



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

# Open-ended fund companies (OFC)

**July 2018**

# Contents

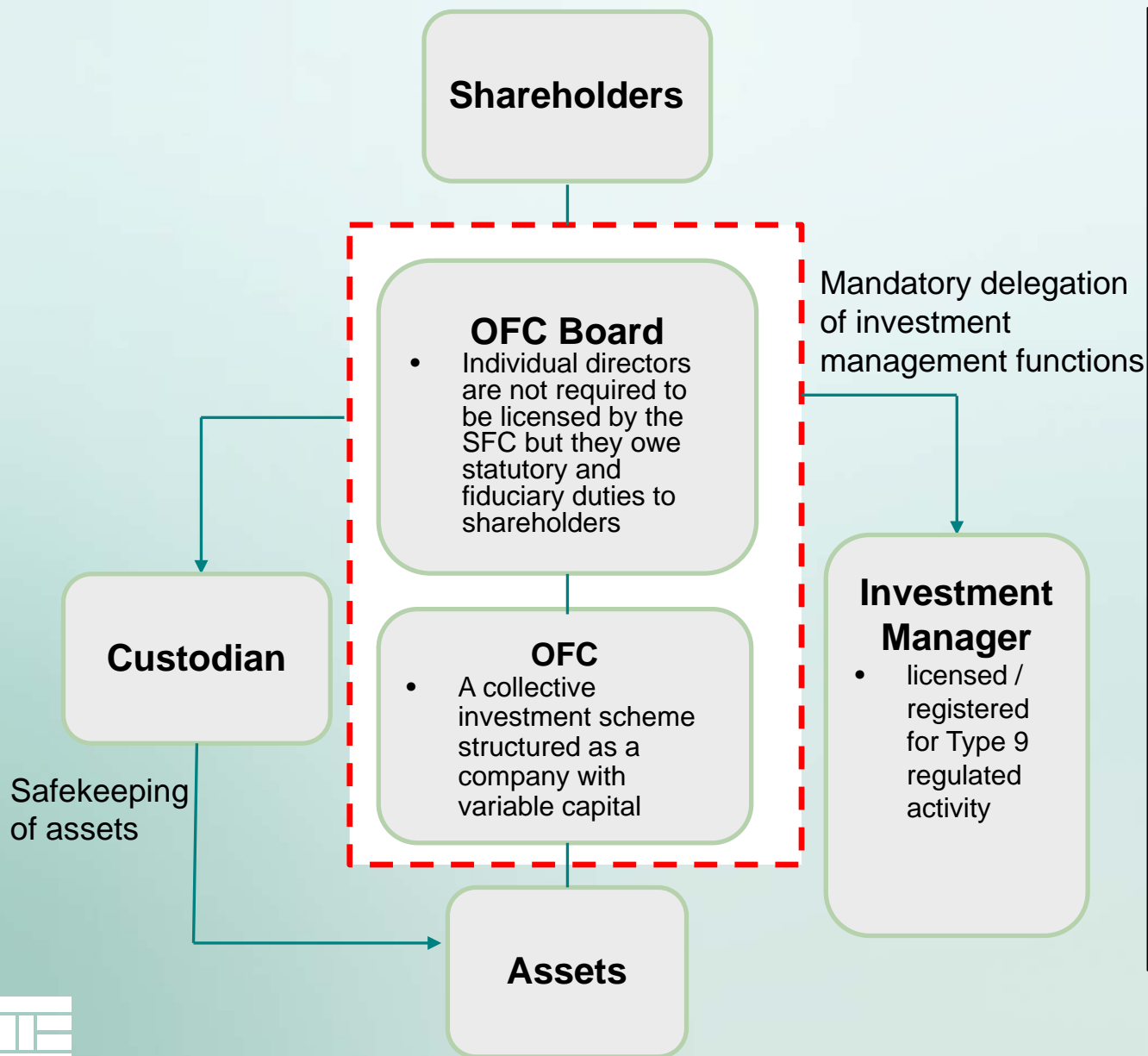
- **Overview of legal and regulatory components**
- **OFC structure**
- **General regulatory framework**
- **Establishment of an OFC**
- **Post-establishment of an OFC**
- **Fees applicable to OFCs**
- **Implementation**



