

立法會
Legislative Council

LC Paper No. CB(1)1185/17-18

Ref.: CB1/SS/12/17

Paper for the House Committee meeting on 29 June 2018

**Report of the Subcommittee on
Three Pieces of Subsidiary Legislation Related to the Open-ended Fund
Company Regime and Gazetted on 18 May 2018**

Purpose

This paper reports on the deliberations of the Subcommittee on Three Pieces of Subsidiary Legislation Related to the Open-ended Fund Company Regime and Gazetted on 18 May 2018.

Background

Open-ended fund company

2. An open-ended fund company ("OFC") is a collective investment scheme with variable capital set up in the form of a company, but with the flexibility to create and cancel shares for investors' subscription and redemption in the funds, which is currently not enjoyed by conventional companies. Also, OFCs will not be bound by restrictions on distribution out of capital applicable to conventional companies, and instead may distribute out of capital subject to solvency and disclosure requirements.

3. Currently, an open-ended investment fund may be established under the laws of Hong Kong in the form of a unit trust but not in corporate form due to various restrictions on capital reduction under the Companies Ordinance (Cap. 622) ("CO"). There are calls from the market for a more flexible choice of investment fund vehicle through introducing a new OFC structure in Hong Kong.

Regulatory framework of the open-ended fund company regime

4. In June 2016, the Legislative Council ("LegCo") enacted the Securities and Futures (Amendment) Ordinance 2016 ("the Amendment Ordinance") to, among others, add a new Part IVA to the Securities and Futures Ordinance (Cap. 571) ("SFO") to provide for a legal framework for the OFC structure in Hong Kong. According to the Administration, the introduction of this new form of investment fund vehicle will enhance Hong Kong's attractiveness as a location for the domiciliation and origination of funds. This in turn will be conducive to the development of the local asset management industry. The Administration's intention is to bring the Amendment Ordinance into operation when the operational details for OFCs to be set out in subsidiary legislation are ready.

The three pieces of subsidiary legislation

5. The following three pieces of subsidiary legislation were published in the Gazette on 18 May 2018 and tabled before LegCo at the Council meeting of 23 May 2018:

- (a) the Securities and Futures (Amendment) Ordinance 2016 (Commencement) Notice ("the Commencement Notice") which appoints 30 July 2018 as the date on which the Amendment Ordinance, and thus the OFC regime, will commence;
- (b) the Securities and Futures (Open-ended Fund Companies) Rules ("the OFC Rules") which set out the detailed legal and regulatory requirements for OFCs; and
- (c) the Securities and Futures (Open-ended Fund Companies) (Fees) Regulation ("the Fees Regulation") which provides for charging or collecting of fees by the Securities and Futures Commission ("SFC") and the Registrar of Companies ("R of C") in respect of OFCs.¹ (Items (a) to (c) above are collectively referred to as "the three pieces of subsidiary legislation".)

¹ In this report, "R of C" means the Registrar of Companies or the Companies Registry as the context so requires.

6. As provided therein, the three pieces of subsidiary legislation are to come into operation on 30 July 2018.

The Subcommittee

7. At the House Committee meeting on 25 May 2018, Members agreed to form a subcommittee to study the three pieces of subsidiary legislation. The membership list of the Subcommittee is in the **Appendix**. Under the chairmanship of Hon CHEUNG Kwok-kwan, the Subcommittee has held two meetings with the Administration to scrutinize the subsidiary legislation.

8. To allow more time for the Subcommittee to consider the three pieces of subsidiary legislation and prepare a report on its deliberations for submission to the House Committee, the Subcommittee Chairman moved a motion at the LegCo meeting of 20 June 2018 to extend the scrutiny period of the subsidiary legislation to the LegCo meeting of 11 July 2018. The motion was passed.

Deliberations of the Subcommittee

9. Subcommittee members in general have no objection to the three pieces of subsidiary legislation. In the course of deliberation, the Subcommittee has examined issues relating to the governance and regulation of OFCs, OFC fund offerings, termination and winding-up of OFCs, regulatory powers of SFC and R of C, protection of privilege against self-incrimination under the OFC Rules (in relation to R of C's power of enquiry in respect of documents provided to him/her under the new Part IVA of SFO), and fees chargeable in relation to OFCs. The deliberations are summarized in the ensuing paragraphs.

