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# The Hong Kong Institute of Chartered Secretaries

## Submission:

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

16 August 2017

By Email Only: [ListingRegulation@sfc.hk](mailto:ListingRegulation@sfc.hk)

**Corporate Finance Division**  
Securities and Futures Commission  
35/F, Cheung Kong Center  
2 Queen's Road Central  
Hong Kong

Dear Sirs,

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

### **About HKICS**

The Hong Kong Institute of Chartered Secretaries (HKICS) is an independent professional institute representing Chartered Secretaries as governance professionals in Hong Kong and Mainland China with over 5,800 members and 3,200 students. HKICS originates from the Institute of Chartered Secretaries and Administrators (ICSA) in the United Kingdom with 9 divisions and over 30,000 members and 10,000 students internationally. It is also a Founder Member of the Corporate Secretaries International Association (CSIA), an international organisation comprising 14 national member organisations to promote good governance globally.

### **Long standing support for OFC structure**

HKICS has supported the development of the Open-ended Fund Companies (**OFC**) structure which contributes to Hong Kong's international reputation as a leading financial centre by providing an alternative to the unit trust structure for a collective investment scheme. In this connection, HKICS as a governance institute had made a submission to the Financial Services Branch of the Financial Services and the Treasury Bureau (**FSTB**) in relation to the consultation paper on legislative proposal to introduce a new open-ended fund company (OFC) structure in December 2015 focusing on the governance aspects under the OFC structure, along with calls on the Administration to expand the tax exemptions to facilitate the OFC structure in Hong Kong which is now being proposed by the Inland Revenue Department (IRD).

HKICS had at the time of its FSTB submission in December 2015 assumed that the SFC would conduct a separate consultation to provide time for the market participants and other relevant stakeholders to provide their comments upon the detailed OFC proposals as SFC is now doing. This background is intended

to set forth HKICS's long standing support for the OFC structure, including under the current SFC consultation with emphasis that the success of the OFC structure for promoting Hong Kong as an international financial centre.

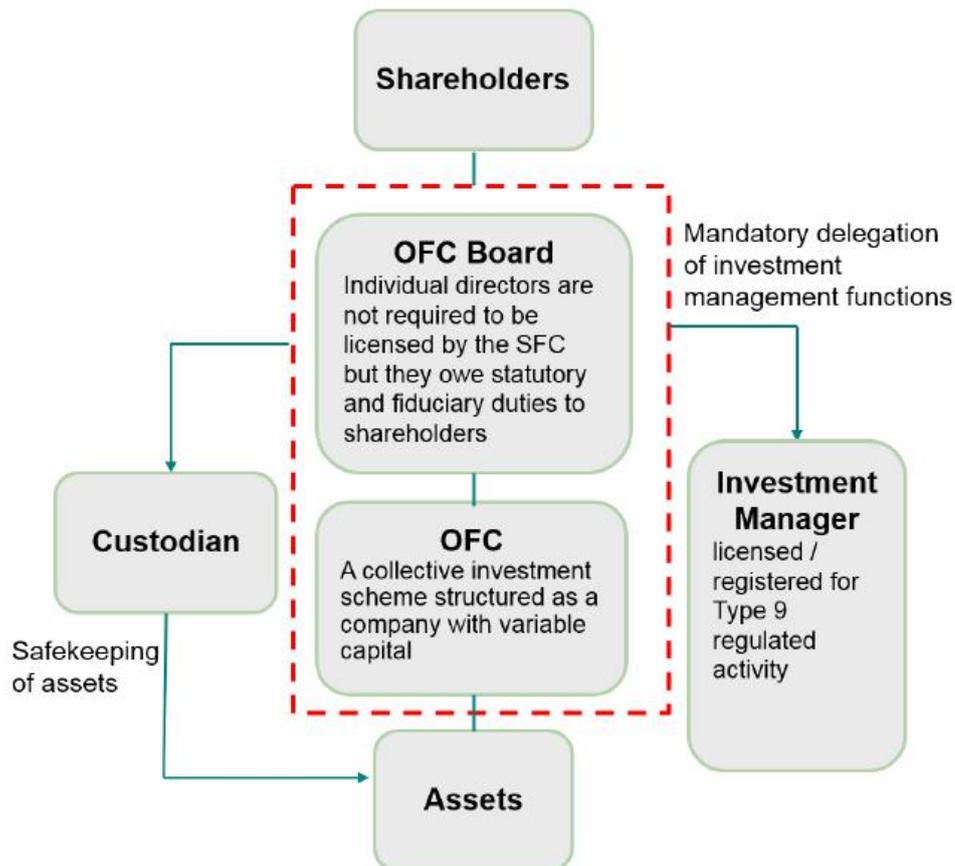
### **Consultation Paper on the Securities and Futures (Open-ended Fund Companies) Rules and Code on Open-ended Fund Companies**

