

SECURITIES AND FUTURES ORDINANCE (Chapter 571) ('Ordinance')

Pursuant to section 112ZR of the Ordinance, the Securities and Futures Commission publishes the following amendments to the Code on Open-Ended Fund Companies (the "OFC Code"). These amendments shall become effective on 11 September 2020.

1. Add the following paragraphs as the new 6.2A, 6.2B and 6.2C of the OFC Code after 6.2 of the OFC Code:-

"6.2A In conducting the investment management functions of the OFC, the investment manager should comply with the Fund Manager Code of Conduct, the Code of Conduct, the Management, Supervision and Internal Control Guidelines for Persons Licensed by or Registered with the Securities and Futures Commission, the Guideline on Anti-Money Laundering and Counter-Financing of Terrorism (For Licensed Corporations) and the Guideline on Anti-Money Laundering and Counter-Financing of Terrorism (For Authorized Institutions) as if all the investment management functions of the OFC are undertaken by the investment manager in the course of, and as an integral part of its conduct of the Type 9 regulated activity for which it is licensed by or registered with the Commission.

6.2B In conducting the investment management functions of the OFC, the investment manager should keep

- (a) such trading, accounting and other records as are sufficient to explain and reflect the financial position and operation of the investment manager's activities, including maintaining an audit trail of all transactions effected and contracts entered into by the investment manager, details of all orders initiated by the investment manager or instructions received by the investment manager, details of all income received by the investment manager, whether such income relates to charges made by the investment manager for the provision of services to the OFC, all information relating to the OFC accounts and transaction records produced by third parties and all relevant internal reports, accounting/securities ledgers, registers of securities, and records of investment processes adopted by the investment manager; and
- (b) those records in such manner as will enable an audit to be conveniently and properly carried out.

6.2C An investment manager which is a licensed corporation should retain records or documents related to its business of conducting investment management functions of an OFC in premises which have been approved by the Commission under section 130(1) of the SFO for keeping records or documents in relation to the regulated activity for which the investment manager is licensed by the Commission. The investment manager should retain such records or documents for a period of not less than seven years."

2. Replace 7.1 of the OFC Code with the following:-

“7.1 The custodian of an OFC should:

- (a) for public OFCs, meet the same eligibility requirements as set out in the UT Code for SFC-authorized funds; and
- (b) for private OFCs:
 - (i) meet the same eligibility requirements as set out in the UT Code for SFC-authorized funds; or
 - (ii) be a licensed corporation or registered institution licensed or registered for Type 1 regulated activity and meet the following criteria:

- A. its licence or registration granted under section 116(1) or section 119(1) of the SFO (as the case may be) is not subject to the condition that it shall not hold client assets;

Note: The terms “hold” and “client assets” are as defined in the SFO.

- B. for a custodian which is a licensed corporation, it at all times maintains paid-up share capital of not less than HK\$10 million and liquid capital of not less than HK\$3 million;
- C. the private OFC is, and remains at all times, a client of such licensed corporation or registered institution in respect of its business in Type 1 regulated activity;

Note: Where a private OFC will likely cease, or has ceased to be a client of the licensed corporation or registered institution, the licensed corporation or registered institution should inform the Commission prior to or as soon as practicable following the cessation. A grace period of six months for the licensed corporation or registered institution to continue to act as custodian of the private OFC will be allowed. The licensed corporation or registered institution should arrange for the transfer of the private OFC’s scheme property to another custodian (subject to SFC’s approval) to be appointed in place of the licensed corporation or registered institution as soon as practicable. An extended grace period may be allowed in exceptional circumstances. Early consultation with the Commission is encouraged.

- D. have at least one responsible officer or executive officer responsible for the overall management and supervision of its custodial function; and

- E. be independent of the investment manager.

Note: While the custodian and the investment manager may be bodies corporate having the same ultimate holding company, the custodian must be functionally independent of the investment manager. Amongst other things, there should be systems and controls in place to ensure that persons fulfilling the custodial function / safekeeping of the OFC's scheme property are functionally independent of persons fulfilling the OFC's investment management functions."

3. Add the following paragraph as the new 7.1A of the OFC Code after 7.1 of the OFC Code:-

"7.1A The custodian must:

- (a) ensure that it has sufficient experience, expertise and competence in safekeeping the asset types in which the OFC invests; and
- (b) maintain adequate internal controls and systems commensurate with the custodial risks specific to the type and nature of assets in which the OFC invests."