The Securities and Futures (Amendment) Ordinance 2016 (Commencement) Notice and the Securities and Futures (Open-ended Fund Companies) Rules

Governance and regulation of open-ended fund companies

10. As laid down in the Amendment Ordinance, an OFC is to be governed by a board of directors, and there should be at least two natural-person directors.² The OFC board will be legally responsible for all the affairs of the OFC, and must delegate the OFC's investment management functions to an investment manager who is responsible for managing the scheme property of the company.³

² Sections 112U and 112V of SFO as amended.

³ Section 112Z of SFO as amended.

All the scheme property of an OFC must be entrusted to a custodian for safe keeping. The custodian is separate and independent from the investment manager, and must take reasonable care, skill and diligence to ensure the safe keeping of the OFC's scheme property.⁴ In the above connection, the OFC Rules set out the detailed statutory requirements concerning an OFC's formation and maintenance, appointment and cessation of appointment of the key operators of the OFC, the capacity and powers of the OFC including the requirements relating to and effect of its instrument of incorporation, as well as corporate administrative matters including powers and procedures on the holding of meetings and record-keeping requirements. As stipulated in rule 13 of the OFC Rules, the instrument of incorporation of an OFC must include, among other things, a statement that the object of the company is the operation of the company as a collective investment scheme.

11. The Subcommittee has noted that the framework of the OFC structure in Hong Kong is housed under SFO. An OFC will be established by obtaining a certificate of incorporation from R of C and registration from SFC. Procedure-wise, this is done via a one-stop approach whereby SFC will notify R of C of its registration of the OFC, and the registration will take effect upon the issuance of a certificate of incorporation by R of C. Under the OFC regime, SFC serves as the principal regulator responsible for the registration and regulation of OFCs. Meanwhile, R of C oversees the incorporation and statutory corporate filings of OFCs whereas the Official Receiver oversees the winding-up procedures. The documentary requirements for an OFC's registration and incorporation, and the functions and powers of R of C in relation to filing of OFC documents and keeping of the OFC register, are set out in the OFC Rules.

12. The Administration has advised that the regulation of OFCs and their operators is consistent with that of conventional companies under CO, save for necessary differences owing to the investment fund nature of an OFC. In formulating the legal framework for OFCs, the "limited company" nature of OFCs (i.e. shareholders' limited liability under section 112Q of SFO as amended) has to be accounted for. Accordingly, relevant elements from CO and the conventional company winding-up regime that are applicable to OFCs are replicated in SFO and the OFC Rules.

13. At the request of the Subcommittee, SFC has provided supplementary information on the circumstances under which SFC's powers may override the constitutive and offering documents of an OFC or the resolutions of the OFC

⁴ Section 112ZA of SFO as amended.

board.⁵ In gist, SFC may petition to the Court of First Instance, under section 214A of SFO as amended, for certain orders if it appears to SFC that at any time since the incorporation of an OFC, the business and affairs of the OFC have been conducted in a manner oppressive or unfairly prejudicial to its shareholders or any part of its shareholders. Such an order may require the alteration of the instrument of incorporation of an OFC.

14. To facilitate LegCo Members in considering the effectiveness of the OFC regime in future, the Administration has agreed to provide information to the Panel on Financial Affairs, when appropriate, on the implementation of the regime including the number of OFCs established in Hong Kong. SFC has indicated that it will discuss with relevant overseas securities regulators with which Hong Kong has entered into mutual recognition of funds arrangements in due course to consider whether OFCs may fall under such arrangements.

Registration of privately-offered OFCs

15. Noting that privately-offered OFCs, like publicly-offered OFCs, will also have to be registered with SFC, Hon Kenneth LEUNG has queried the need for this requirement, taking into account that privately-offered OFCs usually involve small numbers of investors or small-scale offers. Hon James TO considers the said requirement not proportionate to the intended policy intent of investor protection, in particular given that open-ended investment funds set up in the form of unit trust are not subject to similar registration requirements at present. He has also asked about the benefits of establishing a private open-ended fund in the form of a company instead of a unit trust.

