrument of incorporation (c) the accounts made up by a liquidator in respect of an OFC being wound up under the OFC Rules (d) any other document	\$23 \$29 \$29 \$13	\$21 \$26 \$26 \$12	Not applicable Not applicable Not applicable Not applicable



<b>Item no.</b>	<b>Fee particulars</b>	<b>Fee payable by unregistered online user</b>	<b>Fee payable by registered online user</b>	<b>Fee payable by on-site user</b>
5.	For obtaining a copy of any record containing the current particulars of an OFC, per OFC	\$22	\$22	\$22
6.	For registering an account with the Registrar for inspecting and obtaining documents and information specified in items 1, 2, 4 and 5 above per year – (a) for a principal account (b) for each subsequent account	Not applicable Not applicable	\$500 \$100	Not applicable Not applicable



***(III) Proposed fees chargeable by the ORO in respect of an OFC<sup>1</sup>***

Item no.	Fee particulars	Fee payable
<b><i>Fees adapted from Table A of Schedule 3 to the Companies (Fees and Percentages Order) (Cap. 32C) (“the Order”) (11 fees)</i></b>		
1.	On an inspection of a copy of the liquidator’s accounts filed under section 203(4) or (6) of the C(WUMP)O <sup>2</sup> (as applied to an OFC by virtue of the OFC Rules)	\$11
2.	On an application by a liquidator to the OR for a special bank account under section 202 of the C(WUMP)O <sup>3</sup> (as applied to an OFC by virtue of the OFC Rules)	\$360
3.	On an order by the OR for a special bank account	\$360
4.	On an application by a liquidator to the OR acting as a committee of inspection	\$360
5.	On an application to the OR – (a) under section 285 of the C(WUMP)O <sup>4</sup> (as applied to an OFC by virtue of the OFC Rules) for payment of money out of the Companies Liquidation Account (b) after 6 months from the date of issue, for the re-issue of a lapsed cheque or money order in respect of moneys standing to the credit of that account	\$55  \$55
6.	On every payment under section 285 of the C(WUMP)O (as applied to an OFC by virtue of the OFC Rules) of money out of the Companies Liquidation Account, to be charged as follows – (a) where the money consists of unclaimed dividends, on each dividend paid out;	\$50 (on each \$1,000 or fraction of \$1,000)

<sup>1</sup> Given that the winding-up procedures for conventional companies and OFCs are largely the same, the fee levels in this annex are the same as those for winding-up of conventional companies.

<sup>2</sup> Every liquidator (other than the Official Receiver (“OR”)) of a company which is being wound up by the court is required send to the OR an account of his receipts and payments as liquidator. Section 203(4) of the C(WUMP)O provides for the filing with the OR and the court when such account has been audited (unless the OR decides that the account need not be audited). Even if the OR decided that the account need not be audited, the OR can subsequently cause it to be audited. Section 203(6) provides for the filing of such audited account.

<sup>3</sup> Section 202 of the C(WUMP)O provides for payments of a liquidator into the bank account where the Companies Liquidation Account is kept or, on the application of the liquidator to the OR, into a special bank account specified by the liquidator.

<sup>4</sup> Section 285 of the C(WUMP)O provides for the payment of unclaimed assets to the Companies Liquidation Account.