4. Replace 7.3 of the OFC Code with the following:-

"7.3 The custodian must:

- (a)
 - (i) hold in its custody all scheme property 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;
 - (ii) maintain a proper record of all other scheme property of the OFC which by its 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 scheme property belonging to the OFC, including cash and scheme property that cannot be held in custody, 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 scheme property of the OFC;
- (d) segregate the scheme property of the OFC from the assets of the custodian and, unless the scheme property of the OFC is held in

an omnibus client account with adequate safeguards in line with international standards and best practices to ensure that the scheme property of the OFC is properly recorded with frequent reconciliations, segregate the scheme property of the OFC from:

- (i) the assets of the investment manager of the OFC and its affiliates;
 - (ii) the assets of a sub-custodian, if any, throughout the custody chain; and
 - (iii) the assets of other clients of the custodian throughout the custody chain;
- (e) not reuse the scheme property of the OFC without prior consent from the OFC;
 - (f) put in place adequate risk management measures to ensure that it can properly carry out the above functions; and
 - (g) for private OFC custodians, comply with the requirements for safekeeping of OFC scheme property set out in Appendix A.”

5. Repeal 11.1, 11.2 and 11.3 of the OFC Code.

6. Replace 11.5 of the OFC Code with the following:-

“11.5 The investment scope and investment strategies adopted by the investment manager must be clearly disclosed in the offering documents of the OFC.”

7. Add the following note to 13.3 of the OFC Code:-

“Note: This would include ensuring that offering documents contain clear disclosures on all material risks specific to the type and nature of assets in which the OFC is invested, in particular where the OFC invests 10% or more of the gross asset value of the OFC in non-financial or other less common asset class(es).”

8. Add the following Appendix as the new Appendix A to the OFC Code:-

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Appendix A

Requirements for safekeeping of private OFC scheme property under 7.3(g) of the OFC Code

1. Custodians of private OFCs (“Private OFC Custodian”) should comply with the requirements set out in this Appendix.

Money of the private OFC in Hong Kong

2. Where a Private OFC Custodian that is not a bank receives or holds any money on behalf of a private OFC in Hong Kong ("Hong Kong Scheme Money"), it should:
- (a) establish and maintain in Hong Kong one or more segregated bank accounts designated as a trust account or client account for holding the Hong Kong Scheme Money received by it. Such bank account(s) should be established and maintained with an authorized financial institution in Hong Kong;
 - (b) pay all amounts of Hong Kong Scheme Money into a segregated bank account mentioned in paragraph 2(a) of this Appendix within one business day after the receipt of such monies;
 - (c) ensure that any amount of Hong Kong Scheme Money is retained in a segregated bank account mentioned in paragraph 2(a) of this Appendix until it is:
 - (i) paid in accordance with a written direction for Hong Kong Scheme Money from or on behalf of the private OFC;
Note: A "written direction for Hong Kong Scheme Money" is a written notice given to a Private OFC Custodian by or on behalf of a private OFC directing the Private OFC Custodian to pay a specified amount of Hong Kong Scheme Money in a particular manner and ceases to have effect after the Hong Kong Scheme Money to which it relates has been paid by the Private OFC Custodian in the manner directed.
 - (ii) paid in accordance with a standing authority for Hong Kong Scheme Money from or on behalf of the private OFC;
Note: A "standing authority for Hong Kong Scheme Money" is a written notice given to a Private OFC Custodian by or on behalf of a private OFC authorizing the Private OFC Custodian to deal with Hong Kong Scheme Money from time to time in one or more specified ways before the expiry date of the authority.
 - (iii) required in order to meet the private OFC's obligations to meet settlement or margin requirements in respect of any investment transaction carried out by the investment manager of the private OFC on behalf of the private OFC; or
 - (iv) required to pay Hong Kong Scheme Money that the private OFC, on whose behalf such Hong Kong Scheme Money is held by the Private OFC Custodian, owes to the Private OFC Custodian in respect of:
 - A. the carrying on by the Private OFC Custodian of any regulated activity for which it is licensed; or