16. SFC has pointed out that private investment funds may be set up in different forms, including limited partnership, unit trust or corporate form. Without any legislative amendments, if an investment fund opts to be established in corporate form in Hong Kong, it can only be set up under CO and be subject to various restrictions which are in practice unviable for investment funds. In view of these constraints under CO and the regulatory framework in other major overseas fund jurisdictions, it was decided that the framework for the new OFC structure in Hong Kong would be housed under SFO and SFC is the principal regulator responsible for the registration and regulation of all OFCs.⁶ The OFC regime and regulatory framework received general support

⁵ Please refer to paragraphs 12 to 15 of the Administration/SFC's paper provided to the Subcommittee on 12 June 2018 (LC Paper No. CB(1)1102/17-18(02)).

⁶ Please refer to paragraphs 2 to 3 of the Administration/SFC's paper provided to the Subcommittee on 19 June 2018 (LC Paper No. CB(1)1137/17-18(02)).

in the public consultations of 2014 and 2017. The legal and regulatory requirements in the OFC regime are intended to lay down the same basic or minimum operational requirements applicable to all OFCs (whether publicly or privately offered) with reference to an OFC's corporate nature as well as international regulatory practices and standards. The approach adopted is broadly in line with those in overseas fund jurisdictions such as the United Kingdom, Ireland and Luxembourg. Those basic requirements are also necessary to ensure Hong Kong's regime under SFO is compliant with the fundamental principles laid down by the International Organisation of Securities Commissions, as well as to protect investors' interests. Following the commencement of the OFC regime, SFC will continue to keep in view the OFC's legal and regulatory requirements having regard to international developments, including overseas regulatory practices concerning private corporate investment funds.

17. At the Subcommittee's request, SFC has provided supplementary information on the regulation of privately-offered OFCs vis-à-vis publicly-offered OFCs.⁷ In gist, a more streamlined approach will be adopted with regard to approval matters of privately-offered OFCs. Besides, the filing requirements for OFCs are also in line with those existing requirements for private conventional companies under CO but are streamlined for the purpose of OFCs.

18. SFC has also pointed out that, where a private fund opts for the OFC structure instead of a unit trust structure, while it will be subject to the registration process and the basic requirements as set out in the OFC-related laws and regulations, it will be able to benefit from the profits tax exemption provided by the Inland Revenue (Amendment) (No. 2) Ordinance 2018, which also comes into operation on 30 July 2018. As the corporate fund structure is generally popular internationally, offering a private OFC structure provides an additional choice for the fund industry in Hong Kong.

Time required for processing registration of open-ended fund companies

19. Hon Christopher CHEUNG has expressed worry that the requirement for SFC's approval for the appointment of the directors of an OFC may adversely affect the timing of launching OFCs in the market. Hon Kenneth LEUNG has suggested that SFC may set a performance pledge in respect of processing applications for registration of OFCs. SFC has advised that it is envisaged that the processing time in handling relevant applications for registration (and

⁷ Please refer to paragraphs 24 to 25 of the Administration/SFC's paper provided to the Subcommittee on 12 June 2018 (LC Paper No. CB(1)1102/17-18(02)).

authorization) of publicly-offered OFCs will be broadly in line with the existing practice for other SFC-authorized publicly-offered investment funds. For privately-offered OFCs, it is generally expected that the processing time will take less than one month. SFC will in due course consider putting in place a performance pledge on the processing time having regard to the experience in the implementation of the OFC regime.

