



**SECURITIES AND
FUTURES COMMISSION**
證券及期貨事務監察委員會

Open-ended Fund Companies (OFC) – the Corporate Investment Fund Vehicle in Hong Kong

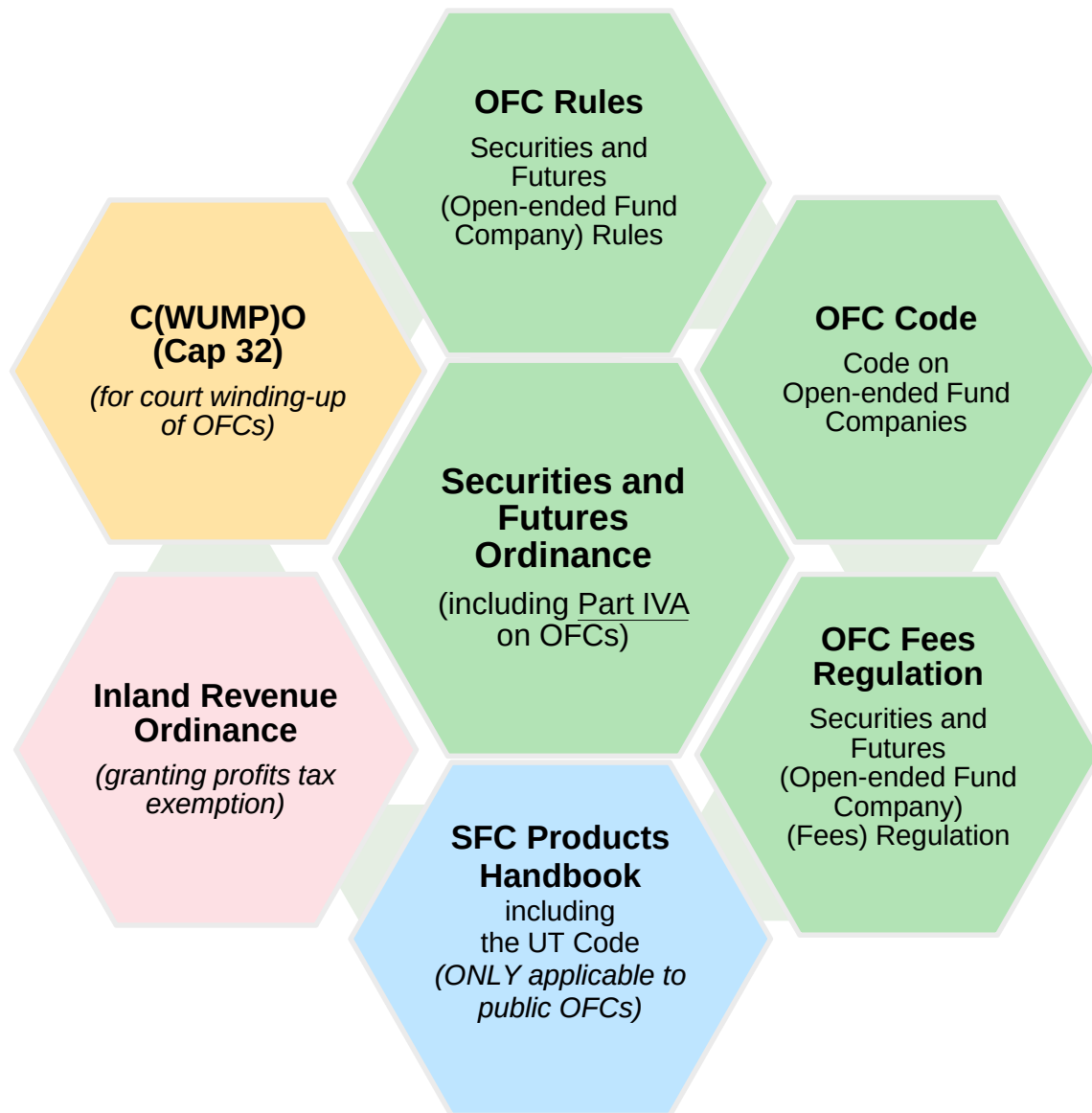
Updated - September 2020

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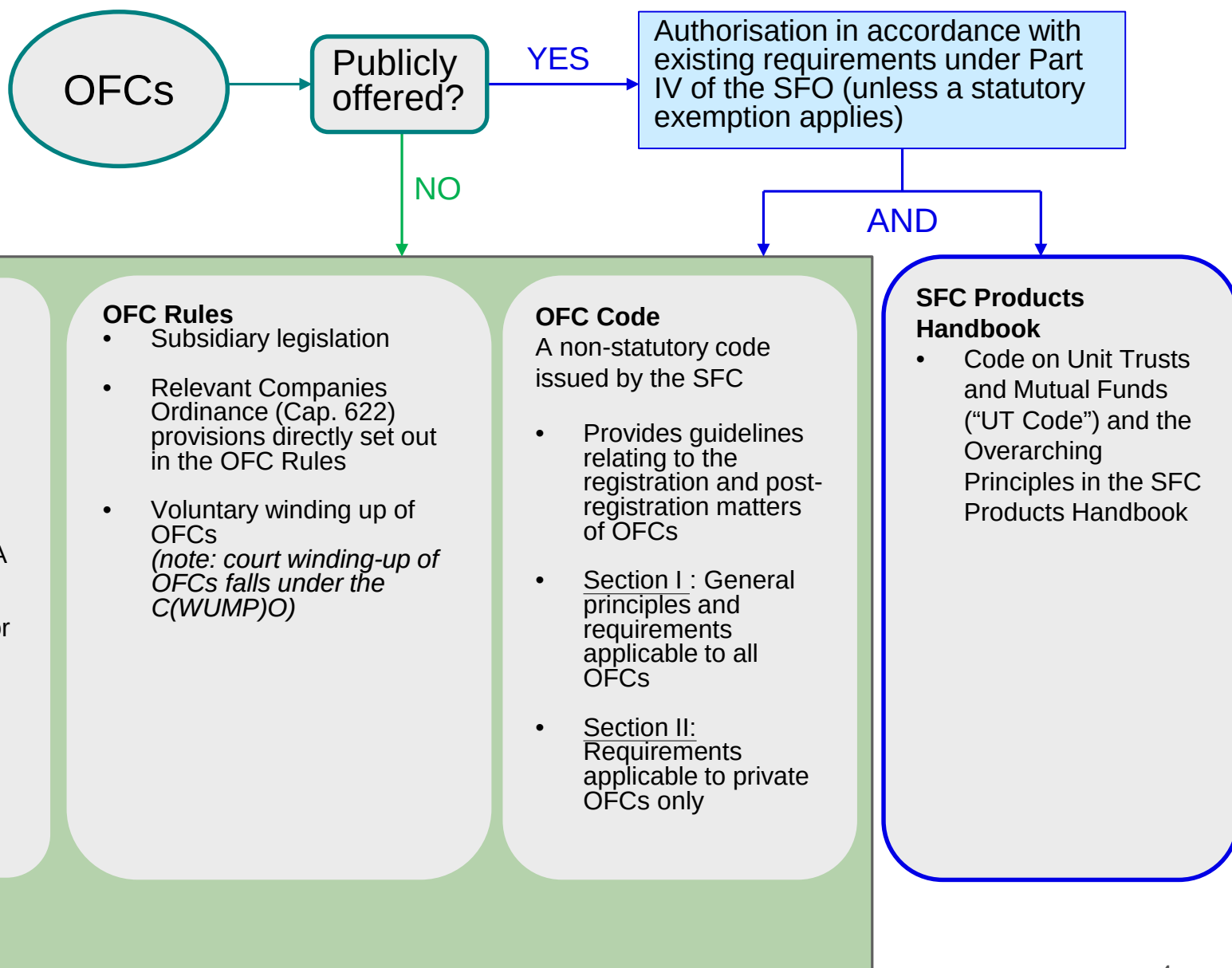
Legal and regulatory framework for OFC