- B. acting as the custodian of the private OFC;
- (d) not pay any amount of Hong Kong Scheme Money pursuant to a standing authority for Hong Kong Scheme Money if:
- (i) to do so would be unconscionable; or
 - (ii) the standing authority authorizes payment to an account in Hong Kong of
 - A. the Private OFC Custodian or its associated entity in circumstances other than those set out in paragraph 2(c)(iii) or (iv) of this Appendix; or
 - B. any corporation with which the Private OFC Custodian is in a controlling entity relationship or in relation to which its associated entity is a linked corporation,

and that account is not a segregated account; or

Note: Linked corporation, in relation to an associated entity of a Private OFC Custodian, means a corporation –

- (a) *of which the associated entity is a controlling entity;*
 - (b) *which is a controlling entity of the associated entity; or*
 - (c) *which has as its controlling entity a person which is also a controlling entity of the associated entity;*
- (e) pay out an amount held in a segregated bank account mentioned in paragraph 2(a) of this Appendix that is not Hong Kong Scheme Money within one business day of becoming so aware.

Securities of the private OFC in Hong Kong

3. Where a Private OFC Custodian receives or holds securities on behalf of a private OFC in Hong Kong (“Hong Kong Scheme Securities”), it should:

Note: For the purpose of paragraph 3 of this Appendix, “securities” refers to securities listed or traded on a recognized stock market or interests in a collective investment scheme authorized by the Commission under section 104 of the SFO.

- (a) establish and maintain in Hong Kong one or more segregated accounts designated as a trust account or client account for holding the Hong Kong Scheme Securities received by it. Such accounts should be established and maintained with an authorized financial institution in Hong Kong, a custodian approved by the Commission under section 11 of the Securities and Futures (Client Securities)

Rules (“CSR”) or another licensed corporation or registered institution licensed or registered for dealing in securities;

- (b) ensure that, as soon as reasonably practicable, the Hong Kong Scheme Securities are:
- (i) deposited in safe custody in a segregated account; or
 - (ii) registered in the name of:
 - A. the OFC on whose behalf the Hong Kong Scheme Securities have been received; or
 - B. the associated entity of the Private OFC Custodian;
- (c) deal with the Hong Kong Scheme Securities that it receives or holds in accordance with:

- (i) a written direction for Hong Kong Scheme Securities from or on behalf of the private OFC; or

Note: A “written direction for Hong Kong Scheme Securities” is a written direction given to a Private OFC Custodian by or on behalf of a private OFC directing the Private OFC Custodian to deal with any of the Hong Kong Scheme Securities in a particular manner, such as settlement of a sale order executed for the private OFC by the investment manager of the OFC and applying any of the Hong Kong Scheme Securities in question pursuant to a securities borrowing and lending agreement entered by the private OFC.

- (ii) a standing authority for Hong Kong Scheme Securities from or on behalf of the private OFC, except where (unless permitted under the CSR) this would result in a transfer of any of the Hong Kong Scheme Securities to an account in Hong Kong of:

- A. the Private OFC Custodian or its associated entity; or
- B. any corporation with which the Private OFC Custodian is in a controlling entity relationship or in relation to which its associated entity is a linked corporation;

other than an account referred to in paragraph 3(a) of this Appendix, or otherwise result in the Private OFC Custodian or any corporation with which the Private OFC Custodian is in a controlling entity relationship having the benefit or use of any of the Hong Kong Scheme Securities; or

- C. be unconscionable.

Note: A “standing authority for Hong Kong Scheme Securities” is a written notice given to a Private OFC Custodian by or on behalf of a private OFC authorizing the Private OFC

Custodian to deal with Hong Kong Scheme Securities from time to time in one or more specified ways.

A Private OFC Custodian which is a Type 1 intermediary may deal with Hong Kong Scheme Securities which are client securities or securities collateral of the intermediary in accordance with section 7 of the CSR.

Linked corporation, in relation to an associated entity of a private OFC Custodian, has the same meaning as set out in the Note to paragraph 2(d)(ii) above.

Other scheme property of a private OFC

4. Where any of the scheme property of a private OFC is not received or held by the Private OFC Custodian or its sub-custodian(s), the Private OFC Custodian should verify that the private OFC or the investment manager of the private OFC has authorized the payments of, transfers of or other dealings with the private OFC's scheme property.