# Overview of legal and regulatory components

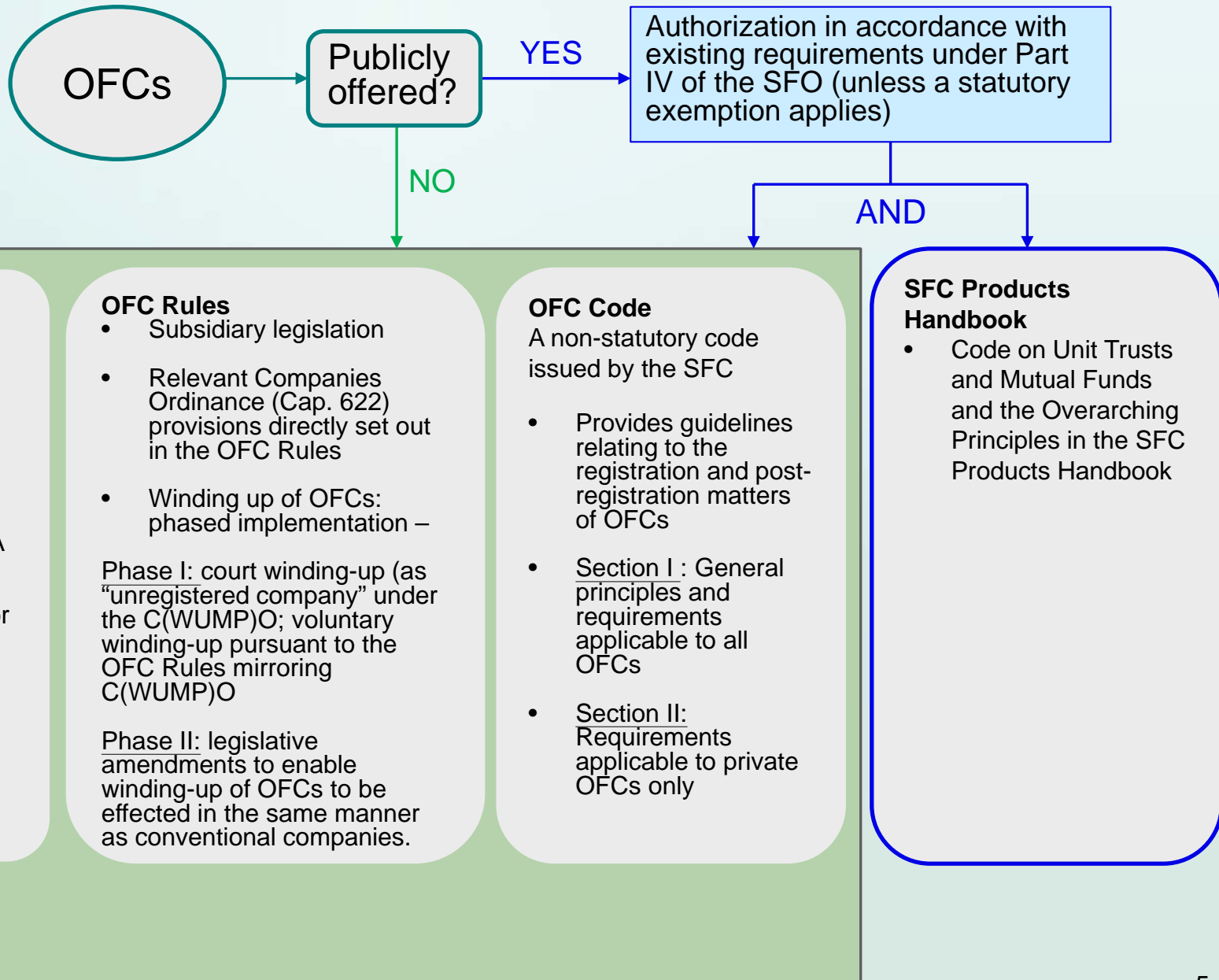


# OFC structure



- A new corporate structure (in addition to unit trust form) for investment funds in Hong Kong
- Not subject to restrictions under Companies Ordinance on (1) capital reduction; (2) distribution out of capital