The OFC regime came into effect on 30 July 2018

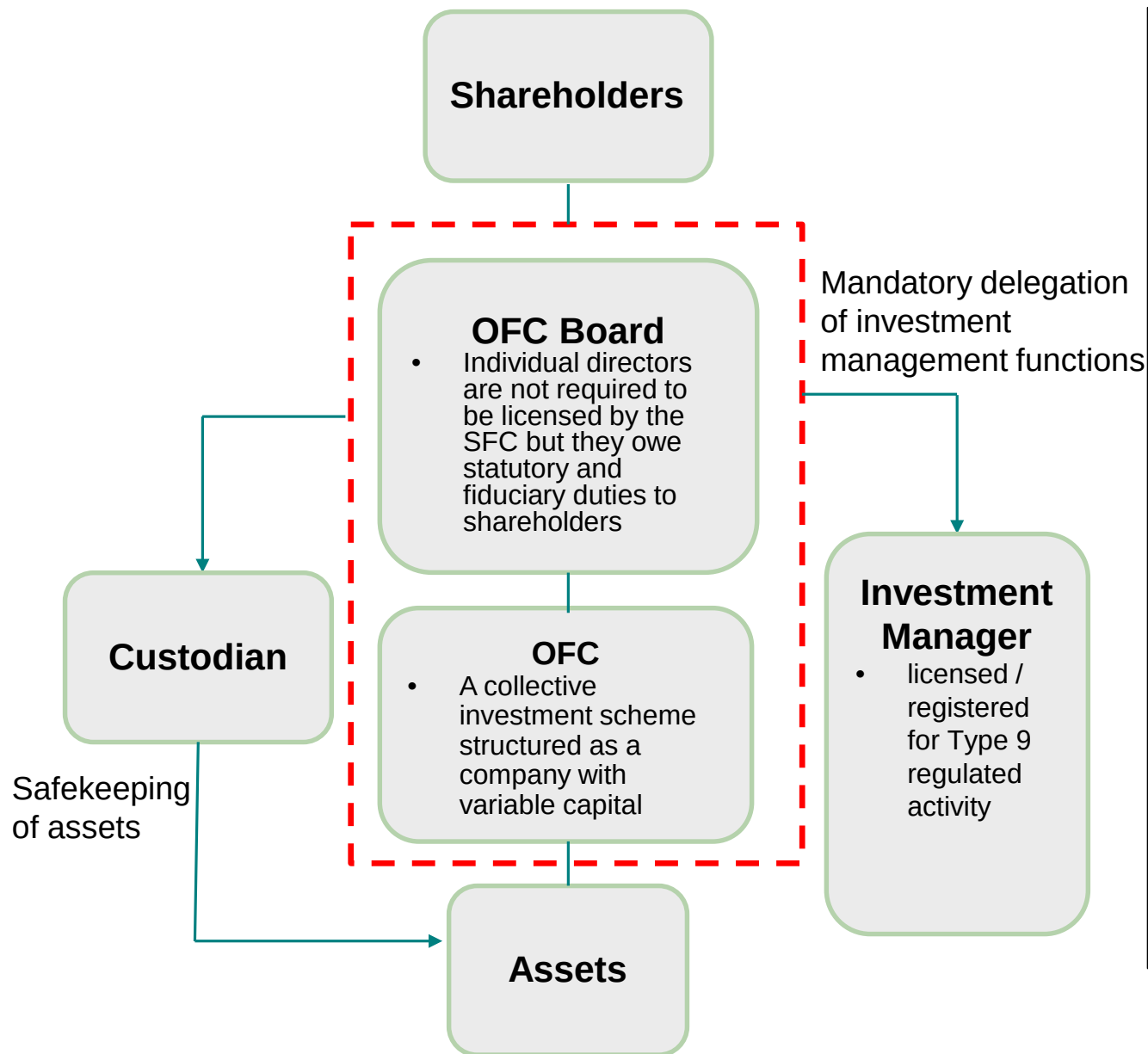


- **Primary regulator:** SFC
- **Incorporation and corporate filings:** Companies Registry (CR)
- **Winding up:** Official Receiver's Office (ORO)

Legal and regulatory framework for OFC



OFC structure

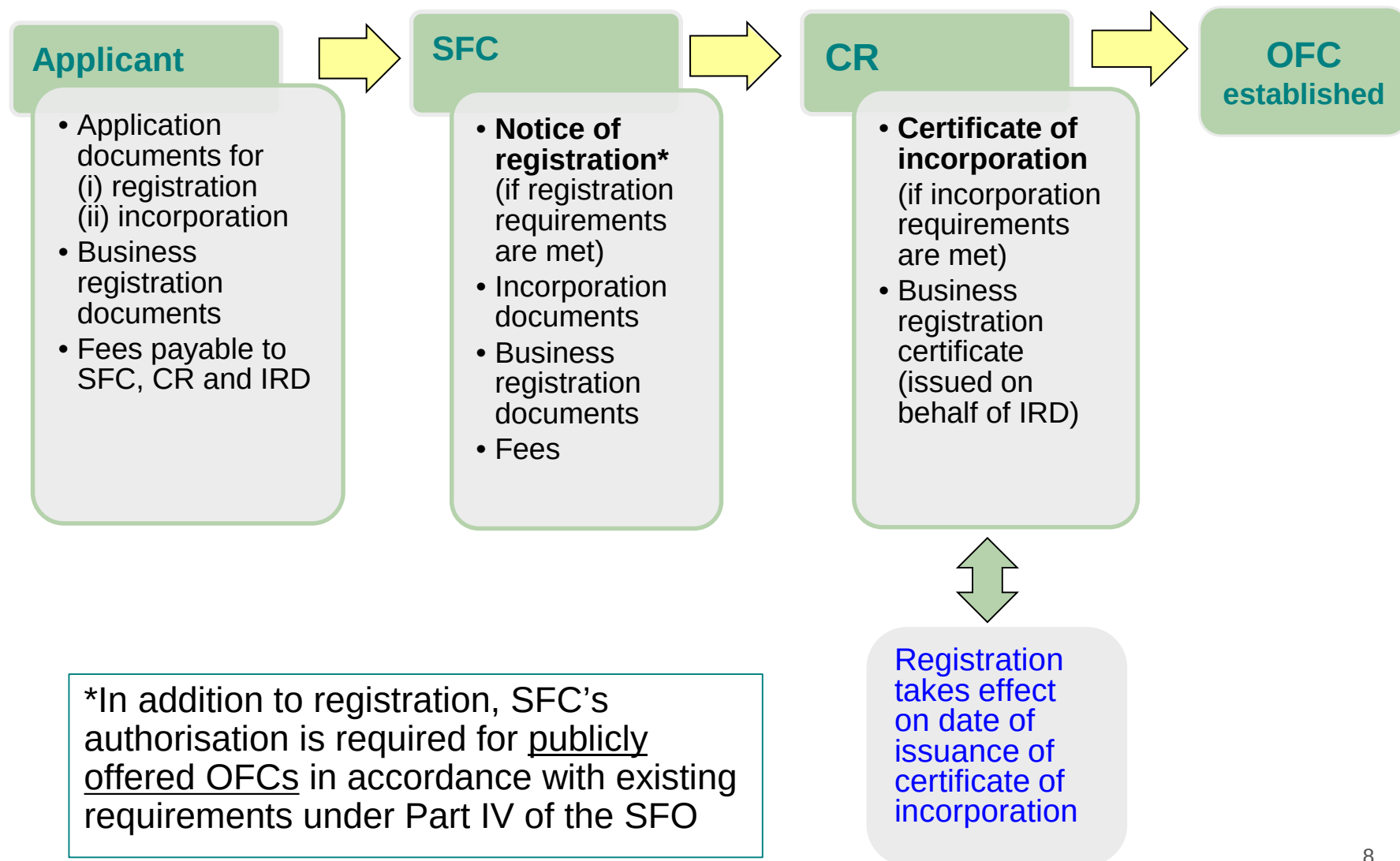


- A new corporate structure (in addition to unit trust form) for investment funds in Hong Kong
- Not subject to restrictions under Companies Ordinance ("CO") on (1) capital reduction; (2) distribution out of capital
- Can be used for both listed (e.g. ETFs) or unlisted funds
- Can be used for both public and private funds
- Can be used for closed-ended funds (i.e. can impose redemption terms and conditions subject to clear disclosure)

