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特許秘書

The Hong Kong Institute of Chartered Secretaries

Submission:

Major forms for Open-ended Fund Company (OFC)

31 January 2018

By Email Only: kkyu@cr.gov.hk

Your ref: CR HQ/1-55/26 Pt.15

Companies Registry

15/F, Queensway Government Offices

66 Queensway

Hong Kong

Attn: Mr Yu Kwok-kuen

Secretary, Companies Registry Customer Liaison Group

Dear Sirs

Re: Major forms for Open-ended Fund Company (OFC)

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. HKICS is also a Founder Member of Corporate Secretaries International Association Limited (CSIA), an international organisation comprising 14 national member organisations to promote good governance globally.

Comments to Forms

We have collated the following Member views on the OFC forms as follows:

1. **Form OFCNC1 – Incorporation Form**

General Comment

- The processing time that the Securities and Futures Commission (SFC) would take to check for compliance with the registration requirements under section 112E of the Securities and Futures Ordinance (SFO) is unclear. Therefore, there could be the possibility of applicant's cheque(s) going stale after six months from the submission date.
- As such, the practice under the SFC's Frequently Asked Questions (FAQs) on 'Application Procedures for Authorization of Unit Trusts and Mutual Funds'¹, and 'Procedures of Application for Authorization relating to Structured Investment Products under the Code on Unlisted Structured Investment Products'² should be followed. That is, there should be a set of FAQs from the Registrar of Companies (CR) setting out that the applicant would not be required to deliver cheque(s) to the CR (including to the Business Registration Office for the Business Registration Certificate) unless the SFC determines to proceed with the registration.
- The CR may also consider adding under the additional notes for completion of the form the estimated time required for processing the registration of OFC, and how enquiries to the SFC on processing matters should be made.

Classification of OFC

- There could be a new section added to indicate whether the OFC being applied for with the CR is a private or publicly offered OFC. This would enable practitioners and the Stamp Duty Office dealing with OFCs to save time in ascertaining the stamp duty obligations relating to share transfers, if any, in the issued capital of privately offered OFCs after incorporation. Please refer to the amended section 19 of the Stamp Duty Ordinance.

¹ ([http://www.sfc.hk/web/files/PCIP/FAQ-PDFS/01_Application%20Procedures%20for%20Authorization%20of%20Unit%20Trusts%20and%20Mutual%20Funds%20\(under%20the%20existing%20fund%20authorization%20process\)_2.pdf](http://www.sfc.hk/web/files/PCIP/FAQ-PDFS/01_Application%20Procedures%20for%20Authorization%20of%20Unit%20Trusts%20and%20Mutual%20Funds%20(under%20the%20existing%20fund%20authorization%20process)_2.pdf))

² (<http://www.sfc.hk/web/files/PCIP/FAQ-PDFS/FAQs%20on%20Unlisted%20Structured%20Investment%20Products%20dated%208%20Apr16.pdf>)

Advisory note on directors' duties

- The CR should consider adding the following advisory note (similar to that contained under Form NNC1 and Form ND2A for companies incorporated in Hong Kong) as there is no reference to directors' duties under the Code on Open-ended Fund Companies (OFC Code):

"All directors of this company are advised to read 'A Guide on Directors' Duties' published by the Companies Registry and acquaint themselves with the general duties of directors outlined in the Guide in addition to the other applicable Codes and Rules issued by the SFC from time to time."

Section 5 and Continuation sheet B relating to Process Agent

- We note from paragraph 56 of the Executive Summary under the SFC's Consultation Paper of June 2017 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 [Companies Ordinance] in Hong Kong, or (c) a firm of solicitors or certified public accountants in Hong Kong".
- However, rule 102(2) of the Securities and Futures (Open-Ended Fund companies) Rules 2017 (OFC Rules) does not specify that any process or notice required to be served on a non-resident director has to be served on a partnership's last known principal place of business "in Hong Kong". Accordingly, we would suggest the CR liaising with the SFC to ensure that either rule 99 defining the capacity of process agent in the form of a company and partnership or rule 102(2) be amended to the effect that process or notice to be served on a non-resident director must be delivered to a corporation or partnership with an address in Hong Kong.
- Also, the details of process agent, including telephone number, facsimile number and electronic mail address of the process agent should be recorded by an OFC pursuant to rule 102(2) of the OFC Rules, and the details of the process agent to be stated in the form appears incomplete. We would suggest removing the sub-heading under subsection 5A – Details of Process Agent in the Form and Continuation Sheet as well

as removing the number of sub-section B in order to avoid any confusion which may be caused.

Statement of Director

- Please replace the word "the" by "a" director of this company in line 1, section 6(a) of Form OFCNC1.

Notes for completion

- Under rule 104(7), Schedule 10 to the OFC Rules, the residential address of a director does not include "an address at a hotel unless the person to whom it relates is stated...to have no other permanent address...". We would suggest that note 10 of Form OFCN1 be amended to tally with the rule.

2. Form OFCND1 – Notice of Appointment of Director

General

- In line with the comments to Form OFCNC1, the CR may also consider adding under the additional notes for completion for the form the estimated time required for processing the registration of OFC, and how enquires to the SFC on processing matters should be made.

Advisory note on directors' duties

- In line with the comments to Form OFCNC1, the CR should consider adding the advisory note (similar to that contained under Form NNC1 and Form ND2A for companies incorporated in Hong Kong) as there is no reference to directors' duties under the Code on Open-ended Fund Companies (OFC Code):

Section 3 and Continuation sheet B relating to Process Agent

- The comments under Form OFCNC1 is equally applicable to this form.

Notes for completion

- The comments under Form OFCNCI is equally applicable to this form.

3. Form OFCND2 – Notice of Cessation of Director

Cessation of non-resident director

- The CR should consider adding a new section to the form to indicate whether the ceasing director has previously been appointed a process agent. If that is the case, section 3 and Continuation Sheet B of the form should be completed. The cessation date of process agent of non-resident director must be the same as the ceasing director. If that is not the case, section 3 and Continuation Sheet B need not be completed and should be left blank.

4. Form OFCND3 – Notice of Change in Particulars of Director

Name of form

- We would suggest amending the name of the form to "Open-ended Fund Company – Notice of Change in Particulars of Director and Process Agent", as a change of particulars of process agent, if any, may be notified to the CR under section 3 and Continuation Sheet B of this form. The Chinese name of the form should correspond to the new name of the form.

Notes for completion

- The comments under Form OFCNCI is equally applicable to this form.

5. Form for reporting a change of process agent of non-resident director only

- We assume that a non-resident director may change his or her process agent and the director would be obliged to notify the CR and the SFC of such change in a prescribed form. Please clarify if a different prescribed form has to be used which must first be delivered to the SFC pursuant to paragraph 4.3 of the OFC Code.

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.

Yours faithfully,

David Fu FCIS FCS(PE)

President

The Hong Kong Institute of Chartered Secretaries