



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

**Consultation Conclusions on (1) the proposal to extend the application of the Codes on Takeovers and Mergers and Share Repurchases to SFC-
authorised real estate investment trusts and related amendments and (2) the proposal to extend Parts XIII to XV of the Securities and Futures Ordinance to listed collective investment schemes**

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Section A

Consultation conclusions on the proposal to extend the application of the Codes on Takeovers and Mergers and Share Repurchases to SFC-authorized REITs and related amendments

Introduction

1. On 8 January 2010 the Commission issued a consultation paper (**Consultation Paper**) on the proposal to extend the application of the Codes on Takeovers and Mergers and Share Repurchases (**Codes**) to SFC-authorized real estate investment trusts (**REITs**) and related amendments and the proposal to extend Parts XIII to XV of the Securities and Futures Ordinance (**SFO**) to listed collective investment schemes (**CIS**). The two-month consultation ended on 8 March 2010.
2. The Commission received a total of 12 written submissions from market participants including REIT managers (also referred to as “**management companies**”), substantial unitholders, a professional trustee and an industry body. The submissions are available on the Commission’s website at www.sfc.hk. A list of respondents is set out in **Appendix A**. We thank all respondents for their feedback and comments.
3. Respondents generally welcomed and supported the proposal to extend the application of the Codes to REITs. Many of those who commented on the proposal believed the proposal would protect unitholders’ interests. Some respondents also noted that the proposal would align the treatment of REITs more closely with comparable international markets.
4. The proposed amendments to the Code on REITs (**REIT Code**) and the Codes have been implemented with immediate effect subject to the modifications as set out in this paper. For the purpose of Rule 26.1 of the Takeovers Code, the percentage holding of a person at the beginning of 25 June 2010 shall be deemed to be the lowest percentage holding of that person for the 12-month period preceding 25 June 2010.
5. REIT managers are expected to review and revise their trust deeds, compliance manuals and other relevant documents to reflect the amendments to the REIT Code as soon as possible within one month of the effective date of the revised REIT Code. As no specific approval from unitholders will be required to make these amendments to their trust deeds¹, existing REITs² are expected to duly amend their trust deeds to reflect the revised REIT Code within one month of the effective date of the revised REIT Code (namely, by 25 July 2010). Under Rule 5.2(h) of the REIT Code, a REIT manager shall ensure compliance with all applicable laws, rules, codes or guidelines. Accordingly, a REIT is expected to comply with the revised REIT Code and the Codes from the effective date (irrespective of whether appropriate amendments have been made to the trust deed). An announcement should be made to inform unitholders of the amendments made to the trust deed as soon as practicable.

¹ See Rule 9.6 of the REIT Code.

² With the exception of the one REIT which is currently in the process of liquidation.



6. The final amendments to the REIT Code and the Codes are set out in full in **Appendices B** and **C** to this paper respectively. All these amendments are effective on 25 June 2010.
7. Some respondents commented on specific related amendments which primarily focus on the following areas³:
 - (a) While welcoming the proposal to extend the application of the Codes to REITs, some respondents would like to see exemptions from the general offer obligations under the Takeovers Code to be given in relation to units acquired in specific circumstances such as pursuant to pre-existing transactions, distribution reinvestment plans or as part of management fee units.
 - (b) Respondents generally supported the proposed amendments to the REIT Code to bring the requirements with regard to appointment and removal of REIT managers on a par with those applicable to directors of listed companies. A few of them, in particular some existing REIT managers and substantial unitholders of REITs, expressed concerns over the possible disruption to the operation of a REIT that may result from lowering the threshold for the removal of REIT managers. Some respondents considered that clearer guidance should be provided in respect of the transitional arrangement before the replacement REIT manager is appointed.
 - (c) Respondents generally supported the proposed amendments to the REIT Code to clarify the regulatory requirements applicable to delisting of REITs. Some respondents called for a wider “squeeze out” or privatisation mechanism to be made available to Hong Kong REITs.
 - (d) Respondents generally supported the proposed amendments to the Codes. With respect to the scope of the proposed new presumption class (10) of acting in concert, some respondents suggested that it might be appropriate to separate the presumptions of acting in concert so that a management company and its trustee are presumed to be acting in concert with the REIT, but not with each other.
8. The Commission has sought the views of the Committee on REITs and the Takeovers Panel on the comments received.
9. Having carefully analysed the comments received and the views of the Committee on REITs and the Takeovers Panel, the Commission proposes to adopt the proposals in relation to the application of the Codes to REITs with certain modifications or clarification of the regulatory intent as set out in this paper.

³ Some of the comments received from the 12 respondents do not appear to fall within the scope of the present consultation. These comments were noted although not addressed specifically in this paper.



Proposed changes to the REIT Code

10. Part 2 of Section A of the Consultation Paper sought the public's views on possible changes to the REIT Code to:
 - (a) expressly require takeover and merger activities to be conducted in compliance with the Codes;
 - (b) bring the requirements regarding the appointment and removal of management companies on a par with those applicable to directors of listed companies to enable the application of the Codes to REITs and to align such requirements with those of other comparable international markets; and
 - (c) clarify the regulatory requirements applicable to delisting of REITs.

The Consultation Paper further discussed related issues in relation to privatisation of REITs.

Application of the Codes to REITs

Question 1: Do you have any comments on the proposed amendments to the REIT Code to expressly require takeover and merger activities concerning REITs to be conducted in compliance with the Codes?

Public comments

11. Respondents generally welcomed and supported the proposal to extend the application of the Codes to REITs. Many of the respondents who commented on the proposal believed that the proposal would protect unitholders' interest. Some respondents also noted that the proposal would more closely align the treatment of REITs with comparable international markets.
12. While welcoming the proposal to extend the application of the Codes to REITs and supporting rationale, some respondents commented on specific implementation issues. A few respondents, in particular some existing REIT managers and substantial unitholders, would like to see exemptions from the general offer obligations under the Takeovers Code to be given to units acquired in specific circumstances. These include units acquired pursuant to pre-existing transactions, units acquired pursuant to distribution reinvestment plans, units acquired as part of management fee units, units acquired pursuant to placing and top-up transactions and units acquired in relation to corporate actions such as consideration units for asset acquisition.
13. One respondent also suggested a 10-year exemption from strict compliance with the 2% creeper requirement under Rule 26.1(c) and (d) of the Takeovers Code be provided if the existing unitholding of any person or any group of persons acting in concert is in aggregate not less than 30% but not more than 50% before the implementation of the proposal to apply the Codes to REITs. This respondent submitted that the suggested exemption is similar to the 10-year exemption granted when the general offer trigger and creeper thresholds were respectively reduced from 35% to 30% and 5% to 2% in 2001.



14. Other comments received are more technical in nature. Some respondents sought clarification on the application of certain provisions in the REIT Code as a result of the application of the Codes to REITs.

Commission's response

15. In view of the general support received to extend the application of the Codes to REITs and the general support of the proposal to align the control structure of REITs with listed companies, the Commission has proceeded with the proposal to extend the application of the Codes to REITs.
16. The Commission understands the rationale given by respondents who sought to seek exemptions from the general offer obligations under the Takeovers Code in specific circumstances. However it must be noted that General Principle 1 of the Codes requires equality of treatment for all shareholders and is considered to be an absolutely fundamental principle underpinning the regulation of takeovers and mergers in Hong Kong. Accordingly, if control of a company changes, a general offer to all shareholders is normally required (Rule 26 of the Takeovers Code). Now that the Codes apply to REITs in order to achieve the fair and equal treatment of unitholders of a REIT it follows that the same principle must apply to all unitholders of a REIT as described below.

Changes to the REIT Code and the Codes take immediate effect

17. As mentioned in paragraph 13 above, one respondent suggested that grandfathering arrangements should be put in place along the lines of the transitional provisions for shareholders that were introduced when the general offer trigger and creper thresholds were respectively reduced in 2001. In this regard the Commission notes that the transitional arrangements in the 2001 Code review applied only to shareholders holding 30% or more of the voting rights of a company but less than 35% immediately prior to the implementation of the changes. In the absence of transitional arrangements the reduction of the trigger threshold to 30% would have conferred an advantage to this category of persons as they would have been free to acquire shares without triggering a general offer obligation under Rules 26.1(a) and (b). The grandfathering arrangement was therefore introduced as an equitable solution so that this group of shareholders would be required to make a general offer if their shareholding increased to 35% or more. Consistent with the objective of ensuring as far as possible that all shareholders were neither advantaged nor disadvantaged as a result of the changes transitional arrangements were not made available to other groups of shareholders i.e. those holding below 30% and those holding above 35%. The Commission believes that in order to achieve the fair and equal treatment of unitholders in a REIT the same rationale should apply to unitholders in a REIT and therefore the Codes should apply to all unitholders with immediate effect and hence no transitional arrangements will apply.
18. In other words, following implementation of the application of the Codes to REITs on 25 June 2010:
 - (a) the trigger provisions under Rule 26.1(a) and (b) will apply to any person or group of persons holding less than 30% of the voting rights of a REIT who increases his/its holding to 30% or more; and



- (b) the creeper provisions under Rule 26.1(c) and (d) will apply to any person or group of persons holding between 30% and 50% of the voting rights of a REIT who increases his/its holding by more than 2% from the lowest percentage holding of that person or group of persons in the 12-month period ending on and inclusive of the date of the relevant acquisition.