- **Public OFCs: OFCs which are offered to the public**
 - Compliance with essentially the same requirements under the UT Code as existing SFC-authorised unit trusts
- **Private OFCs: OFCs which are privately offered**
 - Key regulatory focus:
 - Key operators - directors, custodian and investment manager meet basic eligibility requirements
 - Investment Scope
 - No investment restrictions – private OFCs can invest in all asset classes without any limit
 - Compliance with basic principles and structural requirements
 - No pre-vetting of offering documents nor SFC's approval required for changes to the OFC's instrument of incorporation, offering documents, investment strategy and assets
 - SFC's approval required for change of name, appointment of key operators, establishment of sub-funds and termination of OFC or sub-fund only

Establishment of an OFC

Establishment of an OFC: “one-stop” flowchart



Application documents

Registration of OFC / approval of establishment of sub-fund

- Application Form
 - separate forms to be used for public and private OFCs
 - to be signed by proposed director/ senior executive of proposed investment manager, duly authorised by the applicant
- Information Checklist
 - separate forms to be used for public and private OFCs
- Instrument of Incorporation
 - to be signed by all of the first directors
 - templates for both private and public OFCs available on SFC website for reference
- Cheque
 - registration fee for private OFCs
 - application for authorisation fee for public OFCs (no separate fee for registration of public OFCs)

Application documents

For incorporation by CR and business registration by IRD

- Incorporation form (Form OFCNC1(SFC))(to be signed by any director of the OFC)
- A copy of the Instrument of Incorporation
- Notice to Business Registration Office (IRBR3)
- Cheque for incorporation fees, business registration fee and levy payable to CR

“One-stop” workflow

- Documents to be submitted to SFC prior to issuance of notice of registration
- SFC to send to CR together with notice of registration

Processing time

Private OFC

- Generally less than one month after application take-up by the SFC and where the registration requirements are met
- Existing private OFCs were registered within 7-14 business days after application take-up by the SFC

Public OFC

- Same as that for other SFC-authorized funds
- Generally ranging between one and three months after application take-up by the SFC, depending on its complexity, i.e. whether it is a “standard” or “non-standard” application

Instrument of incorporation

■ Contents

- Must include the mandatory provisions under the SFO and comply with the OFC Rules and OFC Code, and SFC Products Handbook in the case of an public OFC, e.g.
 - Objects of the OFC must include a statement on its operation as a collective investment scheme
 - The kinds of properties in which the OFC invests
 - Corporate administrative matters of the OFC, eg. procedures and notices for holding meetings, creation of shares and the rights attached to them
 - A statement that the company is an open-ended fund company with variable share capital
- **Indicative templates (including the mandatory and optional provisions) are available on SFC's website for reference**
 - The indicative instrument of incorporation provides the baseline contents. An OFC may include other provisions provided that they do not contradict the required contents

Key operators – Directors

- An OFC must have at least two directors, who must be
 - natural persons
 - aged 18 or above
 - not an undischarged bankrupt unless with the leave of the court
- At least one of the directors must be an independent director
 - OFC Code provides guidance on independent director, who must not be a director or employee of the custodian
- Directors must delegate investment management functions to the investment manager by an investment management agreement
- A non-resident director (i.e. a director whose usual residential address is outside Hong Kong) must appoint a process agent to receive any process or notice
 - an individual whose usual residential address is in Hong Kong;
 - a company; or
 - a firm of solicitors or certified public accountants (practising)

Key operators – Directors

■ Eligibility:

- The experience and expertise of the persons appointed as directors of an OFC, taken together, must be appropriate for carrying on the business of the company
- 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
- Examples of factors considered:
 - whether the person has relevant qualifications and/ or experience; and
 - whether the person, or any business with which the person has been involved, has been held by any court or competent authority to have breached any company, securities or financial markets laws and regulations, have been held for fraud or other misfeasance; or has been disciplined by, or disqualified from, any professional body
- Applicant should submit proposed director's profile – e.g. qualifications and work experience, licensing status etc.

Key operators – Investment manager

- **Eligibility:**

- Must be registered or licensed for Type 9 (asset management) regulated activity
- Must be and remain fit and proper, at and after the registration of the OFC

- **The investment manager is expected to:**

- Have sufficient experience, expertise and competence in managing the asset types in which the OFC will invest
- Carry out investment management functions of the OFC in accordance with the instrument of incorporation and investment management agreement
- Fulfill the duties and functions in compliance with applicable laws and regulations (including the Fund Manager Code of Conduct the Code of Conduct for Persons Licensed by or Registered with the SFC, 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)

- **Documents to support the appointment application:**

- Information in relation to the applicant having registered or licensed for Type 9 (asset management) regulated activity
- Information in relation to the applicant who is in the process of applying for a registration or licence for Type 9 (asset management) regulated activity, for example when the application is made

Key operators – Custodian

■ Eligibility

- For public OFCs, same requirements as to the type of entities and capital requirements as those under the UT Code; and
- For private OFCs, (i) same requirements as to the type of entities and capital requirements as those under the UT Code; or (ii) a licensed corporation or registered institution licensed or registered for Type 1 regulated activity which meets eligibility criteria under 7.1(b)(ii) of the OFC Code

■ Duties of custodian

- Statutory duty to take reasonable care, skill and diligence to ensure the safe keeping of the scheme property of the OFC that is entrusted to it (same for sub-custodian)
- Proper segregation of assets
- Safe-keeping and record keeping of assets
- Sufficient experience, expertise and competence in safekeeping the asset types in which the OFC invests
- Exercise due care in the selection, appointment and ongoing monitoring of its delegates, including sub-custodians
- Internal controls:
 - Public OFC – same as those under the UT Code
 - Private OFC – OFC directors to review the adequacy of the custodian's internal controls which should be commensurate with the OFC's nature, scale, complexity and underlying investments
- audit certificate not mandatory

