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## 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;
  - (e) details of any distribution declared and/ or paid during the financial period should be set out in the notes to the accounts; and

(f) information on cross sub-fund investments conducted during the financial period.

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 umbrella OFCs.

### **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.

9.9 All financial reports published by the OFC must be filed with the Commission within the time frame specified in 9.8.

## 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.

### Procedures and notice of termination

10.6 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.

- 10.7 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.
- 10.8 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.
- 10.9 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**

- 10.10 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).
- 10.11 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**

- 10.12 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 [deleted]

11.2 [deleted]

11.3 [deleted]

11.4 A private OFC must not be a business undertaking for general commercial or industrial purpose.

*Note: A private OFC will generally be regarded as “a business undertaking for general commercial or industrial purpose” if it engages predominantly in:*

- (i) a commercial activity, involving the purchase, sale and/or exchange of goods or commodities, and/or supply of services; and/ or*
- (ii) an industrial activity, involving the production of goods or construction of properties.*

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

## Chapter 12: Scheme changes

12.1 No material change to the instrument of incorporation of 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; or*
- (b) *other changes which may materially prejudice shareholders' rights.*

12.2 No other alteration to the instrument of incorporation of an OFC may be made unless:

- (a) 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
- (b) the directors certify in writing that in their opinion the proposed alteration is of the following nature, and that the custodian has no objection to such alteration:
  - (i) is necessary to make possible compliance with fiscal or other statutory, regulatory or official requirements; or
  - (ii) does not materially prejudice shareholders' interests, does not to any material extent release the directors, the investment manager or any other person from any liability to shareholders and does not increase the costs and charges payable from the scheme property; or
  - (iii) is necessary to correct a manifest error.

12.3 Reasonable prior notice to shareholders should be provided for any material changes which may affect investors' investment decisions, or materially impact on shareholders' rights. Notification of scheme changes should be provided to shareholders in accordance with the offering documents and/or the instrument of incorporation.

*Note: The circumstances and procedures for effecting a scheme change should be set out clearly in the offering documents.*

## 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/or offering documents as appropriate.
- 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.

*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).*

- 13.4 The offering document must be filed with the Commission (a) as soon as practicable following issuance by the OFC and (b) in the case of changes, within seven days from date of issuance of the revised offering document.



## 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
  - (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;

*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.*

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.