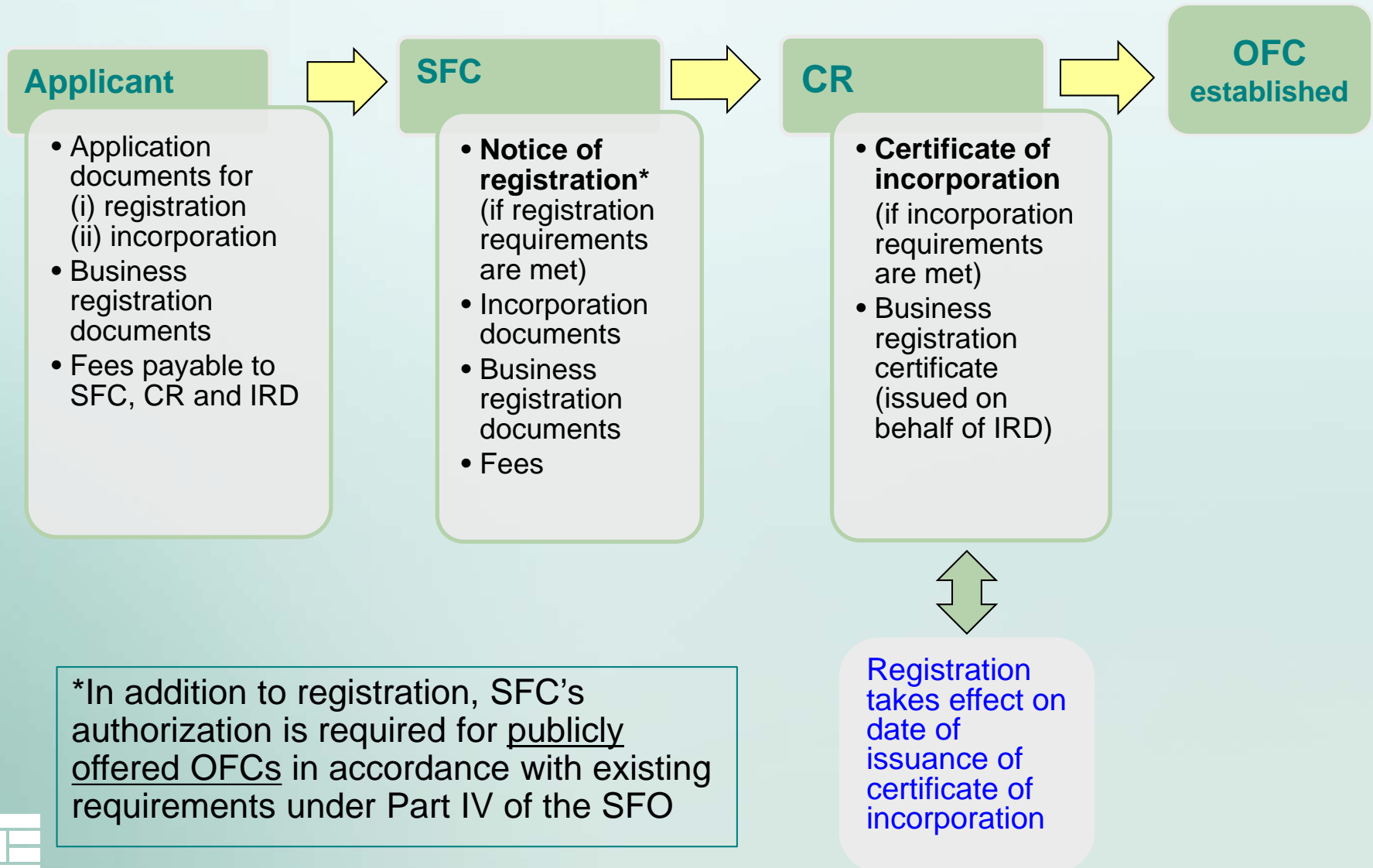
# General regulatory framework



# 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 authorization fee for public OFCs (no separate fee for registration of public OFCs)



# Application documents (cont'd)

## For incorporation by CR and business registration by the 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

## Lapse of application

- Application will lapse if no registration of the proposed OFC / approval for establishment of the proposed sub-fund(s) is granted by SFC within 6 months from the date of take-up



# 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 template (including the mandatory and optional provisions) will be made 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 (cont'd)

- **Eligibility:**

- The experience and expertise of the persons appointed as directors of an open-ended fund company, 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:**
  - 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 and Code of Conduct for Persons Licensed by or Registered with the SFC)
- **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** - same as those under the UT Code
- All the scheme property of an OFC must be entrusted to a custodian for safe-keeping
- **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
  - exercise due care in the selection, appointment and ongoing monitoring of its delegates, including sub-custodians
- **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 authorized 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**
- **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 within 7 days from date of issuance of the revised offering documents**



# Post-establishment of an OFC





# Changes requiring SFC's approval

- (A) Change of name of an OFC or sub-fund of an OFC**
- (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

## **Application documents and related matters:**

- Application form, cheque (for private OFCs/ privately offered sub-fund) and Information Checklist
- For a public OFC or publicly offered sub-fund – in case a notice is issued by the OFC in respect of the change of name or appointment of directors and the notice falls within 11.1B of the UT Code:
  - *NO FILING of the “Filing Form for Notice of Scheme Change(s) falling within 11.1B of the Code on Unit Trusts and Mutual Funds (UT Code) and Do Not Require SFC's Prior Approval” would be necessary, just filing of the notice to the SFC would suffice.*