For the purpose of (b) above, the percentage holding of a person at the beginning of 25 June 2010 shall be deemed to be the lowest percentage holding of that person for the 12 month period preceding 25 June 2010 (see paragraph 3(l) of the REIT Guidance Note).

Management fee units

Public comments

19. Some respondents pointed out that a number of REITs in Hong Kong have arrangements in place relating to the payment of fees to management companies by way of units in a REIT. One respondent in particular noted that such arrangements are unique to REITs and have often been in place since the time of initial listing and in consequence were disclosed in the initial offering circulars. It believed that the payment of management fees by way of new units (instead of cash) assists to preserve cash available for distribution and for other business purposes. Hence, subjecting this to the trigger and creeper thresholds would reduce the flexibility of REITs in planning the structure and form of management fees and may result in situations that are highly difficult to resolve. As such, it was suggested that, either as part of transitional arrangements or by way of specific exemption, any increase in unitholding resulting from issuance of management fee units in REITs should be disregarded when determining whether a mandatory general offer obligation has been triggered under the Takeovers Code. Two other respondents also asked for similar exemption.

Commission's response

20. As mentioned above it is of fundamental importance under the Codes that all unitholders are treated equally and fairly. In this respect the Commission views management companies as akin to boards of directors of listed companies. Now that the Codes apply to REITs and in order to ensure the fair and equal treatment of all unitholders as required by General Principle 1 of the Codes, the Commission does not believe there to be any compelling reason to waive the most fundamental principle of the Codes in relation to the payment of management fees.

Units issued in relation to corporate action and distribution reinvestment plan

Public comments

21. One respondent suggested that exceptions be included in the mandatory general offer provisions under the Takeovers Code as applied to REITs in relation to certain corporate actions (e.g. placing of new units and issuance of consideration units to third parties for asset acquisition) which might result in a change of the total units in issue (and hence dilution to existing unitholdings). The reason for this was said to be the known difficulties in making yield-accretive acquisitions by REITs in the current economic climate and downturn in the capital market and also given the limitations on



borrowing and more stringent investment restrictions applicable to REITs under the REIT Code.

22. Another respondent also pointed out that one of the special features of REITs is the high payout ratio of no less than 90% (by way of unitholders' distribution), which leaves the REITs limited amounts of cash for balance sheet management. Taking into account the gearing limit imposed on REITs, distribution reinvestment schemes are often necessary for REITs to preserve liquidity especially in times of financial uncertainty. The respondent was therefore concerned that the creeper provisions will potentially pose significant problems to REIT unitholders under those scrip distribution/dividend arrangements. As such it was suggested that the issue and allotment of units by REITs pursuant to distribution reinvestment schemes should not be subject to the creeper provisions. This point was also echoed by one other respondent.

Commission's response

23. For the same reasons as set out in paragraph 20 above the Commission does not believe that any special treatment, and hence any specific exemptions, should be granted in these situations. To do so would go against General Principle 1 of the Codes. As regards whitewash transactions (relating to asset injections or cash subscriptions), subject to compliance with the Codes, waivers will be available to REITs in a similar manner as listed companies.

Placing and top-up transactions and whitewash waiver

Public comments

24. One respondent sought clarification on whether the provisions relating to whitewash waivers, in Schedule VI of the Codes, would similarly be available to REITs.
25. There was also a suggestion that a similar exception or waiver from the mandatory general offer obligations under the Takeovers Code be clearly made available if any unitholders have a total holding of 50% or less in units of a REIT, and as a result of such unitholders taking part in a placing and top-up transaction a mandatory general offer obligation technically arises.

Commission's response

26. Now that the Codes apply to REITs they will be treated in the same way as listed companies. As such, subject to compliance with the Codes, the whitewash waiver⁴ mechanism and placing and top-up waivers⁵ will be available to in a REIT.

Pre-existing transactions

Public comments

27. One respondent believed that it is of vital importance that all corporate exercises transacted by REITs prior to the implementation of the Codes should be grandfathered.

⁴ Note 1 on dispensation from Rule 26 of the Takeovers Code.

⁵ Note 6 on dispensation from Rule 26 of the Takeovers Code.



For instance, if prior to the implementation of the Codes, a REIT had already entered into an agreement to grant options to investors for subscription of units or a right to convert certain derivatives into units within a certain period of time, such agreements and the issuance of units thereunder should not be subject to the Codes. This view was shared by another respondent.

Commission's response

28. The Commission appreciates the rationale underlying the respondent's comment in relation to some pre-existing transactions, in particular, where the issue of convertible instruments concerned has already obtained unitholders' approval. As such, the Executive will consider any such application on a case-by-case basis taking into account all relevant facts and circumstances including the question of when the relevant corporate exercise was entered into and whether unitholders' approval was obtained. Parties involved should consult the Executive at the earliest opportunity in this regard.

Other comments on technical issues

Public comments

29. One respondent questioned whether Rule 7.1 of the REIT Code needs to be amended in view of the application of the Codes. The respondent queried whether the current drafting of Rule 7.1 may preclude the possibility of an SFC-authorized REIT from acquiring interests in another SFC-authorized REIT or any other entity, other than a special purpose vehicle whose sole asset is real estate.

Commission's response

30. In this connection, the Commission would like to clarify that Rule 7.1 requires the REIT to invest only in real estate. However, while Rule 7.5 provides that the REIT may hold real estate through special purpose vehicles, it does not mean that this is the only way through which the REIT can hold real estate. The REIT Code is generally a principles-based code and the Commission would adopt a purposive approach in its interpretation and application. Rule 7.1 does not preclude the possibility of a REIT from acquiring interests in another REIT or any other entity. In fact, the Commission will adopt a "see-through" or "substance-over-form" approach in its interpretation of Rule 7.1.

Public comments

31. The same respondent also queried whether Rule 11.2 of the REIT Code needs to be amended as it appears to preclude the possibility of a securities exchange offer by an offeror which is not an SFC-authorized REIT.

Commission's response

32. The Commission would like to clarify that while Rule 11.2 provides that a REIT may be merged with another REIT authorized by the Commission under the REIT Code, it does not preclude or prohibit any other legally valid way through which a REIT can effect a merger. As securities exchange offers may be structured in many different ways, the Commission would review each case on a case-by-case basis. It is however



important to ensure that any proposed mergers must comply with the REIT Code (as well as the Codes) and all other applicable laws and regulations.

Public comments

33. One respondent suggested that it is no longer appropriate for Rule 11.12 of the REIT Code to make reference to a requirement for consultation with the Commission "*on the manner in which such activities could be carried out so that it is fair and equitable to all holders*". This respondent was of the view that the application of the Codes (as amended) is designed to achieve this end and no additional consultation should be required.

Commission's response

34. The Commission does not propose to further amend Rule 11.12 as we believe it is important to ensure all takeovers activities are carried out in a fair and equitable manner. We therefore do not see any cogent basis for deleting the words as suggested. Although the Codes now apply to REITs takeovers cases, there may be instances where early consultation of the Commission would be desirable. For instance, relevant parties should consult the Commission on the transitional arrangements concerning the removal and appointment of REIT manager⁶ to ensure a smooth transition and to minimise interruption to the business of the REIT.

Public comments

35. Some respondents sought clarification on the role of the trustee in a takeovers situation.

Commission's response

36. It is a fundamental principle under the REIT Code that the trustee shall provide a layer of independent oversight of the REIT and shall act in the best interests of the unitholders. Normally, the trustee does not manage the REIT and in practice has no control over the affairs of the REIT. The management company is responsible for the day-to-day operations and management of the REIT. In view of the two distinctive roles of the management company and the trustee and that fact that a REIT is to be treated as akin to a listed company for the purpose of the Codes, the primary responsibility to advise unitholders on the terms of an offer should rest with the independent board committee formed from the independent non-executive directors of the management company. Where it is not possible to form an independent board committee due to conflicts of interest or other reasons, the independent financial adviser should be responsible for advising unitholders. This is in line with the current practice applicable to listed companies under the Codes.

Public comments

37. One respondent sought clarification on when a REIT manager would be allowed to manage more than one REIT.

⁶ See discussion in paragraph 54 below.