■ **A non-Hong Kong custodian** (i.e. a custodian incorporated outside Hong Kong) must have a process agent to receive any process or notice

- Exception: a non-Hong Kong custodian that is a “registered non-Hong Kong company” as defined in the CO, since the CO already provides for a local authorised representative for service of documents

Offering documents

Public and private OFCs:

- **Must comply with disclosure requirements in the OFC Code, for example:**
 - General Principles: disclosure should be clear, concise and effective; ongoing disclosure of information shall be disseminated in a timely and efficient manner
 - Whether the OFC is a private OFC or a public OFC
 - Its nature as an OFC with variable capital with limited liability
 - For an umbrella OFC, statement on the segregated liability between sub-funds and warning regarding the enforceability of such segregation in foreign courts
 - Circumstances for cessation of office of key operators and removal procedures
 - Custody arrangements of the OFC's property and associated material risks
 - Termination: summary of circumstances for termination, party who may apply and any shareholders' approval required
 - Manner in which shareholders may obtain the OFC's information and make enquiries

Public OFCs

- **Must also comply with the SFC Products Handbook**

Private OFCs:

- **Must also disclose the investment scope and restrictions**
- **Must 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 GAV of the OFC in non-financial or other less common asset class(es)**
- **OFC to send the offering document to SFC for filing as soon as practicable following issuance by the OFC**
- **In the case of changes to the offering documents, should be filed with the SFC within¹⁷ 7 days from date of issuance of the revised offering documents**

Post-establishment of an OFC

Changes requiring SFC's approval

All OFCs

- (A) Change of name of an OFC or its sub-fund**
- (B) Appointment of key operators (directors, investment manager and custodian):**
 - early consultation with SFC regarding change of key operators is encouraged
 - for directors, early consultation is especially encouraged where a change may impact on the OFC's compliance with the requirement to have at least 2 directors including at least 1 independent director
- (C) Establishment of sub-funds**
- (D) Termination of the OFC or its sub-fund**

Public OFCs

- Compliance with the Code on Unit Trusts and Mutual Funds as well

Alteration to instrument of incorporation

- **Amendments may be made to the instrument of incorporation**
 - Public OFCs: comply with the SFC Products Handbook requirements on effecting changes to their constitutive documents
 - Private OFCs: post-change filing with the SFC in respect of the alteration, no SFC's approval required
 - Material changes: require shareholders' approval
 - Immaterial changes: (1) shareholders' approval or (2) the board of directors certifies that the nature of the change falls within 12.2 (b) of the OFC Code and obtain the custodian's confirmation that it has no objection

Corporate administration matters

- **Share certificates:** not required, share title to be evidenced by entry into the register of shareholders
- **Instrument of transfer:** to be lodged with OFC
- **Register of shareholders:**
 - May be inspected by shareholder as to his/ her own shareholding
 - May be inspected by the custodian or investment manager
 - May be inspected by the SFC and relevant public bodies or public officers
- **Register of directors and information on process agent:**
 - May be inspected by any person
- **Meetings:**
 - No mandatory annual general meetings
 - Meeting quorum and notice period should comply with OFC Rules and OFC Code (private OFC) or UT Code (public OFC)

Auditor and financial reports

- Eligibility and cessation of office requirements: largely similar to those under the CO
 - Only “practice unit” under the Professional Accountants Ordinance (Cap. 50) is eligible for appointment
 - Outgoing auditor must give a statement of circumstances connected with the resignation that should be brought to the attention of shareholders or creditors, or if there are no such circumstances, a statement to that effect
- The OFC must prepare an audited annual report for each financial year
- Accounting standards under the OFC Code:
 - All accounts must be prepared in a manner compliant with Hong Kong Financial Reporting Standards or International Financial Reporting Standards
 - Other accounting standards may be considered on a case-by-case basis
- Guidance on contents required for financial reports of private OFCs are set out in the OFC Code (*Note: public OFCs to comply with the UT Code*)
- Interim report not a mandatory requirement for private OFCs

Sub-funds - protected cell regime

- Part IVA of the SFO (section 112S) provides for the segregated liability of sub-funds of an OFC to limit the contagious effect of insolvency of a sub-fund within an umbrella OFC
- For an umbrella OFC, its instrument of incorporation and offering document must contain a statement on the segregated liability of its sub-funds
- To fortify the protected cell regime, certain terms are implied into the contracts and transactions entered into by an umbrella OFC under the OFC Rules:
 - the counterparty agrees not to seek recourse to any assets of a sub-fund to discharge any liability not incurred on behalf of that sub-fund,
 - if the counterparty succeeds to have such recourse to the sub-fund's assets, the counterparty will pay a sum to the OFC equal to the value of benefit it has obtained, and
 - if the counterparty succeeds in seizing the assets of the sub-fund for unrelated liabilities, it will hold such assets or proceeds for sale of assets on trust for the OFC
- For an umbrella OFC, a standard warning statement must also be included in the offering document regarding the enforceability of section 112S in foreign courts

Termination by application to the SFC

Key steps:

