

28 August 2017

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

Dear Sir or Madam,

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

The purpose of this submission is in response to the Securities and Futures Commission (the "SFC")'s Consultation Paper on the Securities and Futures (Open-ended Fund Companies) Rules and Code on Open-ended Fund Companies dated 28 June 2017 (the "Consultation Paper").

Capitalised terms used in this response and not defined herein shall have the same meaning ascribed to them in the Consultation Paper.

General Observation and Our Response

Despite the rapid growth in asset management activities in Hong Kong, choice of investment fund structure is relatively limited in Hong Kong as compared with the other fund domiciled jurisdictions. In this connection, while the introduction of OFC is mostly welcomed by both Hong Kong and overseas fund managers and investors, it is not difficult to envisage that, unless the advantages brought about by the introduction of the OFC are attractive enough, such that OFCs are competitive and comparable to Cayman Islands etc. incorporated funds in terms of convenience in registration and/or administration, it is difficult that OFCs could be able to attract massive investors or asset management market players from worldwide. To this end, the largest deterrents for market players to consider OFCs, is the lack of clarity in respect of *taxation*, and the fact that there are *stringent reporting requirements and registration and administration processes of OFCs*, even in the context of private OFCs where investors are likely to be sophisticated and professional.

We hope the OFC structure could be successful and provide more diversity to the Hong Kong asset and wealth management market. As such, we summarise our views in this Paper for the SFC's consideration. In this response, we will highlight important areas which can enhance the attractiveness of OFCs, after which we will address some of the questions raised in the Consultation Paper.

Our recommendations

Re-domiciliation / Transfer from existing Hong Kong unit trust to OFC structure

A potential re-domiciliation mechanism, which is being proposed in the S-VACC structure in Singapore, is one important channel that will encourage an existing fund in other jurisdictions to re-domicile itself as a Hong Kong fund using the OFC structure. Mechanism to encourage existing Hong Kong unit trust to transfer into OFC structure will be equally important. We hope that the SFC can expressly provide rules and requirements in the OFC Code and OFC Rules as to how existing funds in other jurisdictions or Hong Kong unit trusts can re-structure themselves into Hong Kong OFCs.

In formulating the relevant rules and requirements, there are two important aspects which we suggest that the SFC must provide clarity in order to make the re-domiciliation/ transfer mechanism viable.

The first aspect is the Hong Kong tax implications, since it often would involve a complete change to the structure of the re-domiciling fund or the Hong Kong unit trust. To this end, there needs to be an assessment of whether or not there would be any change in the ultimate beneficial ownership of the underlying portfolio assets of the fund to determine whether or not any Hong Kong stamp duty would arise. To attract re-domiciliation /restructure to Hong Kong OFCs, availability of specific tax exemption in this regard will be a strong and valid justification to investors for the change.

Secondly, the permissibility for a re-domiciling fund or a Hong Kong unit trust to rely on its past performance track record is a very important factor that an investor takes into account when deciding whether to invest in a particular fund. Thus, without clarity on this aspect, it would deter the attractiveness of Hong Kong OFCs to be adopted by market players worldwide.

Responses to Questions in the Consultation Paper

Q1: Do you have any comments on the suggested one-stop process for the establishment of an OFC? Please explain your view.

We welcome the one-stop process for the establishment of an OFC, as this would lessen the burden of making dual filings. However, it is advisable for the SFC to prescribe in the OFC Rules and/or the OFC Code a clear timeline or performance pledge as to the timing of handling the establishment process of an OFC.

The main reason behind the importance of a timeline or performance pledge is that market players strive hope to arrange for the setting up of a fund in a short period of time to take advantage of market opportunities, when such opportunities present.

It is advisable for the SFC to consider from the efficiency point of view throughout the registration process of an OFC, in order to allow swift incorporation timeline as comparable to other jurisdictions.

Q5. 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.

It is a requirement in the OFC Code that a director of the OFC must be of good repute, appropriately qualified, experienced and proper for the purpose of carrying out the business of the OFC³.

It is advisable for the SFC to clarify the details and extent as to the factors which the SFC would consider in making its determination in this regard (especially in relation to the extent of the “relevant industry qualifications and/ or experience” as set out in paragraph 5.1(a) of the OFC Code), or otherwise dispense with such requirements, having regard to the fact that directors of the OFC are already subject to stringent statutory directors’ duties under the Companies Ordinance⁴.

Q10. Do you agree with the proposed requirements regarding the financial reports of an OFC? Please explain your view.

We hope that the SFC can clarify as to the kind of information which is required to be included in the financial report.

For example, it is unclear whether a business review in respect of the past financial year prepared by the directors of the OFC should be included, and how detail such business review is required to be.

Q17. Do you have any views on the proposed approach to the different types of scheme changes of a private OFC?

The proposed approach requires both (1) approval of shareholders and (2) approval of the SFC. We generally agree with the proposals that different types of scheme changes shall require approval of the OFC’s shareholders, as analogous to a Hong Kong private limited company where similar corporate actions would likewise require approval of its shareholders.

³ Proposed paragraph 5.1 of the OFC Code

⁴ Proposed s.112U of the new Part IVA in the Securities and Futures (Amendment) Ordinance 2016



That said, we suggest removing the need to obtain prior approval of the SFC in respect of scheme changes for private OFCs, because the inflexibility and administrative burden in obtaining SFC's approval would disproportionately outweigh the intended protection offered to investors.

In fact, such proposed approach is not in line with the international trend. For example, the proposed s. 41 of the S-VACC rules in Singapore requires only shareholders' approval and registration thereof. Likewise, the Mutual Funds Law of the Cayman Islands requires the filing of the amended offering document or amended prescribed details within 21 days⁵. Such proposed approach may be merely "administrative", the very presence of an additional hurdle could dis-incentivize funds from using the OFC structure.

In addition to the above, it is not clear from the consultation paper whether both public OFC and private OFC can be set up under the same OFC umbrella structure. While this is allowed under the unit trust structure, we suggest the SFC to keep a consistent approach on this.

Should you have any questions, please contact our
or email at

by telephone at

Yours faithfully,
For and on behalf of
BEA Union Investment Management Limited

⁵ S.4(8) of the Mutual Funds Law (2015 Revision)