Commission's response

38. On the issue of whether a REIT manager may be allowed to manage more than one REIT, the Commission would like to clarify that this is possible provided that the REIT manager could demonstrate that it has the requisite expertise, resources and capability to do so. In particular, the Commission would expect the REIT manager to have in place robust internal controls and written procedures to ensure unitholders of all REITs under its management are fairly and equitably treated and to manage any conflicts of interest that may arise such that investors' interests would not be prejudiced⁷.

Removal and appointment of the management company

Question 2: Do you have any comments on the proposed amendments to the REIT Code to bring the requirements with regards to appointment and removal of REIT managers on a par with those applicable to directors of listed companies?

Public comments

39. Respondents were generally supportive of the proposal to bring the requirements with regard to appointment and removal of REIT managers on a par with those applicable to directors of listed companies. One respondent noted that the proposal would align Hong Kong with best practices adopted elsewhere.
40. Whilst respondents generally supported the proposal to make the appointment of REIT managers subject to approval by way of ordinary resolution of unitholders where all unitholders would be entitled to vote, two respondents queried why the consent of the trustee should still be required in such a case.
41. A majority of the respondents who commented on the proposal supported the proposal to make the removal of REIT managers subject to approval by way of ordinary resolution of unitholders where all unitholders would be entitled to vote.
42. A few respondents raised concerns about the proposal. These respondents were mainly concerned about the possible disruption to the operation of a REIT that may result from lowering the threshold for the removal of REIT managers. Quite a number of respondents noted that distinction may be drawn in the case of removal of a director of a listed company as the removal of a REIT manager would be equivalent to the removal of the entire board of a listed company. In particular some respondents were concerned that as no "directors" would be left to manage a REIT following the removal of a REIT manager, the continued management of the REIT might be affected. Hence they were concerned that the lowering of the voting threshold may result in disruption to the operation of a REIT which may not be in the interests of REIT investors who are normally looking for a stable and reliable income stream.
43. One respondent therefore believed that the appointment and removal of REIT manager should require approval by way of a special resolution which requires the approval of no less than 75% of the votes. Another respondent sought a distinction to be drawn between internally and externally managed REITs as it believed that the interest of unitholders of internally managed REITs within the present context is

⁷ See also Rule 5.3C of the REIT Code.



already adequately protected. This respondent also suggested that if the proposed change to the voting threshold for the removal of REIT managers must be implemented, the threshold should be set at 50% of all outstanding units instead.

44. In connection with the issue of transitional arrangements, one respondent proposed that policies and requirements relating more specifically to management companies of REITs, particularly in relation to licensing (e.g. relevance of licensing criteria and examination) be developed and published. There was a suggestion that if the voting requirement for the removal of a REIT manager is to be reduced to a simple majority, it should be a condition that a replacement REIT manager is in place before the existing REIT manager is removed. One respondent suggested that the Commission must be consulted before a meeting is requisitioned to change a REIT manager in order to ensure that proper guidance can be given.
45. Another respondent sought clarification on the role of the trustee during the transitional period following the removal of the REIT manager and the transitional arrangement concerning the property manager (commonly a delegate of the REIT manager) in the event the property management contract was terminated at the time the REIT manager ceased to be the manager of the REIT.
46. Some respondents sought clarification on whether a change of control in the management company would have any Takeovers Code implications.
47. Separately, one respondent queried why the same voting requirements would not be extended to the appointment and removal of the trustee.

Commission's response

48. The Commission notes the general support received on the current proposal to bring the requirements with regard to the appointment and removal of REIT managers on a par with those applicable to directors of listed companies. The Commission also notes that our current proposal with regard to the appointment and removal thresholds for REIT managers would align the regulations in Hong Kong with other comparable international markets such as Australia and Singapore. Further, it is a prerequisite that the control structure of REITs must be aligned with that of listed companies in order that the Codes could apply to REITs.
49. On the other hand, the Commission is also mindful of the potential impact and disruption to the operation of a REIT that may result from the removal of the existing REIT manager. The Commission notes that this is the main area of concern raised by the respondents over the current proposal.
50. The Commission has further consulted the Committee on REITs on this issue and taken into account international practice. We have accordingly devised some additional guidance and measures to deal with the transitional arrangement issues that may arise relating to the removal of an existing REIT manager and appointment of the new REIT manager as set out in paragraphs 53 to 58 below. We believe the additional guidance and measures should be able to address the transitional issues and concerns raised by the respondents.
51. On balance, in view of the additional guidance and measures and also taking into account the extensive support given to the proposal to extend the application of the Codes to REITs, the Commission has decided to proceed with its original proposal to



revise the voting thresholds for the appointment and removal of REIT managers in order to align the control structure of REITs with that of listed companies, which is a prerequisite to enable the Codes to apply to REITs.

52. For the same reason, the Commission does not propose to revise the threshold for removal of REIT managers to 50% of all outstanding units as suggested by one respondent and the proposed voting requirements for the appointment and removal of REIT managers will apply to both internally managed and externally managed REITs. Similarly, the Commission has retained the original proposal to allow all unitholders, including affiliates of the relevant REIT manager, to vote on the appointment and removal of REIT manager. As explained in the Consultation Paper, we believe that our proposal to allow all unitholders to vote on the appointment and removal of REIT managers would better align the economic interests of controlling stake of ownership in a REIT and is in line with regulations in other comparable international markets such as Australia and Singapore.

Transition between outgoing and incoming management companies

53. The Commission is mindful of the potential impact to a REIT's operation that may result during the transitional period between the removal of a REIT manager and the appointment of the new REIT manager. It should be noted that the offeror would always have the liberty to retain the existing REIT manager upon completion of the offer. In any event, the outgoing REIT manager, as an SFC licensee, must act in the best interests of the unitholders and work with the incoming REIT manager and the trustee to ensure a smooth transition of the REIT's operation and to minimise interruption to the business of the REIT. As such, where a resolution to remove the existing REIT manager is proposed at a general meeting of unitholders of the REIT, the Commission would expect that the appointment of a duly qualified new REIT manager⁸ will also be proposed in the same resolution. The objective is to ensure that the resignation and appointment will take effect simultaneously and there will not be any "vacuum" period during which the REIT does not have a management company in place. This is substantially in line with the practice adopted in the context of REITs in Australia⁹ and should address the concerns which some of the respondents expressed. In addition, since the trustee of a REIT may not retire except upon the appointment of a new trustee under the REIT Code¹⁰, the trustee is also under duty to oversee the REIT if for any reason there is no manager under the trust.
54. Pursuant to Rule 5.3 of the REIT Code, the new REIT manager proposed to be appointed shall be licensed under Part V of the SFO and approved by the Commission to manage the REIT in question. As such, any person who wishes to acquire voting rights in units of any SFC-authorized REIT which might give rise to a requirement for an offer under Rule 26 of the Takeovers Code and who wishes to appoint a new REIT manager is strongly encouraged to consult the Commission on a confidential basis at the earliest opportunity regarding the acceptability of the new REIT manager. To accommodate a smooth transition, the Commission would be prepared to give an

⁸ Under paragraph 3(n) of the new REIT Guidance Note, any intention to appoint a new REIT manager should be disclosed in the offer document.

⁹ Pursuant to the Corporations Act, the responsible entity of a registered scheme must ensure that the scheme is wound up if, among other things, the members pass a resolution removing the responsible entity but do not, at the same meeting, pass a resolution choosing a company to be the new responsible entity that consents to becoming the scheme's responsible entity.

¹⁰ See Rule 4.7 of the REIT Code.



approval-in-principle in respect of the requisite licensing application of the proposed new REIT manager where appropriate.

55. Under the Takeovers Code, except with the consent of the Executive, the new REIT manager may not be appointed until the offer document has been posted¹¹ and the outgoing REIT manager may not resign until the first closing date of the offer or the date when the offer becomes or is declared unconditional, whichever is later¹².
56. Taking into account the above, it would mean that under normal circumstances, the new REIT manager will be appointed and the outgoing REIT manager will resign simultaneously on the same date which will not be earlier than the first closing date of the offer or the date when the offer becomes or is declared unconditional, whichever is later.
57. One respondent observed that it is common practice where a property management company is appointed as a delegate of the REIT manager, the property management agreement will immediately be terminated if the REIT manager ceases to be the manager of the REIT. Hence, this may aggravate the disruption to the operation of a REIT if its REIT manager is removed without a new REIT manager being appointed immediately.
58. As mentioned above, it is generally expected that the outgoing REIT manager will act in the best interests of the unitholders and work with the incoming REIT manager and the trustee to ensure smooth transition of its duties and to minimise interruption to the business of the REIT. Further, for reasons set out above, we do not expect there will be any “vacuum” period during which a REIT may not have a management company in place. In addition, any major changes to the operation of a REIT, including any proposed change of the property management company and the corresponding transitional arrangement, will be required to be disclosed in the relevant offer document to keep unitholders informed¹³. Paragraph 3(n) of the REIT Guidance Note has been amended to expand the scope of disclosures in the offer document.