Key operators of open-ended fund companies

20. Under section 112Z of SFO as amended, the investment manager of an OFC has to be licensed by or registered with SFC for carrying out Type 9 (asset management) regulated activity (i.e. RA9 licensee). In response to the Subcommittee's enquiry, SFC has advised that the investment manager of an SFC-authorized publicly-offered OFC will be subject to: (a) the same obligations as the investment managers of all other SFC-authorized publicly-offered investment funds constituted in other legal forms (e.g. in unit trust form); and (b) the same regulatory requirements applicable to other investment managers of SFC-authorized publicly-offered funds who are RA9 licensees, including the requirement to comply with the Fund Manager Code of Conduct. In addition, the investment manager of an OFC needs to comply with the legal and regulatory requirements applicable to OFCs, including the Code on Open-ended Fund Companies ("OFC Code") and rules 125 to 127 of the OFC Rules. SFC has supplemented that an OFC should make investments in accordance with SFC's product code requirements and authorization conditions.⁸

21. The Subcommittee has enquired about how an OFC's investment functions can be properly maintained and whether trading of the OFC's shares has to be suspended in the case of a succession gap arising from resignation/removal of any of its key operators (i.e. directors, investment manager and custodian) taking into account the time required for SFC's approval of new appointments. SFC has advised that an OFC must have at least two natural-person directors, an investment manager and a custodian. Since sufficient notice has to be given for the resignation/removal of a key operator, the OFC board should in parallel identify the successor to fill a vacant office so as to ensure that a succession gap will not arise. Furthermore, SFC-authorized publicly-offered funds (including those domiciled in other fund jurisdictions and offered in Hong Kong) must give notice in writing to SFC on the changes to its key operators. SFC can therefore exercise oversight in relation to the requirements in the appointment and removal of the OFC's key operators.

⁸ For details of the requirements imposable on investment managers of OFCs, please refer to paragraphs 2 to 5 of the Administration/SFC's paper provided to the Subcommittee on 12 June 2018 (LC Paper No. CB(1)1102/17-18(02)).

22. SFC has also confirmed that, as stipulated in section 112U(3) of SFO as amended, a director of an OFC owes the OFC the same fiduciary duties that are owed by a director of an ordinary company to the ordinary company; and the duty to exercise reasonable care, skill and diligence that is owed by a director of an ordinary company to the ordinary company under section 465 of CO.

Fund offerings

23. The OFC Rules prescribe the nature of and requirements concerning the share capital of an OFC, including the rights attached to the shares, requirements for a transfer of shares and keeping of the register of shareholders, and matters relating to sub-funds. In line with the existing arrangement adopted for fund offerings in Hong Kong, OFC fund offerings will be made under an offering document. The Subcommittee has noted that as with other publicly-offered funds, an OFC which is publicly offered (including those that are domiciled in other fund jurisdictions and publicly offered in Hong Kong) will be subject to SFC's authorization (i.e. the OFC's offering document has to be authorized by SFC) unless an exemption applies.⁹

24. Given that an OFC has the flexibility of creating and redeeming shares, the Subcommittee has enquired whether the offering document will need to be updated upon variation of the issued share capital. As an OFC is required, like conventional companies, to publish financial statements and auditor's reports annually, which should suffice to reflect any material changes to the OFC, Hon Kenneth LEUNG takes the view that if the shares offered by an OFC are those redeemed or bought back from shareholders, or the shares are transferred between shareholders (or from a shareholder to another person), which does not involve issue of new shares, it should not be necessary to update the offering document accordingly lest frequent updating may create undue compliance burden.

25. SFC has advised that an offering document should contain the information necessary for investors to be able to make an informed judgment of the investment. If, at any time after the issue of the offering document, the issuer becomes aware that there has been a significant change affecting any matter contained in the offering document, the issuer shall, as soon as practicable, update its offering document. The offering documentation and disclosure requirements currently imposed on SFC-authorized open-ended investment funds established in the form of unit trust are also applicable to those established in the form of OFC. Those requirements are broadly in line with the practices of overseas fund jurisdictions.

⁹ Sections 103(2) and 103(3) of SFO set out the relevant exemptions.