Item no.	Fee particulars	Fee payable
	<p>(b) where the money consists of undistributed funds or balances, on the amount paid out).</p> <p>The total fees taken under this item in respect of undistributed funds or balances shall not exceed \$37,500 in each liquidation.</p>	\$50 (on each \$1,000 or fraction of \$1,000)
7.	For insertion in the Gazette of a notice relating to an OFC which is being wound up by the court	\$330
8.	On an application by a member of the public to the OR for a search on whether a winding-up petition has been presented against an OFC	\$80
9.	On a proof of debt above \$250 (other than a proof for workmen's wages) (This fee includes administering oath and filing. No fee is payable on a proof for \$250 or under.)	\$35
<b><i>Fees adapted from Table B of Schedule 3 to the Order (18 fees)</i></b>		
10.	On the aggregate amount of assets realised and brought to credit by a liquidator (including the OR when he is acting as liquidator), after deducting any sums paid to secured creditors, other than holders of floating charges in respect of their securities and any sums spent out of money received in carrying on the business of the OFC	<p>(a) On the first \$500,000 or fraction thereof, \$100 on every \$1,000 or fraction thereof;</p> <p>(b) On the next \$500,000 or fraction thereof, \$75 on every \$1,000 or fraction thereof;</p> <p>(c) On the next \$4,000,000 or fraction thereof, \$65 on every \$1,000 or fraction thereof;</p> <p>(d) On the next \$5,000,000 or fraction thereof, \$37.5 on every \$1,000 or fraction thereof;</p> <p>(e) On the next \$40,000,000 or fraction thereof, \$20 on every \$1,000 or fraction thereof;</p>



Item no.	Fee particulars	Fee payable
		(f) On all further amounts, \$10 on every \$1,000 or fraction thereof.
11.	Where the OR acts as provisional liquidator only – (a) where no winding-up order is made upon the petition, or where a winding-up order is rescinded, or all further proceedings are stayed prior to the summoning of the statutory meetings of creditors and contributories; or (b) where a winding-up order is made but the OR is not continued as liquidator after the statutory meetings of creditors and contributories	Such amount as the court may consider reasonable to be paid by the petitioner or by the OFC Such amount as the court may consider reasonable
12.	Where the OR acts as liquidator of the OFC and a special manager is appointed (to include the OR's services as provisional liquidator)	Such amount as the court may consider reasonable
13.	In all other cases where the OR acts as liquidator of the company (to include his services as provisional liquidator) – (a) In respect of every 10 members, creditors and debtors, and every fraction of 10 (This fee includes cost of official stationery, printing, books, forms and postages in Hong Kong.) (b) On every payment made into the Companies Liquidation Account under section 202 of the C(WUMP)O (as applied to an OFC by virtue of the OFC Rules) (This item does not include (i) where the OR collects, calls or realises property for debenture holders, the total assets, including the produce of calls on contributories, realised or brought to credit by the OR; or (ii) money received in carrying on the business of the OFC.) (c) On the amount distributed in dividend or paid to contributories, preferential creditors and debenture holders	\$620  \$170  5% on amount distributed
14.	Where the OR collects, calls or realises property for debenture holders, fee is to be paid out of the proceeds of the calls or property – (a) On the total assets, including the produce of calls on contributories, realised or brought to credit by the OR, after deducting the amount spent out of the money received in carrying on the business of the OFC (b) The same fee as under Item 13(c) above to be paid out of the proceeds of	10% on proceeds  5% on amount distributed



Item no.	Fee particulars	Fee payable
	such calls or property	
15.	Where the OR realises property for secured creditors other than debenture holders, a fee is to be paid out of the proceeds of the property – On the total assets, including the produce of calls on contributories, realised or brought to credit by the OR, after deducting the amount spent out of the money received in carrying on the business of the OFC.	10% on proceeds
16.	Where the OR performs any special duties not provided for under the Tables in the Order	Such amount as the court may consider reasonable
17.	Travelling, keeping possession, law costs, and other reasonable expenses of the OR	The amount disbursed
18.	Notwithstanding the fees and percentages prescribed in Items 10, 12 to 16 above, where the OR acts as liquidator	Total fees collected should not be less than \$11,250
<b><i>Fees adapted from the Companies (Winding-up) Rules (Cap. 32H) (2 fees)</i></b>		
19.	The costs of summoning a meeting of creditors or contributories at the instance of any person other than the OR, including all disbursements for stationery, printing, postage within Hong Kong (but excluding hire of room outside the ORO)	\$1,440
20.	Deposit in relation to a petition presented by the petitioner (to be paid before presenting a petition)	\$11,250