Sub-custodians

5. Where sub-custodian(s) are appointed, a Private OFC Custodian should have proper oversight over the sub-custodian(s) to enable the Private OFC Custodian to be satisfied that the sub-custodian(s) are suitably qualified and competent in safekeeping any of the private OFC's scheme property. The Private OFC Custodian should have written internal control policies and procedures for:
 - (a) the selection of a sub-custodian for the safekeeping of any of the private OFC's scheme property, including an assessment of the sub-custodian's competence, regulatory and financial status, capabilities and internal controls and systems in discharging its delegated obligation of safekeeping of any of the private OFC's scheme property;
 - (b) the ongoing monitoring of such sub-custodian(s); and
 - (c) addressing actual or potential conflicts of interests arising from the appointment and oversight of the sub-custodian.
6. Although a sub-custodian may be engaged by a Private OFC Custodian to perform safekeeping of the scheme property of a private OFC, the responsibilities and obligations shall remain with the Private OFC Custodian.

Record-keeping

7. A Private OFC Custodian should keep such accounting and other records as are sufficient to:
 - (a) account in the books of the Private OFC Custodian for all of the private OFC's scheme property that:
 - (i) it receives or holds on behalf of each private OFC; and

- (ii) by its nature cannot be held in custody;
 - (b) enable all movements of such scheme property of a private OFC to be traced through its account systems and asset holding system;
 - (c) maintain an audit trail of all transactions relating to the scheme property of a private OFC (such as deposits and withdrawals of scheme property) effected by (i) the Private OFC Custodian; (ii) the private OFC; or (iii) the investment manager of the private OFC, all information relating to the accounts of the private OFC showing the details of all movements of scheme property of the private OFC produced by the Private OFC Custodian or third parties and all relevant internal reports and statements of account;
 - (d) show particulars of the liabilities, including any financial commitments and contingent liabilities of each private OFC; and
 - (e) demonstrate that the Private OFC Custodian has complied with the requirements set out in the OFC Code and all other requirements administered by the Commission which are applicable to the Private OFC Custodian.
8. A Private OFC Custodian which is a licensed corporation should retain records or documents related to its business of safekeeping of the scheme property of each private OFC in premises which have been approved by the Commission under section 130(1) of the SFO for keeping records or documents in relation to the regulated activity for which the Private OFC Custodian is licensed by the Commission. The Private OFC Custodian should retain such records or documents for a period of not less than seven years.

Risk management

9. A Private OFC Custodian must manage custody risk with adequate organisational arrangements to minimize the risks of loss of the scheme property of a private OFC.

General

10. In general, a Private OFC Custodian is expected to adopt internal policies and procedures, systems and controls that are substantially the same as those adopted by the Private OFC Custodian for the safekeeping of client assets received or held by the Private OFC Custodian in conducting a regulated activity for which it is licensed by or registered with the Commission ("RA assets"), in particular, in respect of scheme property of the private OFC of the same asset type as the RA assets.
11. For the avoidance of doubt, where a Private OFC Custodian which is licensed for Type 1 regulated activity and provides dealing in securities services to a private OFC receives or holds any client money, client securities and securities collateral on behalf of a private OFC in Hong Kong, it should:
- (a) treat and deal with such client money, client securities and securities collateral in accordance with the applicable provisions of the Securities and Futures (Client Money) Rules and CSR; and

- (b) keep such accounting, trading and other records in relation to the services provided in accordance with the applicable provisions of the Securities and Futures (Keeping of Records) Rules.
12. In performing its duties of safekeeping the scheme property of a private OFC, to the extent not already covered elsewhere in the OFC Code and this Appendix, a Private OFC Custodian which is licensed by or registered with the Commission to conduct a regulated activity should comply with the applicable provisions of the Code of Conduct, the Management, Supervision and Internal Control Guidelines for Persons Licensed by or Registered with the Securities and Futures Commission, the Guideline on Anti-Money Laundering and Counter-Financing of Terrorism (For Licensed Corporations) and the Guideline on Anti-Money Laundering and Counter-Financing of Terrorism (For Authorized Institutions) as if:
- (a) the holding of each of the private OFC's scheme property is undertaken in the course of, and as an integral part of its conduct of the regulated activity for which it is licensed by or registered with the Commission; and
 - (b) any reference to client assets, including client money, client securities and securities collateral in the applicable codes and guidelines, includes the private OFC's scheme property."

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