Change of control of REIT manager

59. The Commission is mindful that it is theoretically possible that externally managed REITs may be “taken over” by way of taking over a REIT manager instead of acquiring a majority of the units in a REIT. Where an acquirer takes over a REIT manager, which is usually a private company, the unitholders will not have any involvement in the takeover process. Hence the question arises as to whether a change of control in a REIT manager would have any implications under the Takeovers Code for the REIT.
60. Since a change in control of a REIT manager is analogous to a change of directors in the context of a listed company, a change of directors in itself without an acquisition of voting rights would not trigger a general offer obligation under the Takeovers Code. This would also be in line with the position in other comparable international markets such as Australia and Singapore. Given that a REIT manager can now be removed by unitholders passing an ordinary resolution, there would appear to be little incentive in practice for any bidder to attempt to “takeover” the control of the management of a

¹¹ Rule 26.4 of the Takeovers Code.

¹² Rule 7 of the Takeovers Code.

¹³ See paragraph 3(n) of the new REIT Guidance Note.



REIT by acquiring only the REIT manager without acquiring an interest in voting rights of the REIT itself.

Other comments

61. The Commission does not propose to dispense with the requirement to obtain the trustee's consent in the case of the appointment of a REIT manager, as suggested by some of the respondents in view of the significant role assumed by the trustee in the REIT structure and its fiduciary duty to oversee the activities of the REIT manager. The Commission also notes that the current arrangements relating to the appointment and removal of trustees appear to have worked well and therefore does not see any need for changes to be made to the relevant provisions.
62. In relation to the removal of a REIT manager, one respondent suggested that rights similar to those under section 157B(3) of the Companies Ordinance be expressly granted to a management company to make representation or to send a copy of its representation to unitholders of a REIT before the proposed removal is voted on. The Commission does not object to any such right being incorporated into the constitutive documents of a REIT. In fact, we note that the trust deeds of some existing REITs already contain similar provisions.

Delisting of REITs

Question 3: Do you have any comments on the proposed amendments to the REIT Code in relation to delisting of REITs?

Public comments

63. Respondents generally supported the proposed amendments to the REIT Code in relation to delisting of REITs. Two respondents did not agree to the application of the 10% blocking right in the case of delisting of REITs (i.e. the requirement that votes against a delisting should be no more than 10% of the votes of disinterested units).
64. Two respondents also sought clarification on certain technical issues.

Commission's response

65. In view of the general support received from respondents, the Commission has proceeded with the proposed amendments to the REIT Code in relation to delisting of REITs.
66. One of the respondents who did not agree with the 10% blocking right did not offer any reason for this view. The other respondent who raised concerns on the issue appeared to be concerned about the headcount test. The Commission would like to clarify that the 10% blocking right under Rule 2.10 of the Takeovers Code is not on the basis of a headcount test which is a requirement in the Companies Ordinance in the case of a scheme of arrangement. The 10% blocking right is calculated with reference to the number of disinterested votes and not the number of unitholders attending the meeting or the number of unitholders in total. Given that this 10% blocking right is applicable to all listed companies, the Commission does not see any cogent basis for not applying the same requirement, or applying such requirement differently, to REITs.



67. One respondent noted that the possible position of REITs becoming cash companies and any resulting action following any substantial disposal is not mentioned in the REIT Code or its proposed amendments. The Commission would like to clarify that if it is clear that a REIT manager does not have any intention to reinvest the sale proceeds in acquiring other real estate in the short term after a substantial disposal, the REIT would generally be regarded as unable to satisfy the requirements under the REIT Code in order to remain authorised¹⁴. This would normally result in the de-authorisation and consequent delisting of the REIT as the Listing Rules require that a REIT must remain authorised by the Commission for so long as it is listed¹⁵.
68. As regards a technical comment received on the need to “align” the voting requirement applicable to termination and delisting, the Commission would like to clarify that in normal cases, we would also regard a proposal to terminate a REIT as a delisting proposal, which would simultaneously trigger the application of new Rule 11.13. This is because once a REIT is terminated, de-authorisation of the REIT would follow given the REIT would no longer be able to comply with the authorisation conditions imposed by the Commission. This would logically result in the delisting of the REIT as a REIT must remain authorised by the Commission for the period of its listing¹⁶. Accordingly, we would expect any proposal to terminate a REIT to comply with the requirements under new Rule 11.13.

Privatisation of REITs

Question 4: Do you have any comments on our proposal regarding application of Note 7 to Rule 2 of the Takeovers Code and the new Rule 11.13 of the REIT Code?

Public comments

69. Privatisation of REITs was a related issue discussed in the Consultation Paper. One respondent in particular noted the importance of a regulatory regime that encourages acquisition and privatisation activity, which in its view is essential for regeneration and continuing vitality of the public market. Some respondents who commented on this issue called for a wider “squeeze out” or privatisation mechanism to be made available to Hong Kong REITs. There was a suggestion that the Australian “trust schemes” framework may be followed in Hong Kong. Another respondent also questioned if a more conventional corporate structure would be preferable for Hong Kong REITs. Some respondents also raised a few technical comments.
70. Respondents generally supported the application of Note 7 to Rule 2 of the Takeovers Code in cases of a disposal of assets followed by delisting of a REIT or resulting in the REIT being considered not suitable to remain authorised by the Commission under section 104 of the SFO. Some respondents sought clearer guidance on the applicability of the Public Auction Requirement¹⁷. One suggestion was to amend the REIT Code to provide that the Public Auction Requirement would not apply where

¹⁴ For example, Rule 3.2 of the REIT Code requires that a REIT must have dedicated investments in real estate that generates recurrent rental income.

¹⁵ See Note (iv) to Rule 20.01 of the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited.

¹⁶ See Note (iv) to Rule 20.01 of the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited.

¹⁷ The requirement in the case of termination of a REIT to dispose all real estate through public auction or any form of open tender pursuant to Rule 11.8 of the REIT Code.



there has been a termination following a privatisation provided that there is full compliance with the Takeovers Code.

Commission's response

71. As noted in the Consultation Paper, the statutory compulsory acquisition mechanism and scheme of arrangement mechanism do not apply to REITs which are in the trust form¹⁸. The Commission notes the implementation of “trust schemes” to effect privatisation of REITs in Australia by way of a “scheme of arrangement” through contractual (as opposed to the statutory framework for companies) arrangements with unitholders.
72. For the reasons discussed in the Consultation Paper¹⁹, in the absence of any statutory framework or case law, it appears that there remains a high degree of uncertainty as to whether Hong Kong courts would give sanction to a scheme of arrangement concerning Hong Kong REITs without legislative requirements similar to those in section 166 of the Companies Ordinance. Without any statutory or other form of court sanction of the scheme approval process undertaken by a REIT, investors' interests may not be properly protected to the same extent as shareholders of a listed company that undertakes a scheme of arrangement under section 166 of the Companies Ordinance. As such, schemes of arrangement may not really be viable in the case of REITs.
73. As noted in paragraph 71 above, the statutory compulsory acquisition mechanism does not apply to REITs. This means that where an offeror satisfies the applicable delisting requirements²⁰, unitholders who do not accept the offer will become holders of units of an unlisted trust scheme which would fall outside the jurisdiction of the Codes and the REIT Code because the REIT would cease to be an SFC-authorized REIT. To this end, the Commission considers it beneficial to unitholders that where an offer is made to the unitholders of a REIT in relation to or together with:
- (a) a proposal to withdraw the listing of the units of the REIT on the Stock Exchange; or
 - (b) a proposal which might result in the REIT being not regarded as suitable to remain authorised by the SFC under section 104 of the SFO;
- where such offer becomes or is declared unconditional in all respects it should remain open for acceptance for a longer period than normally required by Rule 15.3 of the Takeovers Code. The Commission would not normally expect this period to be less than 28 days. A corresponding extension of the written notice period will also be required.
74. The Commission also believes that an offeror should clearly disclose its intention with regard to the listing status of the offeree REIT in the offer document (see paragraph 3(n) of the REIT Guidance Note). This is intended to ensure that relevant unitholders may reach a decision on an informed basis as to whether to accept the offer or

¹⁸ As explained in the Consultation Conclusions on The Draft Code on Real Estate Investment Trusts (published in July 2003), the Commission considers that the trust structure is the preferred form for REIT, as it ensures that the trustee will provide a layer of oversight.

¹⁹ See paragraphs 40 to 45 of the Consultation Paper.

²⁰ See Rule 11.13 of the REIT Code and the applicable provisions of the Takeovers Code.



continue to invest in the units of an unlisted trust scheme which may no longer be regulated by the Codes and the REIT Code. To this aim a clear explanation of the implications of the proposal should also be clearly and prominently disclosed in the offer document sent to those unitholders who have not accepted the offer (see paragraph 3(k) of the REIT Guidance Note).