26. Arising from the above deliberations, SFC has also pointed out that:

- (a) investors' purchase and sale of its shares in an OFC from the fund manager is usually conducted by way of the OFC's creation and redemption of shares, as opposed to transfer of shares, given that an OFC is an investment fund and not a conventional company;
- (b) as stipulated in rule 66 of the OFC Rules, the shares of an OFC that have been redeemed or bought back by or otherwise transferred to the company are to be regarded as cancelled (and the amount of the issued share capital of the company is reduced by the amount of consideration paid by the company for the shares), and cannot be re-issued. In other words, an OFC cannot hold treasury stock bought back by the issuer;
- (c) for transfer of shares by way of a private transaction between an OFC's shareholders (or from a shareholder to another person), the disclosure between them is expected to rest with the shareholder transferring the shares, with regard to the relevant contract laws;
- (d) the share prices of an OFC is calculated on the basis of net asset value. In determining the share prices, an OFC investment manager has to observe the applicable regulatory requirements, including the Fund Manager Code of Conduct; and
- (e) the constitutive or offering document of an investment fund may provide for certain specific circumstances in which a compulsory redemption may be made.¹⁰ The same will apply to OFCs. In considering the acceptability of a constitutive or offering document of an OFC which provides for compulsory redemption in certain circumstances, SFC may have regard to whether such provision may contravene applicable legal and regulatory requirements, including whether it may constitute a case of unfair prejudice to shareholders under section 214A of SFO as amended.¹¹

¹⁰ Such circumstances typically include where an investor will be in breach of relevant laws and regulations by holding interests in the fund, or the holding of such interests by the investor may result in adverse tax consequences on the fund as well as other investors.

¹¹ Please also refer to paragraph 12 of this report for SFC's power to override an OFC board's decisions or seek remedies where the business and affairs of the OFC have been conducted in a manner oppressive or unfairly prejudicial to its shareholders or any part of them.

Termination and winding-up of open-ended fund companies

27. Matters relating to the termination or insolvency of an OFC including winding-up, entering into an arrangement and compromise,¹² and cancellation of registration of an OFC are set out in the OFC Rules.

Termination

28. Given the nature of OFCs as investment funds, which can be terminated for commercial reasons (e.g. changes in the market conditions resulting in the investment strategy becoming unviable, the size of the fund dropping below a certain level, or changing investment trends), the Amendment Ordinance has laid down a mechanism for termination of an OFC in a straight-forward and cost efficient manner. The OFC Code will set out the detailed requirements and procedures for such streamlined termination. Among other requirements, the triggering mechanism for termination of an OFC has to be disclosed in the OFC's constitutive and offering documents for clear disclosure to investors. The OFC has to provide SFC with a termination proposal supported with the justifications, a solvency statement, etc.^{13 14}

¹² Arrangement and compromise refers to the court's powers to sanction certain arrangements by a company with its shareholders and/or creditors in respect of certain rights or obligations of those parties. The arrangement and compromise provisions in the OFC Rules are similar to those under CO for conventional companies.

¹³ According to SFC, when considering the registration of an OFC and/or authorization of a publicly-offered OFC's offering document, it will also give regard to disclosure on the conditions for streamlined termination of the OFC as laid down in the OFC's constitutive or offering document.

¹⁴ An OFC may apply to SFC for cancellation of registration voluntarily upon streamlined termination, where: (a) the OFC is to be terminated in accordance with the instrument of incorporation; (b) the OFC is solvent as certified by the OFC board; and (c) reasonable prior notice has been given to shareholders. Once the OFC assets have been fully distributed to shareholders and all liabilities have been settled, the OFC board can apply to SFC for cancellation of registration under section 112ZH of SFO together with the final accounts of the OFC accompanied by the auditor's report, and a declaration signed by the OFC board and the investment manager confirming that all assets have been distributed to shareholders in accordance with the OFC's instrument of incorporation and the OFC has no outstanding liabilities. In line with the one-stop approach, cancellation of the OFC's registration with R of C will automatically take place upon the cancellation of its registration by SFC. As advised by SFC, the option of streamlined termination is currently not available to conventional companies.