- Application will lapse if no approval is granted within the applicable processing time period as indicated in the first requisition issued by the SFC

# 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:**
  - Minimum 14-day notice period (*Note: public OFCs shall comply with the UT Code, 21-day notice for special resolution applies*)
  - For OFCs which opts for AGMs, a 21-day notice period applies
  - Procedural details including quorum: comply with instrument of incorporation and disclosure in offering documents, public OFCs have to comply with the UT Code as well

# 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
- Financial year determination:
  - First financial year: starts from date of incorporation and ends on a date within 18 months from incorporation (“primary accounting reference date”)
  - Subsequent year: follows upon previous year and ends on anniversary of the primary accounting reference date
  - The financial year may be shortened or extended by the board of directors after consultation with the auditor of the company, such extension should not be longer than 18 months
- 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 authorization (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, for example:**
  - Annual report
  - Interim report (if any)
  - Offering documents
  - 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
- **Public OFCs have to comply with the requirements in the UT Code**

# Corporate filings

- **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 25 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 authorization and post-authorization annual fee for public funds will apply to public OFCs
- **Private OFCs:** Basic registration and post-registration fees

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



# Implementation

Event	Date
<p><b>Gazettal of OFC Code and application forms</b></p> <p><b>OFC documents available on SFC's website, including:</b></p> <ul style="list-style-type: none"><li>▪ Application forms</li><li>▪ Information checklists</li><li>▪ Instrument of incorporation templates</li><li>▪ FAQs</li></ul>	<p><b>27 July 2018</b></p>
<p><b>OFC legislation coming into effect and implementation of new OFC regime</b></p>	<p><b>30 July 2018</b></p>

**Thank you**