75. As regards whether a waiver from strict compliance with the Public Auction Requirement would be granted where there has been a termination following a privatisation, it was explained in the Consultation Paper that the Commission would be prepared to consider granting such a waiver subject to compliance with Rule 11.13 of the REIT Code and the applicable provisions in the Takeovers Code.
76. In deciding whether such waiver should be granted, one key factor would be whether the proposed disposal price or consideration for the real estate of the REIT was determined at the time unitholders were asked to approve the privatisation and termination.
77. The Public Auction Requirement set out in Rule 11.8 of the REIT Code requires that upon termination of a REIT, all real estate held by the REIT shall be disposed of through public auction or any form of open tender and the disposal price shall be at the best available price obtained through public auction or open tender. The key question would be whether the disposal price or consideration for the real estate held by the REIT was disclosed in the relevant circular to unitholders. If so, unitholders would have been provided with the opportunity to reach an informed decision on the disposal and termination at the requisite general meeting with the benefit of the advice from the independent board committee of the REIT manager and/or independent financial adviser. In such a case the Commission would normally grant a waiver from strict compliance with the Public Auction Requirement.
78. In the event such price or consideration has not been determined at the time unitholders are asked to approve the privatisation and termination, the Commission believes unitholders and investors should not be deprived of the safeguards under the existing Public Auction Requirement.



Changes to the Codes

79. Part 3 of section A of the Consultation Paper proposed (subject to the implementation of the changes to the REIT Code discussed in Part 1 and Part 2 of Section A of the Consultation Paper):
- (a) possible related changes to section 4.1 of the Introduction to the Codes to extend the application of the Codes to REITs; and
 - (b) the introduction of a REIT Guidance Note as new Schedule IX to the Codes.

Section 4.1 of Introduction to the Codes

Question 5: Subject to the implementation of appropriate modifications to the REIT Code as discussed in the relevant paragraphs in Part 1 and Part 2 of Section A of the Consultation Paper being implemented do you agree that the Codes should apply to REITs? If not, please give reasons and any suggestion that you may have.

Public comments

80. Six of the eight respondents who commented on this question generally supported the proposal that the Codes should apply to REITs. One respondent did not express a view and one respondent disagreed for the reasons set out in paragraphs 13, 17 and 19 above.
81. Paragraph 53 of the Consultation Paper proposed that as the Codes apply to public companies in Hong Kong, the same principles should apply to REITs which are listed in Hong Kong as well as REITs which are not listed but fall within the concept of public companies. Two respondents questioned the reference to unlisted REITs as the REIT Code provides that all REITs must be listed within a certain time after authorisation and the listing status is an essential element to REITs.

Commission's response

82. Currently Rule 3.6 of the REIT Code provides that it is a condition for a REIT to be authorised by the Commission that it will be listed on the Stock Exchange within a period acceptable to the Commission. Section 4.1 of the Introduction to the Codes (as amended) makes it clear that the Codes apply to all REITs with a primary listing of their units in Hong Kong. Section 4.2 would also apply to a REIT with a secondary listing in Hong Kong. In such circumstances the question of whether the Codes apply to the REIT in question would be determined in accordance with section 4.2.

Public comments

83. Two respondents suggested that the issuance of units by a REIT for settlement of the management company's fees and issue and allotment of units pursuant to the distribution reinvestment schemes should not be subject to the creeper provisions under the Codes. It was also suggested that pre-existing transactions entered into by a REIT prior to implementation of the Codes should be grandfathered.



Commission's response

84. As explained in paragraph 16 equality of treatment for all shareholders is a fundamental principle underpinning the regulation of takeovers and mergers in Hong Kong. The Commission sees no compelling reason to waive one of the most fundamental provisions (Rule 26) of the Codes in relation to the issuance of units by a REIT for settlement of the management company's fees or pursuant to a distribution reinvestment scheme. The treatment of pre-existing transactions is explained in paragraphs 27 and 28.

Public comments

85. One respondent suggested that outstanding convertible bonds previously issued by a REIT but not yet converted should be grandfathered.

Commission's response

86. The treatment of such convertible bonds is explained in paragraph 28.

Public comments

87. One respondent queried whether the new Schedule IX (the REIT Guidance Note) is intended to apply to a REIT as an offeree but not in other situations.

Commission's response

88. The REIT Guidance Note applies to all those involved in REITs in matters relating to takeovers, mergers and share repurchases. It follows that the REIT Guidance Note applies to a REIT irrespective of its role in a matter which is governed by the Codes.

Public comments

89. One respondent suggested that it should be for the trustee rather than the management company to consider the terms of an offer and advise unitholders because the management company has a conflict of interest. This respondent suggested that the special role of the trustee in relation to a takeover transaction should be specified in the Codes.

Commission's response

90. The responsibility for advising unitholders on the terms of an offer is explained in paragraph 36.

Public comments

91. One respondent suggested that it is unclear whether the Share Repurchase Code prevails over any Unit Repurchase Mandate in the event of a conflict.

Commission's response

92. Now that the amendments are effective a REIT must comply with the Share Repurchase Code. The REIT manager must therefore satisfy itself that a proposed repurchase of units does not contravene the Share Repurchase Code.



Section 1.5 of Introduction to the Codes

Question 6: If the Codes were to apply to REITs, do you agree with the proposed amendments to section 1.5 which would impose the responsibilities provided for in the Codes on management companies, their directors and trustees?

Public comments

93. Five of the six respondents who commented on this question generally agreed that the Codes should apply to management companies, their directors and trustees. One did not comment on the application of the Codes to trustees but disagreed with the application of the Codes to directors of a management company. Three respondents suggested that further consideration be given to the situation of trustees. One respondent suggested that the relevant rules that are applicable to a trustee should be specifically identified.

Commission's response

94. The Commission notes the general oversight role typically carried out by the trustee of a REIT. Section 1.5 is a general statement identifying the parties upon whom the responsibilities of the Codes are imposed. A trustee's specific responsibilities under the Codes will depend on the actual duties carried out and actions taken by the trustee which may differ on a case-by-case basis. Given this, the Commission does not propose to specify which rules apply to the trustee.
95. Given that the management company and its directors are responsible for the day-to-day operation and management of a REIT and perform similar functions to directors of a listed company, the Commission believes they should be subject to the same responsibilities, provided for in the Codes, as directors of listed companies.

Public comments

96. One respondent expressed the view that where the REIT is an offeree, the management company should be responsible for compliance with Schedule II.

Commission's response

97. For the reasons stated in paragraph 95, the management company and/or its directors should be primarily responsible for the preparation of the offer document and/or the offeree board circular (as the case may be).

REIT Guidance Note

Definition of "shares" and "shareholders"

Question 7: If the Codes were to apply to REITs, do you agree with the proposal to cross reference "shares" and "shareholders" to "units" and "unitholders"?

Public comments

98. Five respondents agreed to the proposal to cross refer "shares" and "shareholders" to "units" and "unitholders".



Commission's response

99. The Commission has adopted the cross references as proposed.

Definition of “board” and “directors”

Question 8: If the Codes were to apply to REITs, do you agree with the proposal to extend the meaning of “board” and “director(s)” in the context of REITs?

Public comments

100. Six respondents agreed to the extension of the meaning of “board” and “director(s)”. One respondent did not agree that individual directors of a management company should be subject to the Codes. This respondent made a similar remark in its response to Question 6. One respondent commented that the definition should include the management company and (not and/or) its board of directors. Another respondent suggested that “board” should mean the board of the management company and “director(s)” should include any one or more of the directors of the management company.

Commission's response

101. Given that the term “board” may mean a management company or its board (as the case may be depending on the context), the Commission considers it more appropriate to adopt the original proposed wording. For example, in Rule 7 of the Takeovers Code, the term “board” should mean a management company or its board as either one of them can receive an offer. Likewise, the term “director” in Rule 7 may mean a management company or any one of its directors.

Definition of “acting in concert”

Question 9: If the Codes were to apply to REITs, do you agree that the REIT, the management company (and its directors) and the trustee should be presumed to be acting in concert as proposed?

Public comments

102. One of the nine respondents who commented agreed with this proposal. Two respondents suggested that it might be appropriate to separate the presumptions of acting in concert so that a management company and its trustee are presumed to be acting in concert with the REIT, but not with each other. Two respondents objected. Four respondents either agreed or did not object to the imposition of a presumed concert party relationship between a REIT and its management company but did not agree that the trustee should be presumed to be acting in concert with its REIT.

103. Reasons cited in support by the five respondents objecting to a presumed concert party relationship between the trustee on one hand and the REIT and its management company on the other hand include:

- (a) the trustee is independent of the management company;
- (b) the trustee does not manage the REIT and has no control over its affairs;



- (c) the trustee does not influence business decisions unless such decisions contravene the constitutive documents, the REIT Code or the law; and
- (d) there is clear division of roles between a trustee and a management company.