Winding-up

29. The Subcommittee has noted that the Administration's intention is that the winding-up processes under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) ("CWUMPO") should apply to OFCs, and that the winding-up regime for OFCs should be set out under the OFC Rules by incorporating the relevant provisions in CWUMPO with appropriate modifications. However, there are technical issues over the adequacy of the enabling provisions under SFO as currently amended that have come to the Administration's attention in the course of drafting the OFC Rules and the Fees Regulation. The Administration has advised that in order that the OFC regime can be established without delay, it will adopt a phased approach in laying down the winding-up provisions applicable to OFCs. In the first phase on the commencement of the OFC regime, OFCs will be subject to the provisions relating to disqualification orders and court winding-up process under CWUMPO as an "unregistered company" thereunder.¹⁵ OFCs can also be wound up under the voluntary winding-up process in Part 11 of the OFC Rules.¹⁶ In the next phase, the Administration plans to further amend the law to lay down the necessary enabling provisions to enable the winding-up of OFCs to be effected in the same manner as conventional companies. The Administration will start the work on phase two as soon as practicable.

30. Since an OFC may divide its scheme property into separate parts, with each part forming a sub-fund,¹⁷ the Subcommittee has enquired about whether each sub-fund of an OFC can be wound up separately. SFC has replied in the affirmative¹⁸ and pointed out that the OFC Rules provide for matters relating to sub-funds including the implied terms in contracts with OFCs to ensure segregated liability between sub-funds, and the winding-up of sub-funds. SFC has also stressed that under the protected cell regime of OFCs, the assets of a sub-fund of an umbrella OFC will belong exclusively to that sub-fund and cannot be used to discharge the liabilities of or claims against the umbrella OFC or any other sub-fund of the company.¹⁹

¹⁵ Court winding-up of an OFC can be initiated by way of a petition to the court from the OFC itself, shareholders or creditors of the OFC.

¹⁶ Voluntary winding-up of an OFC can be triggered by a resolution of the OFC's shareholders, or initiated by the directors of the OFC, in accordance with the OFC Rules which replicate relevant provisions of CWUMPO.

¹⁷ Section 112R of SFO as amended.

¹⁸ Rule 188 of the OFC Rules.

¹⁹ Section 112S of SFO as amended.

31. The Subcommittee has further noted that while each sub-fund of an umbrella OFC may be wound up separately having regard to the protected cell regime of OFCs, the umbrella OFC can be liquidated at the corporate level together with all its sub-funds in one go so long as the liabilities of individual sub-funds are segregated in the winding-up process.

32. At the request of the Subcommittee, SFC has provided supplementary information on the major differences between OFCs and conventional companies in relation to the winding-up process.²⁰ SFC has pointed out that:

- (a) the provisions for an OFC's voluntary winding-up set out in the OFC Rules mirror the equivalent voluntary winding-up provisions in CWUMPO for conventional companies and are therefore largely the same, including the grounds for commencing a voluntary winding-up, except for certain technical changes (e.g. SFC has been added as a party (in addition to shareholders and creditors) who may apply to the court to have questions arising from the winding-up determined by the court);
- (b) there is no difference in the court winding-up of an OFC as an unregistered company under CWUMPO in comparison with other unregistered companies under CWUMPO; and
- (c) as compared with a conventional company incorporated pursuant to CO, the key difference in court winding-up provisions from unregistered companies (including OFCs) is that the grounds for winding-up of conventional companies under Part V of CWUMPO are wider than those for unregistered companies.

33. The Subcommittee has noted that the meaning of "unregistered company" given in section 326 of CWUMPO does not include a partnership, association or company which consists of less than eight members and is not formed or established outside Hong Kong. The Subcommittee has enquired about how an OFC with less than eight members can be wound up in the interim after commencement of the OFC regime. The Administration has advised that in this case, the OFC in question may resort to the voluntary winding-up process under Part 11 of the OFC Rules or the mechanism of streamlined termination provided in the OFC Code.

²⁰ Please refer to paragraphs 6 to 11 of the Administration/SFC's paper provided to the Subcommittee on 12 June 2018 (LC Paper No. CB(1)1102/17-18(02)).