- **Submit a termination proposal** with explanation of the proposed arrangements with:
 - a solvency statement approved by the board of directors confirming ability of OFC to meet liabilities within following 12 months
- OFC to **issue a termination notice to shareholders** (SFC's approval is only required for public OFC according to the UT Code), following which the OFC should no longer be marketed and shall not accept new subscriptions
- After realization of assets, settlement of liabilities and distribution of proceeds to shareholders, an OFC may **make an application to the SFC for cancellation of registration** enclosing:
 - the final accounts of the OFC accompanied by the auditor's report;
 - a declaration signed by the OFC board and the investment manager confirming completion of realization of assets and distribution of proceeds, and there are no outstanding liabilities
 - *Note: applicant should ensure that it has no outstanding tax liabilities by obtaining a tax clearance letter from the Inland Revenue Department*
 - an application for withdrawal of authorisation (in the case of a public OFC)
- OFC to **make written notification to investors** prior to and upon cancellation of registration, with explanations as to the reasons for the termination and cancellation of registration
- Cancellation of registration with CR takes place automatically upon cancellation of registration with SFC, **no separate application to CR** by OFC will be required
- Application will lapse if no approval is granted within the applicable processing time period as indicated in the first requisition issued by the SFC

SFC filings

- **Various filings have to be made with the SFC:**
 - Annual report
 - Interim report (if any)
 - Offering documents
 - Details of process agent appointed by an overseas director or custodian
 - Notice to SFC of a resolution to remove a director
 - Cessation of investment manager or custodian
 - Alteration of instrument of incorporation
 - Statement of circumstances issued by auditor or custodian
 - Winding up notifications
- **Public OFCs have to comply with the requirements in the UT Code**

- **Various changes of OFCs are required to be reported to the CR, for example:**
 - Change of company name
 - Change of address of registered office
 - Change of directors (appointment / cessation of appointment / change in particulars)
 - Alteration of instrument of incorporation
- **CR has 26 specified forms for OFC**
- Link to the forms: <https://www.cr.gov.hk/en/ofc/specified-forms.htm>
- **The following forms of CR should be submitted via SFC:**
 - OFCNC1(SFC) – Incorporation Form
 - OFCNC2(SFC) – Notice of Change of Company Name
 - OFCD1(SFC) – Notice of Appointment of Director
- **All other forms should be submitted to CR directly**

Fees applicable to OFCs

- Public OFCs: No new fees - only the existing fees for authorisation and post-authorisation annual fee for public funds apply to public OFCs
- Private OFCs: Basic registration and post-registration fees

		Public OFC	Private OFC
Single OFC		Application fee: \$ 20,000 Authorisation fee: \$ 10,000 Post-authorisation Annual fee: \$ 6,000	Application and registration fee: <u>\$ 5,000</u> Post registration Per application for each item of change: <u>\$ 300</u>
	For the umbrella	Application fee: \$ 40,000 Authorisation fee: \$ 20,000 Post-authorisation Annual fee: \$ 7,500	Application and registration fee: <u>\$ 10,000</u> Post registration Per application for each item of change: <u>\$ 300</u>
	For each sub-fund	Application fee: \$ 5,000 Authorisation fee: \$ 2,500 Post-authorisation Annual fee: \$ 4,500	Application and registration fee: <u>\$ 1,250</u> Post registration Per application for each item of change: <u>\$ 300</u>
All OFC			Application for a modification or waiver of requirements of OFC Rules: <u>\$ 6,000</u>

Appeal and benefits of the OFC regime

- **Facilitates international fund distribution**
 - Corporate funds are more popular with investors internationally
- **Cost-savings over offshore structure**
 - Saves management time and costs by dealing with one jurisdiction instead of two
 - Avoid extra offshore layer of service providers
- **Caters for different types of funds**
 - The OFC can be used for public, private, open-ended, closed-ended, listed or unlisted funds
- **Tax incentives**
 - Public OFCs: enjoy same profits tax exemption as other SFC-authorised public funds
 - Private OFCs: enjoy profits tax exemption since roll out of the regime in July 2018, enhanced tax exemption regime commenced on 1 April 2019 (**see Appendix**)

Appeal and benefits of the OFC regime

■ Fast set-up

- “One-stop” approach: submit establishment documents to SFC only, no need to submit separately to the CR or Inland Revenue Department
- Public OFCs – same as other public funds, ranging between 1-3 months depending on standard/ non-standard application, simultaneous authorisation and registration
- Private OFCs – generally less than one month, subject to general principles and basic requirements only
- Template instrument of incorporation available

■ May tap into Hong Kong’s deep capital pool sourced from local and international investors

Appeal and benefits of the OFC regime

■ Easy management and administrative convenience

- Private OFCs: flexibility in setting redemption terms and conditions, no annual fees, minimal approval for changes
- Public OFCs: approvals required on par with other SFC-authorised funds
- No annual returns nor mandatory annual general meetings