104. One respondent remarked that a trustee may be the trustee of a number of different trusts or the custodian of certain assets of a collective investment scheme or corporate vehicle. As each trust will be for a different purpose and the trust properties of each are held for different beneficiaries this respondent suggested that it would be inappropriate to presume that the trustee in one capacity is acting in concert with its other capacities. To do so may unreasonably hinder the operation of such entities depriving them of the right to act in the best interest of their clients. It was suggested that the trustee should only be presumed to be acting in concert in its capacity as the trustee of the REIT concerned.

Commission's response

105. Under Rule 5.7A of the REIT Code, the management company shall ensure that in managing a REIT, it has sufficient oversight of the daily operations and financial conditions of the REIT and its underlying properties. As explained in paragraph 58 of the Consultation Paper, the management company performs a similar role to directors of a limited company. On this basis, the Commission considers that a management company should be presumed to be acting in concert with the REIT concerned. This is in line with the treatment of directors of a limited company under presumption class (2).
106. In view of the role carried out by the trustee and its fiduciary duties to properly segregate the assets and hold the same for the benefit of the unitholders of the trust concerned and taking into account the submissions of the respondents, the Commission accepts that the trustee should not be presumed to be acting in concert with the management company. However it should be noted that the absence of a presumed concert party relationship does not preclude the possibility that the relevant parties are as a matter of fact acting in concert with one another. Notwithstanding the above given the duties owed by a trustee to a REIT the Commission continues to believe that the trustee should be presumed to be acting in concert with the REIT in its capacity as trustee for that REIT.
107. As the trustee of a REIT must comply with the eligibility requirements in Rule 4.3 of the REIT Code and is usually a member of a large international financial group that provides similar services to different clients, the Commission accepts the view that only the trustee acting in such capacity for a REIT should be presumed to be acting in concert with that REIT. Again, where necessary, the question of whether a trustee in its other capacities is acting in concert with the REIT will be a matter to be determined by taking into account all relevant circumstances.
108. Presumption class (10) has been amended so that the reference to the trustee and persons controlling, controlled by or under the same control as the trustee will be removed. As mentioned in paragraph 38 above, there is a possibility that a management company may manage more than one REIT provided that it can demonstrate that it has the requisite expertise, resources and capability to do so. In the context of an offer, conflicts of interest may exist, for instance, when the REITs managed by such management company are parties to an offer. As each case will depend on its own particular facts, it is proposed that the Executive should be consulted where there is a common management company for the parties to an offer.



A separate note has been added to the new presumption class (10) (see paragraph 110 below).

109. A new presumption class (11) has been introduced so that a REIT is presumed to be acting in concert with its trustee acting in such capacity. The explanatory note to presumption (10) as set out in the Consultation Paper has been removed and added to the new presumption (11).

110. Presumptions (10) (as amended) and (11) are as follows:

“(10) a REIT, its management company (together with persons controlling[#], controlled by or under the same control as the management company) and any director (together with their close relatives, related trusts and companies controlled[#] by any of the directors, their close relatives or related trusts) of such management company.

Notes:

1. *The Executive must be consulted where a management company acts at the same time for more than one of the following:-*

(i) offeror or possible offeror;

(ii) competing offeror or possible competing offeror; and

(iii) offeree REIT.

2. *The role carried out by a management company pursuant to its obligations under the REIT Code should be distinguished from a fund manager under class (4) and a financial or other professional adviser under class (5). Nonetheless, classes (4) and/or (5) will also apply to a management company where the management company is acting in such capacity for a REIT.”*

“(11) a REIT and its trustee acting in such capacity.

Notes:

1. *The Executive must be consulted where a trustee acts at the same time in its capacity as trustee for more than one of the following:-*

(i) offeror or possible offeror;

(ii) competing offeror or possible competing offeror; and

(iii) offeree REIT.

2. *For the purpose of calculating the voting rights held by a group acting in concert, the voting rights held by a trustee in its capacity as trustee of unrelated trusts will not normally be counted. In case of doubt, the Executive must be consulted.”*

Public comments

111. One respondent questioned the need for introducing a new class of presumption as presumption class (4) already applies to management companies.



Commission's response

112. Presumption class (4) is intended to cover a fund manager and the investment accounts it manages. The role of a management company of a REIT pursuant to its obligations under the REIT Code may be distinguished from the role of a fund manager (under presumption class (4)). If therefore the sole reason for the connection is that a management company is acting in such capacity for a REIT, presumption class (4) does not apply to it. By the same token, as explained in paragraph 74 of the Consultation Paper, in view of the active role carried out by a management company in managing a REIT, the management company should not be regarded as a financial adviser or professional adviser to a REIT (under presumption class (5)). If therefore the sole reason for the connection is that a management company is acting in such capacity for a REIT, presumption class (5) does not apply to it either. Accordingly, the Commission has added a note to the new presumption class (10) (see paragraph 110 above) to clarify the position.

Public comments

113. Paragraphs 58 to 59 of the Consultation Paper explained the similarities between the director/company relationship and management company/REIT relationship. On this basis, with respect to a REIT, it was proposed in paragraph 60 to expand “*directors (together with their close relatives, related trusts and companies controlled[#] by any of the directors, their close relatives or related trusts)*” in presumption classes (2) and (6) to include “*management company of a REIT (together with persons controlling[#], controlled by or under the same control as the management company)*”. One respondent noted that the scope of presumption classes (2) and (6) is wider in the context of REITs than in listed companies and sought to clarify whether this was intended.

Commission's response

114. As explained in paragraphs 100 and 101, the term “*director*” may mean the management company and/or directors of the management company as the case may be. The scope of presumption classes (2) and (6) is unavoidably wider in the context of REITs than in the case of listed companies. By way of example, presumption class (2) in the context of REITs will cover (i) the management company and persons controlling, controlled by or under the same control as the management company and (ii) directors of the management company and their close relatives, related trusts and companies controlled by any of these directors, their close relatives or related trusts.

Question 10: If the Codes were to apply to REITs, do you agree that the Executive should be consulted where there is common trustee for the parties to an offer?
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Public comments

115. Five of the eight respondents who commented agreed with this proposal while three respondents did not agree. One respondent questioned whether a REIT can make an offer for another REIT.
116. Two respondents commented that trustees should be impartial and act professionally. As such, it should not be necessary to consult the Executive.



Commission's response

117. Consultation with the Executive should not in any way be taken to suggest that the common trustee will not act impartially and professionally. However, acting for more than one party in the context of an offer may involve various issues under the Codes which may impact the logistics and practices of the trustee such as Rule 4 on frustrating action. The Commission believes that early consultation with the Executive in such cases may help progress the transaction smoothly by resolving issues under the Codes at an early stage.

Public comments

118. One respondent asked for clarification that voting rights held by a trustee in different capacities would not be aggregated. This respondent also queried whether actions of and voting rights held by a trustee in its capacities as trustee of different offerors will be viewed separately.

Commission's response

119. As explained in paragraph 70 of the Consultation Paper, a trustee is required under the REIT Code to ensure that all the assets of a REIT are properly segregated. Given this segregation and the duties of a trustee to exercise all due diligence and vigilance in carrying out its function and duties and in protecting the rights and interests of unitholders, the Commission believes it is fair to treat such assets as separate from one another in particular in determining aggregate concert group holdings. This is addressed in the note to the new presumption class (11).

Public comments

120. One respondent suggested that an offeror should change its trustee before it initiates active steps to take over another REIT with the same trustee.

Commission's response

121. The Commission notes the fiduciary and other duties owed by a trustee to unitholders under law and the REIT Code. There is a concern that a change of trustee at the beginning of a takeover transaction might cause unnecessary disruption to the conduct of the transaction. There is also a concern that, in the event that a REIT were required to change its trustee before making an offer for another REIT with the same trustee, unrelated changes in the trustee of a REIT might be taken to mean that an offer is being contemplated resulting in possible market confusion and speculation.

Public comments

122. One respondent suggested that the Codes should provide guidance on how a trustee should deal with the situation where the offeror and offeree have a common trustee.

Commission's response

123. The question of whether there is conflict of interest and if so the extent of such conflict will depend on the actual role carried out by the common trustee in both REITs. There is a concern that setting out rigid rules or guidelines may run the risk of over-generalisation. The Commission considers that the requirement for the trustee to



consult the Executive in such a situation is appropriate so that the Executive may provide the trustee with guidance taking into account the specific facts and circumstances.

Notes to the definitions of exempt fund manager and exempt principal trader

Question 11: If the Codes were to apply to REITs, do you agree that group entities, including exempt fund managers or exempt principal traders, of the management company should be presumed as concert parties of the REIT (offeror or offeree) and therefore exempt status would not be relevant?

Public comments

124. Three of the seven respondents who responded to this question agreed to this proposal. Three respondents did not have any comment. One respondent did not agree and suggested that entities within the management company group with exempt fund manager or exempt principal trader status should be excluded from the concert party presumption between the REIT and the management company.