HKICS supports both the SFC Rules and OFC Code. HKICS submits that the principal based approach under the SFC Code is preferable to an overly prescriptive approach from a governance perspective. HKICS has no issue with the following OFC structure, along with the related governance features, namely (1) requiring directors to fulfil statutory duties; (2) the use of custodian for safekeeping assets; (3) Type 9 licence for the investment manager operating; and (4) operating the OFC as a collective investment scheme (CIS). Further, (5) for public OFCs the compliance with the SFC Handbook for Unit Trusts and Mutual Funds, Investment-Linked Assurance Schemes and Unlisted Structured Investment Products (Products Handbook) would be appropriate as the OFC is a CIS:

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<sup>1</sup> For HKICS's earlier submission to FSTB, please refer to:

[https://www.hkics.org.hk/media/submission/attachment/SUBMISSION\\_A\\_2354\\_Submission%20to%20the%20Financial%20Services%20Branch%20of%20the%20Financial%20Services%20and%20the%20Treasury%20Bureau.pdf](https://www.hkics.org.hk/media/submission/attachment/SUBMISSION_A_2354_Submission%20to%20the%20Financial%20Services%20Branch%20of%20the%20Financial%20Services%20and%20the%20Treasury%20Bureau.pdf)



### The Consultation Questions

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

We support the process which is a streamlined approach conducive of ease of doing business, important for Hong Kong as an international financial centre.

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.

The SFC could take reference from the current practices of the Companies Registry (CR), and could check with the CR their views, as dealing with naming issues is the day-to-day business of the CR.

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

In our submissions to the FSTB, we have asked for provision of the OFC articles to be eventually made available for comments. We submit that the OFC instrument of incorporation (incorporating the articles) should be the subject of further consultation prior to being uploaded to the SFC website.

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?**

We agree with the General Principles. We believe that continuous training for directors and senior personnel are also important general principles to emphasize under the General Principles from a governance point of view.

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.**

We have no particular comments from a governance perspective.

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?**

There are currently reforms to extend Anti-Money laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance to trust and company service providers (TCSPs). TCSPs should be specifically allowed to be process agents.

7. **Do you have any views on the proposals concerning the shares, meetings and resolutions of an OFC discussed above?**

HKICS had Member views submitted during the FSTB consultation relating to the use of management shares, and non-participating share structures as with Cayman Islands' model. We welcome the flexibility in allowing OFCs to adopt these. The issue remains whether transfers of non-participating shares to investors, if adopted, would attract stamp duty. We hope for clarity in this regard.

- 8. Do you agree with the proposed approach with regards to the filings with the CR? Please explain your view.**

HKICS welcomes the table set out under paragraph 79 of the Consultation Paper, which sets out the working list which is practical and useful for compliance.

- 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?**

We have no issue with any market consensus in this regard.

- 10. Do you agree with the proposed requirements regarding the financial reports of an OFC? Please explain your view.**

We have no issue as to whether simplified HKFRS or IFRS are used as accounting standards as part of related relaxations for private OFCs.

- 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.**

There should be clear and prominent notice in intelligible terms given to investors, which should not be contained in boiler plate clauses or buried in legalese from a governance perspective. We have no issue with cross sub-funds investments if the requisite notice is provided to all relevant investors.

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

We have no particular comments.

- 13. What are your views on the proposed requirements and steps for termination by application to the SFC?**

We have no particular issue with the approach.

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.

We agree with adoption of existing mechanism with necessary modifications.

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.

We believe that the approach is sound.

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.

We have no particular issue with the approach.

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

We have no particular issue with the approach.

Should you have any questions, please feel free to contact Samantha Suen FCIS FCS(PE), Chief Executive, HKICS or Mohan Datwani FCIS FCS(PE), Senior Director, and Head of Technical and Research, HKICS at 2881 6177 or [research@hkics.org.hk](mailto:research@hkics.org.hk).

Yours faithfully,

Ivan Tam FCIS FCS  
President  
The Hong Kong Institute of Chartered Secretaries