■ Protected-cell feature

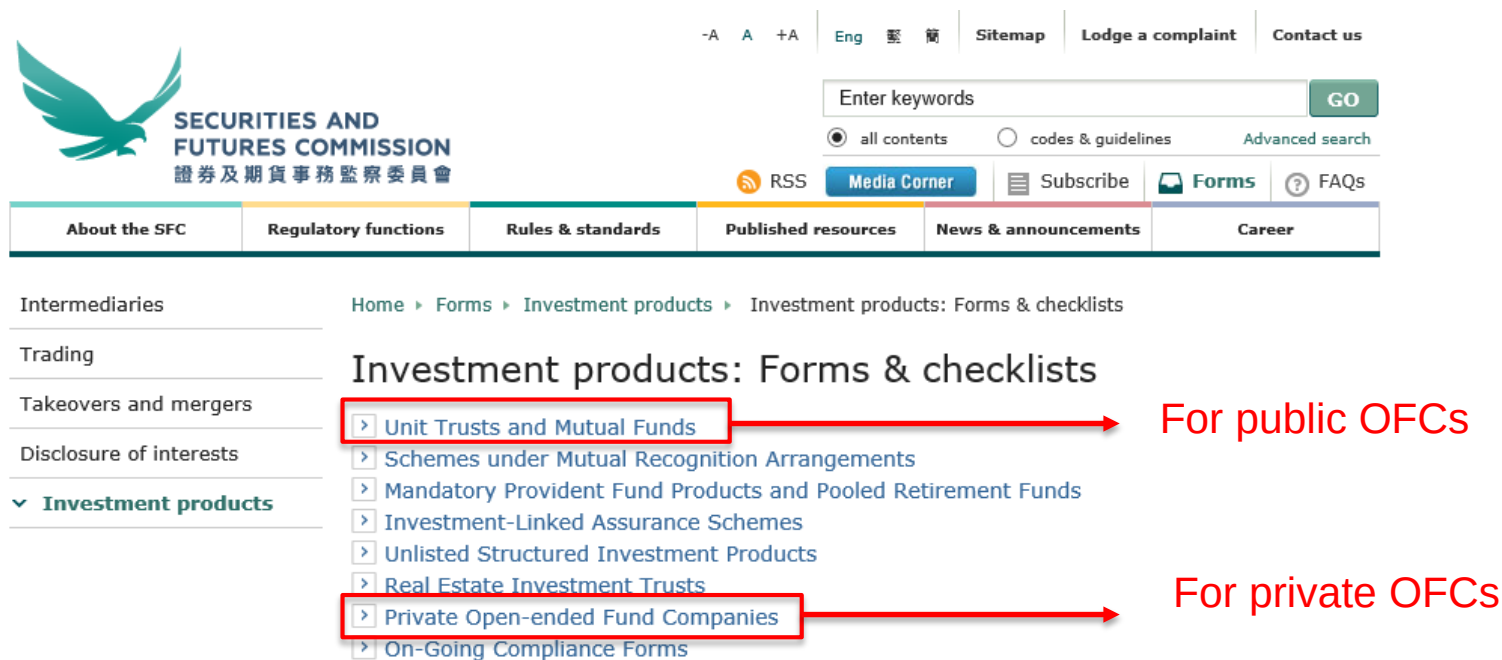
- Statutory segregation of liabilities of sub-funds increases investors' confidence

■ Investor protection and confidence in robust regime

- Funds in traditional offshore jurisdictions come under increasing international scrutiny
- Hong Kong's adherence to international standards promotes investors confidence in its investment products

Further information

■ Forms and checklists on SFC's website



The screenshot shows the SFC website's navigation bar and a sidebar. The main content area is titled 'Investment products: Forms & checklists'. A list of links is provided, with two items highlighted by red boxes and red arrows pointing to external text:

- Unit Trusts and Mutual Funds** → For public OFCs
- Private Open-ended Fund Companies** → For private OFCs

Other links in the list include: Schemes under Mutual Recognition Arrangements, Mandatory Provident Fund Products and Pooled Retirement Funds, Investment-Linked Assurance Schemes, Unlisted Structured Investment Products, Real Estate Investment Trusts, and On-Going Compliance Forms.

Last update: 21 May 2019

Further information

- Revised information checklist reflecting the changes in internal control requirements for custodian


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Investment products: Forms & checklists

- ▶ [Unit Trusts and Mutual Funds](#)
- ▶ [Schemes under Mutual Recognition Arrangements](#)
- ▶ [Mandatory Provident Fund Products and Pooled Retirement Funds](#)
- ▶ [Investment-Linked Assurance Schemes](#)
- ▶ [Unlisted Structured Investment Products](#)
- ▶ [Real Estate Investment Trusts](#)

▼ **Private Open-ended Fund Companies**

Item	Name of the forms and checklists	Forms and checklists	
		PDF	MS Word
1	Application Form for Registration of a Private Open-ended Fund Company or Establishment of a Privately Offered Sub-fund of an Open-ended Fund Company	Download	Download
2	Information Checklist for Application for Registration of a Private Open-ended Fund Company or Establishment of a Privately offered Sub-fund of an Open-ended Fund Company	Download	Download
3	Application Form for Approval of Appointment of Director, Custodian or Investment Manager of an Open-ended Fund Company	Download	Download

Further information

- Information available on SFC's website:
<https://www.sfc.hk/web/EN/regulatory-functions/products/>

About the SFC	Regulatory functions	Rules & standards	Published resources	News & announcements	Career
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Intermediaries

Market infrastructure & trading

Listings & takeovers

▼ **Investment products**

List of publicly offered investment products

List of registered open-ended fund companies

Codes

Guidelines

Circulars

Consultations and conclusions

Forms, checklists

FAQs

Contact us

Enforcement

Home ▶ Regulatory functions ▶ Investment products

Investment products

Publicly offered investment products

SFC authorisation involves the review of offering documents, and in some cases the structural features of a particular product, to determine if certain impartial benchmarks are met and the required information is disclosed.

Open-ended fund companies (OFCs) are subject to SFC registration. The SFC reviews the relevant constitutive documents to determine if the OFC meets the applicable legal and regulatory requirements.

SFC authorisation or registration does not mean the product is suitable for you or any particular investor. The intermediary who sells the product to you has a duty, under the Code of Conduct¹ and guidelines administered by the SFC, to explain to you the nature and risks of the product and why it is suitable for you given your personal circumstances.