Commission's response

125. As explained in paragraph 72 of the Consultation Paper, exempt status is relevant only where the connection of a fund manager or a principal trader with the offeror or the offeree is solely because it is in the same group as a financial or other professional adviser to a party to a transaction under the Codes. As further explained in paragraph 74 of the Consultation Paper, a management company should not be regarded as a financial adviser or professional adviser for the purpose of Note 2 to the Notes to the definition of exempt fund manager and exempt principal trader because of, among other things, the active role carried out by the management company in managing a REIT and the likely active role it will play in an offer. It follows that exempt status should not be relevant to the group companies of the management company.

Question 12: If the Codes were to apply to REITs, do you agree that group entities of a trustee with exempt fund manager or exempt principal trader status should not be presumed as concert parties of the REIT (offeror or offeree) during an offer?

Public comments

126. Five respondents who commented agreed that group entities of the trustee with exempt fund manager or exempt principal trader status should not be presumed as concert parties. One respondent did not agree that the trustee should be presumed to be acting in concert with the REIT. Two respondents questioned whether the presumption should extend to other entities in the corporate group given the more passive role carried out by a trustee.

Commission's response

127. In light of the discussion in paragraphs 102 to 110, a trustee's group entities will not be presumed to be acting in concert with a REIT. Exempt status will therefore not be relevant. Given this, proposed paragraph 3(n) (Notes to the definitions of exempt fund manager and exempt principal trader) of the REIT Guidance Note has been deleted.



Question 13: If the Codes were to apply to REITs, do you agree that Rule 21.6 would apply to a connected management company and a connected trustee in an offer?

Public comments

128. Respondents generally agreed that Rule 21.6 should apply to connected fund managers and connected principal traders of the management company but did not agree that a trustee should be presumed to be acting in concert with the REIT.

Commission's response

129. For the reasons discussed in paragraphs 102 to 110, a trustee's group entities will not be presumed to be acting in concert with a REIT and Rule 21.6 will therefore not apply to such entities. For the same reason, fund managers and principal traders within the trustee's group will not be treated as connected fund managers or connected principal traders as defined under the Codes.
130. As explained in paragraph 125, exempt status is not relevant for fund managers and principal traders within the management company group. They are presumed to be acting in concert. As a result, any shareholdings and dealings in relevant securities by a connected fund manager or principal trader, whether on behalf of discretionary clients or as principal, could have important consequences for the offeror or offeree company with which the fund manager or principal trader is connected. On the basis that before the identity of the offeror or the offeree, as the case may be, is publicly known, the fund manager or principal trader should not be aware of the fact that the party with which it is connected might be involved in a takeover Rule 21.6 should apply. If in fact the fund manager or principal trader had been aware of the possible transaction before the relevant public announcement, the relaxation provided by Rule 21.6 would not apply. In order to apply the relaxation under Rule 21.6 to connected fund managers and connected principal traders within the management company group, a new class (5) has been introduced to the definition of "*connected fund manager and connected principal trader*" as follows:-

"(5) the management company of an offeror REIT or an offeree REIT"

Definition of "associate"

Question 14: If the Codes were to apply to REITs, do you agree that the management company and the trustee should be included in the definition of "associate"?

Public comments

131. Respondents generally agreed to extend the definition of "*associate*" to cover management companies. On the other hand respondents generally did not agree that the definition should include trustees. One respondent suggested that the definition should only include the trustee in its capacity as the trustee of the REIT concerned.
132. One respondent queried whether the definition of "*associate*" should extend to "*any trustee (together with persons controlling[#], controlled by or under the same control as the trustee) of an offeror/offeree or any company in class (1)*". This respondent suggested that by virtue of the definition of "*trustee*" the term "*associate*" should only cover a trustee of the REIT in question but not extend to other unrelated trustees acting for the offeror/offeree or other members of the group in other trustee capacities.



Commission's response

133. The proposed amendments to the definition of “associate” were intended to include only a trustee in its capacity as the trustee of a REIT and as trustee of any company within presumption class (1). For clarity, the wording of the new class (8) to the definition of “associate” has been amended as set out below. Class (9) has been adopted as proposed:

- “(8) any trustee (in its capacity as trustee of a REIT) of an offeror, the offeree REIT or any company in class (1); and
- (9) any management company (together with persons controlling[#], controlled by or under the same control as the management company) of an offeror, the offeree REIT or any company in class (1).”

Action of, voting rights and assets owned, controlled or held by a trustee, a management company and/or its directors and/or special purpose vehicle(s) of a REIT

Question 15: If the Codes were to apply to REITs, do you agree with the proposal to introduce the concepts of parent, subsidiary, fellow subsidiary and associated company to REITs? If you do not agree, your reasons and your suggestions as to how to apply these concepts to REITs are particularly important.

Public comments

134. All six respondents who expressed a view generally agreed to this proposal. One respondent was of the view that the definition of “associated company” in the Codes is very wide and suggested that it be narrowed down.

Commission's response

135. The “Notes to Definitions” in the REIT Guidance Note have been adopted as proposed. As noted in paragraph 85 of the Consultation Paper, the concept of parent, subsidiary, fellow subsidiary and associated company should apply to REITs. For clarity, a note has been added to the definition of “company” in the REIT Guidance Note as follows:

“Note:

In the context of a REIT, the concept of parent, subsidiary, fellow subsidiary and associated company should apply to REITs (see also the Notes to Definitions in this Guidance Note).”

Although the scope of the definition of “associated company” is not the subject of this consultation the comment is noted.

Frustrating action under Rule 4

Question 16: If the Codes were to apply to REITs, do you agree that Rule 4 should apply to the management company as well as its directors?

Public comments

136. Six respondents generally agreed to the proposal.



137. One respondent suggested that service contracts between the management *company* and its individual directors be exempted from Rule 4 as such directors are paid out of the resources of the management company rather than the REIT. Another respondent suggested that note (a) to paragraph 3(d) of the REIT Guidance Note be revised to “*alter the terms of the engagement between the offeree REIT and its management company otherwise than in the ordinary course of business*”.

Commission’s response

138. Rule 4 reflects General Principle 9 of the Codes which provides that the board of the offeree may not take any action in relation to the affairs of the company, without the approval of shareholders, which could effectively result in any bona fide offer being frustrated. The question of whether service contracts newly entered into or amended between a management company and its directors constitute frustrating action will depend on a detailed analysis of the terms of engagement between a REIT and its management company and the terms of the service contract between a management company and the director concerned. Given this, the Commission believes that service contracts should be included in Rule 4.
139. As Note 2 of the Notes to Rule 4 already provides for the exclusion of service contracts entered into in the ordinary course of business the Commission does not consider it necessary to amend note (a) to paragraph 3(d) of the REIT Guidance Note.

Question 17: If the Codes were to apply to REITs, do you agree that Rule 4 should apply to a trustee?

Public comments

140. Four respondents agreed with this proposal. Two respondents disagreed: one because the respondent believes that the Codes should not apply to trustees; the other because a trustee is generally required to act on the instructions of the management company. Two respondents commented that the trustee may be required to take certain action in fulfilment of its duties at law irrespective of whether such action may contravene Rule 4.

Commission’s response

141. The Commission believes that the Codes should apply to trustees of a REIT in such capacity. The Commission notes that this is consistent with the majority of respondents’ views in response to Question 6.
142. The Commission is aware that a trustee is obligated to take certain action in fulfilment of its duties as trustee under the law. Where such action may have implications under Rule 4 of the Takeover Code (or indeed raise concerns relating to any other provisions of the Codes), the trustee should consult the Executive at the earliest opportunity.

Service contracts

Question 18: If the Codes were to apply to REITs, do you agree that the term “*service contract*” in Rule 4, Rule 8.5, Note 1(j) to Rule 8 and paragraph 13 of Schedule II should be interpreted widely to cover “*service contract in whatever form*”?



Public comments

143. Five of the six respondents who expressed a view agreed to this proposal. One respondent suggested that service contracts of individual directors should be excluded as the directors will be remunerated by the management company (this comment has already been addressed in paragraph 138).

Commission's response

144. As service contracts concerning management companies and/or their directors may take different forms, the Commission maintains its view that the term "service contract" should be interpreted widely. Paragraph 3(e) of the REIT Guidance Note has therefore been adopted as proposed.

Dividend forecasts

Question 19: If the Codes were to apply to REITs, do you agree that a dividend forecast should be treated as a profit forecast which is subject to Rule 10 of the Takeovers Code?

Public comments

145. Seven respondents generally agreed to this proposal although one respondent considered that it should be limited to a dividend forecast published during the offer period. One respondent requested clarification that Practice Note 2 applies to the situation where a REIT is required to issue a profit warning/alert pursuant to the requirements of Listing Rules.

