Hong Kong Institute of
Certified Public Accountants
香港會計師公會

28 August 2017

By email (ofc-consultation@sfc.hk) and by hand

Our Ref.: C/RIF, BH36941

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

Dear Sir/ Madam,

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

The Hong Kong Institute of Certified Public Accountants ("the Institute") has considered the consultation paper on the Securities and Futures (Open-ended Fund Companies) Rules ("Rules") and Code on Open-ended Fund Companies ("Code") and would like to provide views indicated below on the proposals.

Question 2: With regards to the name of an OFC, we would like to seek clarification whether the OFC regime is intended to allow for conversion to "closed-ended funds". In the case of a private OFC, there may be circumstances where the board of the private OFC and/ or its shareholders wish to restrict further changes to the shareholders and their respective shareholdings, which would, in effect, make the private OFC a closed-ended fund. Therefore, in such circumstances, including the term “open-ended fund company” or “OFC” in the name of such OFC might be misleading. In addition, the name of an OFC ending with “open-ended fund company” or “OFC” might restrict the flexibility for a fund to structure a private OFC. At the same time, we appreciate that OFCs should be required to make it known to persons dealing with them that they are OFCs and subject to relevant restrictions, etc.

Question 4: Regarding the general principles (paragraph 44 and Chapter 3 of the Code), we woud suggest that the first principle be expanded to "acting fairly and honestly". While acting honestly is already an element of the proposed content of the principle, it seems sufficently important to be highlighted as part of the summary.

Question 6: We suggest that the definition of "process agent" in sub-rule (c) of rule 99 be amended to refer to "a practice unit" under the Professional Accountants Ordinance (Cap. 50) instead of "a firm of certified public accountants (practising)". This would also cover corporate practices and CPAs practising in ther own name.

In connection with the role of directors, paragraph 5.1 of the Code states that, *"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."* We suggest that more details be provided on the extent to which the SFC would expect to consider the factors listed in the note, when determining whether a person fulfils the paragraph 5.1 requirements; for example, what would constitute relevant industry qualifications and/ or experience? Also, we would like to understand how this would interact with the statutory duties of directors under the Companies Ordinance (Cap. 622) ("CO").

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Paragraph 5.2 of the Code states that the independent director must not be a director or employee of the custodian. Presumably, he or she should also not be a director or employee of the investment manager. If so, this should be stated explicitly.

Question 8: With regard to the filing arrangements, we note that it is proposed that the notices pursuant to the Companies (Winding up and Miscellaneous Provisions) Ordinance (Cap. 32) ("CWUMPO") will be submitted directly to the Companies Registry and that these include notices relating to the certificate of solvency (footnote 34 of the consutation paper). However, under Chapter 10 of the Code, a solvency statement under paragraph 10.4 is among the items that must be submitted to the Commission as part of proposal for termination pursuant to paragraph 10.3. This apparent inconsistency needs to be further clarified.

Question 14: While we appreciate that directors will be bound by their statutory duties and relevant guidelines, we would, nevertheless, like to reiterate our previous suggestion that consideration be given to strengthening the checks and balances around the use of section 228A of CWUMPO. This provision gives directors the ability to wind up a company without reference to its members, and so greater protection may need to be given to members' rights and interests under this section. There may also need to be proper monitoring to ensure that the conditions set out in that section are properly complied with by the directors.

In relation to the above, however, instead of imposing additional monitoring requirements on section 228A windings up, we cannot see any specific provisions in the Rules or Code relating to creditors' voluntary windings up generally, that is, voluntary windings up of OFCs where the OFC is insolvent. Chapter 10 of the Code, and paragraph 79 of the consultation paper, as mentioned above, refer to the submission of a solvency statement to the Commission in the case of voluntary winding up, which implies a members' voluntary winding up, and the Rules appear to deal primarily with windings up by the court.

As regards an OFC in financial distress, it is unclear whether the Financial Institutions (Resolution) Ordinance (Cap. 628) may apply and if so how.

On financial reports, we should like to clarify whether directors' reports and business reviews have to be prepared by directors of both public and private OFCs.

In the broader interests of enhancing Hong Kong as centre for asset management, we would suggest that the SFC consider providing more detailed guidance (e.g., in the Rules, Code or separately), to explain how existing funds in other jurisdictions can redomicile themselves in Hong Kong, and consider developing a clear and practical mechanism to help the redomiciling of funds.

We have the following further observations on the detailed drafting in the proposed Rules and Code:

(i) Rule 130: When reading this rule, it is not entirely clear that the appointment of auditor could be made by shareholders by way of a provision in the instrument of incorporation, as indicated in paragraph 81 of the consultation paper. We suggest that this be made more explicit in the rule.

(ii) Rule 132: Rule 132(1) states, *"The remuneration of an auditor of an open-ended fund company must be fixed by the directors when making the appointment."* This wording differs from the provision in rule 132(2) and CO, section 404, both of which use the word "may". We recommend that "may" also be used in rule 130(1), to ensure consistency.

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(iii) Rule 153: The preceeding rule 152(2) requires that the financial statements must give a true and fair view of the financial position and financial performance of the company. On the other hand, rule 153(2) requires the auditors' to opine, whether the financial statements have been properly prepared in compliance with the accounting standards applicable to the financial statements. Given that CO, section 406 uses the term "true and fair view", in the auditors' opinion, the proposed wording in rule 153 may create some confusion. If it is intended that an OFC should prepare a set of financial statements that give a true and fair view, it is recommended that rule 153(2) be fine-tuned. For example, making reference to the CO, rule 153(2) may be amended to read as, *"An auditor's report must state, in the auditor's opinion, whether the financial statements give a true and fair view of the financial position and financial performance of an open-ended fund company, as required by rule 152(2)."*

In addition, we also note that paragraph 9.2 of the Code mentions: "The acceptability of other accounting standards [in addition to Hong Kong and International Financial Reporting Standards] may be considered by the Commission on a case-by-case basis." We understand that there are a number of funds that currently use other standards, in particular, US GAAP. On what basis, i.e., according to what criteria, will the acceptability of such standards be decided in each case?

(iv) Paragraph 10.6 of the Code: This paragraph requires a solvency statement to annex a statement addressed to the directors, to the effect that, in the auditor's opinion, the confirmation by the directors as to the matters mentioned in paragraph 10.4 "is not unreasonable in all the circumstances". We note that the Financial Conduct Authority in the United Kingdom has a similar requirement in relation to collective investment schemes: *"A statement which contains the confirmation under (2)(a) must annex a statement signed by the auditor appointed under Schedule 5 to the OEIC Regulations (Auditors) to the effect that, in his opinion, the enquiry required by (1) has been properly made and is fairly reflected by the confirmation."*[1] We should like to seek further information as to the source of, or precedents for, the proposed wording and whether the Commission sees any material difference between this and the wording used in the United Kingdom.

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Should you have any questions on the submission, please contact me at 2287 7084 or peter@hkicpa.org.hk

Yours sincerely,

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[1] https://www.handbook.fca.org.uk/handbook/COLL/7/3.pdf, see section 7.3.5