List of investment products:

1. Closed-End Funds
2. Exchange Traded Funds
3. Leveraged and Inverse Products
4. Investment-Linked Assurance Schemes (ILAS)
5. Mandatory Provident Funds
6. Paper Gold Schemes
7. Pooled Retirement Funds
8. Real Estate Investment Trusts
9. Structured Investment Products
10. Unit Trusts & Mutual Funds
11. Open-Ended Fund Companies

Further information

■ Laws and Regulations

- SFO (see Part IVA on OFC)
- OFC Rules
- OFC Code
- Products Handbook (applicable to public OFCs only)

■ Forms

- Forms & checklists

■ Template instrument of incorporation

- Template for umbrella public OFC
- Template for umbrella private OFC

■ Guidance

- FAQs

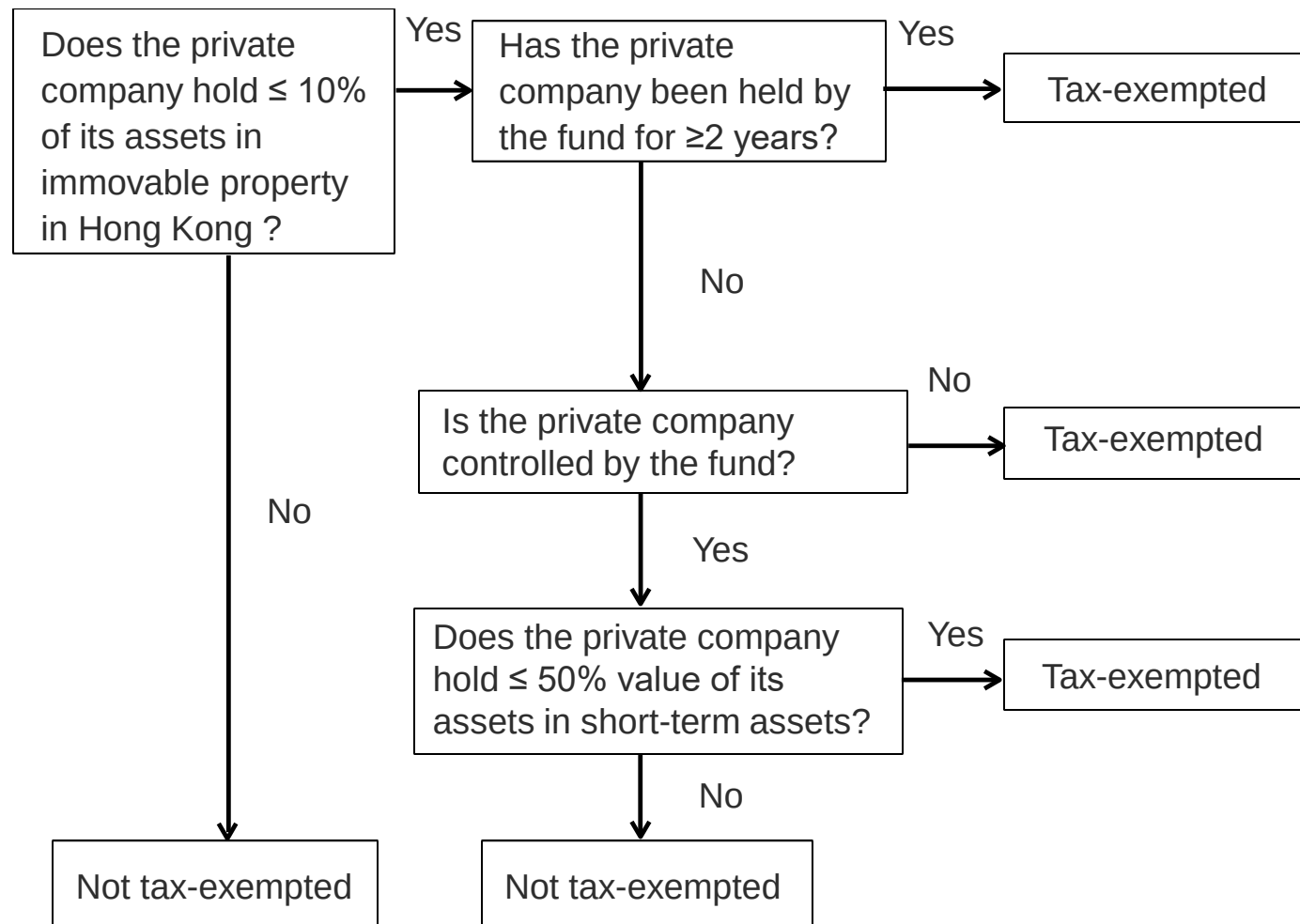
■ Designated mailbox for OFC enquiries: ofc-enquiry@sfc.hk

Appendix: enhanced tax exemption conditions for private funds (effective since 1 April 2019)

- **Profits tax exemption available for onshore and offshore funds alike**
- **Enhanced profits tax exemption for OFC:**
 - No more “non-closely held” test (i.e. minimum number of corporate and individual investors)
 - Expanded classes of transactions that are exempted from profits tax
 - Clearer conditions for exemption regarding investment in private companies
- **Major breakthrough: profits tax exemption applies regardless of the domicile, structure, capital and size of the private fund**

Appendix: enhanced tax exemption conditions for private funds (effective since 1 April 2019)(cont'd)

Profits tax exemption eligibility for profits generated from investment in private companies by private funds – broadbrush overview



A large, stylized graphic of a bird, possibly a phoenix, in shades of light blue and teal. The bird is depicted in profile, facing right, with its wings spread wide. The graphic is composed of several overlapping, curved shapes that create a sense of movement and form. It occupies the left and center portions of the slide, with its tail feathers extending towards the bottom left and its wings reaching towards the top right.

Thank you.

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