Privilege against self-incrimination

34. Division 7 (rules 46 to 55) of Part 3 of the OFC Rules deals with R of C's powers to enquire into whether any act that would constitute an offence under rule 195(1) for making any statement that is misleading, false or deceptive in a material particular ("specified act") under the new Part IVA of SFO has been done. Under rule 46(1), if R of C has reason to believe that a specified act has been done, and that a person is in possession of any record or document that is relevant to the enquiry into the specified act, R of C may by notice in writing require the person: (a) to produce any record or document specified in the notice; and (b) if the record or document is produced, to provide any information or explanation in respect of the record or document. Rule 48(7) provides that a person is not excused from complying with a requirement under rule 46 only on the ground that to do so might tend to incriminate the person. Further, rule 49 deals with the use of incriminating evidence in proceedings, and prohibits the use of *information or explanation* provided by a person pursuant to rule 46(1)(b) as evidence against that person in criminal proceedings in certain circumstances. However, it appears to the Subcommittee that any record or document produced by a person pursuant to rule 46(1)(a), even if it contains incriminating evidence, remains fully admissible against the person in criminal proceedings.

35. The Legal Adviser to the Subcommittee has therefore requested the Administration to explain why the privilege against self-incrimination only applies to information or explanation, but not records or documents, provided by a person under rule 46; and whether the use of incriminating evidence in such records or documents (which have been produced under compulsion pursuant to rule 46(1)(a)) against the person in criminal proceedings will be held by the courts as contravening Article 11(2)(g) of the Hong Kong Bill of Rights which guarantees that a person charged with a criminal offence shall not be compelled to testify against himself or to confess guilt. The Administration has replied that the exercise of investigation power at the investigation stage does not infringe a person's right against self-incrimination because the right is relevant only where a criminal charge is laid and the prosecution seeks to introduce self-incriminating evidence in the course of a criminal trial (see *Saunders v UK* [1996] 23 EHRR 313 and *R v Hertfordshire County Council ex p. Green Environmental Industries* [2000] 2 AC 212). In Hong Kong, the Court of Appeal has also confirmed in *Koon Wing Yee v The Securities & Futures Commission*, CACV 369/2007 (at paragraph 11): "... there was nothing in the Bill of Rights which gave a person protection from legislation requiring him, on pain of penalty, to answer questions put by an investigating authority. What the Bill of Rights did was to give a person protection from his answers being used in criminal proceedings against him or from being compelled to give evidence in

criminal proceedings against himself".²¹

36. Having noted the Administration's explanation on the above issues, Hon James TO remains concerned that rule 48(7) appears to abrogate the common law privilege against self-incrimination even though the person can still make a claim under rule 49(3) before answering the investigator/enquirer's question to the effect that a self-incriminating answer is not admissible against him in criminal proceedings. Addressing this concern, the Administration has clarified that the information or explanation obtained under rule 46 is not admissible in evidence against the person in criminal proceedings relating to an offence for false statement under rule 195(1). However, it is admissible in evidence against the person in criminal proceedings in which the person is charged with (a) an offence under rule 48(4), (5) or (6) of the OFC Rules for providing any false or misleading information or explanation in purported compliance with a requirement under rule 46, (b) an offence under Part V of the Crimes Ordinance (Cap. 200) (perjury, false sworn or unsworn statements or declarations etc.), or (c) perjury.

Other issues relating to the Securities and Futures (Open-ended Fund Companies) Rules

37. In response to the enquiries raised by the Legal Adviser to the Subcommittee, the Administration/SFC has provided supplementary information or verbal responses at the Subcommittee meetings to clarify the following matters in relation to the OFC Rules:²²

- (a) the Rules' use of notes which, under section 13 of Part 1 to Schedule 1 to SFO, are provided for information only and have no legislative effect;
- (b) the policy reasons for treating an OFC's directors and third parties differently in terms of the degree of knowledge required to attract adverse consequences under rules 11(1), 11(2)(b)(ii), 12 and 110, which reflect established company law principles;
- (c) the defences provided by the Rules requiring the defendant to establish certain matters in order to discharge an evidential burden with a view to avoiding criminal liability;

²¹ See paragraphs 18 to 22 of the Administration/SFC's paper provided to the Subcommittee on 12 June 2018 (LC Paper No. CB(1)1102/17-18(02)).

²² For details, please refer to the letter from the Legal Adviser to the Subcommittee and the Administration's written response provided to the Subcommittee on 7 June 2018 (LC Paper Nos. CB(1)1076/17-18(01) and (02)).

- (d) applicability of legal professional privilege (which is preserved by section 380(4) of SFO) in relation to R of C's enquiry powers under rule 46;
- (e) issues relating to disclosure and protection of personal data (including individuals' residential addresses and identity card/passport numbers) in connection with inspection of registers/records kept by R of C or an OFC;
- (f) how the written resolutions of an OFC's directors may be proposed and agreed to, and when they are regarded as passed without a meeting;
- (g) the circumstances in which the Court of First Instance can make an order directing that a statement of circumstances made by an outgoing custodian or auditor is not to be sent to an OFC's shareholders; and the Court's powers to order costs against the maker of the statement;
- (h) in relation to rule 155, the reasons for not rendering a knowing or reckless omission of a statement required to be contained in an auditor's report under rule 154(2)(a) (i.e. the auditor's opinion that adequate accounting records have not been kept by an OFC) an offence; and
- (i) the Chinese renditions of certain terms in rules 12, 40, 55(2) and 140.

38. The Legal Adviser to the Subcommittee has pointed out that under rule 55(2), subject to any reasonable conditions R of C may impose, R of C must permit certain persons to inspect records or documents of which R of C has taken possession. In the Chinese text, while 可 (may) is used in relation to 施加 (impose), 須 (must) appears to have been omitted in relation to 准許 (permit). He is concerned that the Chinese text as written might not accurately reflect the apparent meaning of the English text. The Administration takes the view that the Chinese text, when read as a whole, is clear and would not give readers the impression that R of C may permit inspection but is not obliged to do so.

39. The Subcommittee has noted the responses provided by the Administration/SFC on the above issues and raised no further enquiries.

The Securities and Futures (Open-ended Fund Companies) (Fees) Regulation

40. The Fees Regulation sets out the fees charged by SFC for privately-offered OFCs and the fees charged by R of C for all OFCs. SFC has advised that taking into account the current fees applicable to companies incorporated under CO as well as overseas practices, privately-offered OFCs only need to pay minimal registration fees, and fees for changes that require SFC's approval. They do not need to pay annual fees after registration with SFC. In respect of the fees chargeable by SFC, no new fees will apply to publicly-offered OFCs. These OFCs will have to pay the existing fees for application for authorization and fees for authorization applicable to publicly-offered funds seeking SFC's authorization under Part IV of SFO, as well as post-authorization annual fees.²³

41. The Subcommittee has also noted that the revenue generated from the fees payable to R of C by OFCs will be appropriated to the Companies Registry Trading Fund.²⁴

Recommendation

42. Subcommittee members in general have no objection to the three pieces of subsidiary legislation. The Subcommittee and the Administration will not move any amendment to the subsidiary legislation.

Advice sought

43. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 1
Legislative Council Secretariat
28 June 2018

²³ As these fees have already been set out in Schedule 1 to the Securities and Futures (Fees) Rules (Cap. 571AF), no separate fees regulation needs to be made for publicly-offered OFCs.

²⁴ The power of R of C to administer and enforce the relevant provisions of SFO relating to OFCs (including facilitating the incorporation of OFCs and maintaining a register of OFCs) is laid down in section 45 of the Amendment Ordinance which adds a new section 4A to Schedule 1 to the Resolution of LegCo establishing the Companies Registry Trading Fund (Cap. 430B).

**Subcommittee on
Three Pieces of Subsidiary Legislation Related to the Open-ended Fund
Company Regime and Gazetted on 18 May 2018**

Membership list

Chairman Hon CHEUNG Kwok-kwan, JP

Members Hon James TO Kun-sun
 Hon WONG Ting-kwong, SBS, JP
 Hon Kenneth LEUNG
 Hon Christopher CHEUNG Wah-fung, SBS, JP
 Hon Holden CHOW Ho-ding

(Total: 6 members)

Clerk Ms Angel SHEK

Legal Adviser Mr Bonny LOO