Commission's response

146. Rule 10.3(d) of the Takeovers Code requires that any profit forecast which has been made before the commencement of an offer period must be examined, repeated and reported on in the document sent to shareholders. In line with the treatment of listed companies the Commission believes that Rule 10.3(d) should apply to REITs.
147. Now that the Code applies to REITs Practice Note 2 likewise will apply to REITs.

Appropriate offers for convertible securities under Rule 13

Question 20: If the Codes were to apply to REITs, do you agree that appropriate offers should be made for the convertible securities of a REIT? If so, do you agree to extend the meaning of "convertible securities" of the offeree in Rule 13 to include convertible securities issued by special purpose vehicles of a REIT?

Public comments

148. Six respondents generally agreed with this proposal. One respondent believed that appropriate offers should not be required for convertible securities issued by special purpose vehicles of a REIT as appropriate offers are not required for convertible securities issued by subsidiaries of an offeree which is a listed company.



Commission's response

149. As explained in paragraph 91 of the Consultation Paper, in the context of REITs, convertible securities are at present issued by the REIT's special purpose vehicle(s) and not by the REIT itself. These securities are convertible into units of the REIT and guaranteed by the REIT (through the trustee). The Commission therefore believes that appropriate offers should be made for these securities.



Section B

Consultation conclusions on the proposal to extend Parts XIII to XV of the SFO to listed collective investment schemes

Introduction

150. Section B of the Consultation Paper sought the public's views on the conceptual proposals to extend Parts XIII to XV of the SFO to listed CIS, namely:
- (a) to amend Parts XIII and XIV of the SFO to make it explicit that they are applicable to all listed CIS in whatever form they take; and
 - (b) to amend Part XV of the SFO to apply to all listed CIS with an exemption for listed open-ended CIS.
151. Respondents commenting on the proposals were generally supportive and only some comments on technical issues were raised.

Parts XIII and XIV of the SFO

Question 21: Do you have any comments on the proposal to amend Parts XIII and XIV of the SFO to make it explicit that they are applicable to all listed CIS in whatever form they take?

Public comments

152. Respondents were supportive of the proposal to amend Parts XIII and XIV of the SFO to make it explicit that they are applicable to all listed CIS in whatever form. One respondent observed that the proposal should help promote consistency with listed companies in respect of the market conduct regulations.
153. The same respondent also sought clarification on the practical application of Parts XIII and XIV in the case of exchange traded funds (**ETF**). Taking an ETF tracking an equity market index in the context of what would be considered "insider information" as an example, the respondent was of the view that it would not be justified to prevent trading in a broad-based ETF if information is received in relation to a single index constituent.

Commission's response

154. In view of the support received, the Commission will proceed to make recommendations on the legislative amendments to Parts XIII and XIV of the SFO to the Government so that the Government may draft a bill to implement the proposals.
155. In respect of the technical clarification sought in the context of ETFs, the Commission believes that in practice while ETFs might be less susceptible to corporate actions type of price sensitive information, it is still possible that there may be non-public information that could affect its price. It would be a question of fact for the courts to determine on the basis of the circumstances of each particular case. Our current proposal is also consistent with the regulatory approach adopted in the UK, Australia



and Singapore. We will therefore retain our original proposal to extend the application of Parts XIII and XIV of the SFO to all listed CIS.

Part XV of the SFO

Question 22: Do you have any comments on the proposal to amend Part XV of the SFO to apply to all listed CIS with an exemption for listed open-ended CIS?

Public comments

156. Respondents were supportive of the proposal to amend Part XV of the SFO to apply to all listed CIS with an exemption for listed open-ended CIS.
157. Two respondents commented that Divisions 7 to 9 of Part XV of the SFO should only apply to the management company and its directors and chief executive but not the trustee of the REIT. They also considered that the trustee and related entities should not need to disclose interests as if the trustee were a director.

Commission's response

158. In view of the support received, the Commission will proceed to make recommendations on the legislative amendments to Part XV of the SFO to the Government so that the Government may draft a bill to implement the proposals.
159. On the issue of the application of Divisions 7 to 9 of Part XV of the SFO, the Commission would like to clarify that it does not propose to extend the application of Divisions 7 to 9 of Part XV of the SFO to the trustee of a REIT by treating it as if it were a director of the REIT manager. As explained in the Consultation Paper, the current exercise is a codification of existing practice. The closed-ended CIS currently listed in Hong Kong to which Part XV of the SFO is proposed to apply are mostly REITs²¹. Currently, the Commission already requires that provisions substantially equivalent to those in Part XV of the SFO be adopted in trust deeds of all existing REITs²² and therefore their trust deeds have all contained, among other things, provisions substantially equivalent to those in Divisions 7 to 9 of Part XV of the SFO. These provisions are currently applicable to the REIT manager, its directors and chief executive only. As the trustee of the REIT normally takes an independent supervisory role and is not involved in the day-to-day management of the REIT, it is not deemed to be a director of the REIT manager for the purpose of these provisions.

Way forward

160. Following the publication of these consultation conclusions, the Commission will proceed to discuss with the Government the proposed legislative amendments for the introduction of an amendment bill by the Government in due course.

²¹ HSBC China Dragon Fund is the only closed-ended CIS currently listed in Hong Kong not being a REIT.

²² See press release issued by the Commission on "Notification of Interests in REITs" dated 15 December 2005.



Appendix A

List of respondents

(in alphabetical order)

Respondents whose comments are published on the Commission's website in full

1. Ashurst Hong Kong (亞司特律師行) in association with Jackson Woo & Associates (胡家驃律師事務所)
2. Asian Public Real Estate Association
3. Clifford Chance (高偉紳律師行)
4. Eagle Asset Management (CP) Limited
5. Great Eagle Holdings Limited (鷹君集團有限公司)
6. Henderson Sunlight Asset Management Limited (恒基陽光資產管理有限公司)
7. Mallesons Stephen Jaques (萬盛國際律師事務所)
8. Norton Rose (諾頓羅氏)
9. The Link Management Limited (領匯管理有限公司)

Respondents who requested their comments and names not be published

Three submissions



Final form of amendments to the REIT Code

Chapter 1: Administrative Arrangements

- 1.1 The Commission has delegated its powers under section 104 of the SFO with respect to REITs to its Executive Director (Policy, China and Intermediaries and Investment Products) and any of its delegates appointed pursuant to the SFO.

Chapter 2: Interpretation

- 2.24A "Takeovers Code" means the Codes on Takeovers and Mergers and Share Repurchases issued by the Commission (as amended from time to time).

Chapter 5: Management Company, Auditor, Listing Agent and Financial Adviser

Retirement of a Management Company

- 5.14 The management company shall be removed by the trustee by notice in writing in any of the following events:
- (c) an ordinary resolution is passed by the holders to dismiss the management company, holders representing at least 75% in value of the units outstanding (excluding those held or deemed to be held by the management company, as well as by any holders who may have an interest in retaining the management company), deliver to the trustee a written request to dismiss the management company.
- Notes: All holders, including the management company and its associates, are entitled to vote their units on the ordinary resolution to dismiss the management company and be counted in the quorum for the purposes of passing such ordinary resolution. Units held by holders who are (i) directors, senior executives or officers of the management company; or (ii) associates of the persons in (i); or (iii) controlling entity, holding company, subsidiary or associated company of the management company or any holders who may have an interest in retaining the management company, are units deemed to be held by the management company or holders, as the case may be.*
- 5.17 Upon the retirement or dismissal of the management company, the trustee shall appoint a new management company as soon as possible whose appointment ~~has been~~ shall be subject to holders' approval by ordinary resolution and the prior approval of the Commission.

- Notes: All holders, including the new management company and its associates, are entitled to vote their units on the ordinary resolution to appoint the management company and be counted in the quorum for the purposes of*



[passing such ordinary resolution.](#)

Chapter 9: Operational Requirements

Meetings

9.9 A scheme shall arrange to conduct general meetings of holders as follows:

- (f) holders shall be prohibited from voting their own units at, or counted in the quorum for, a meeting at which they have a material interest in the business to be contracted and that interest is different from the interests of all other holders;

[Notes: Notwithstanding the foregoing, all holders are entitled to vote their units on an ordinary resolution to dismiss or appoint the management company and be counted in the quorum for the purposes of passing such ordinary resolution.](#)

Chapter 11: Termination or Merger of a REIT

11.8 In the case of termination, the trustee shall oversee, as soon as practicable after the scheme falls to be wound up, the realisation of the real estate of the scheme by the management company, and ensure that, after paying all outstanding liabilities and providing adequate provisions for liabilities, the proceeds of that realisation are distributed to the holders proportionately to their respective interests in the scheme at the date of the termination of the scheme.

- Notes: (1) *All real estate held by the scheme shall be disposed of through public auction or any form of open tender. The disposal shall be conducted at arm's length and in the best interests of the holders. The disposal price shall be the best available price obtained through public auction or open tender. [Where appropriate, the Commission may consider granting a waiver from strict compliance with such public auction or open tender requirement where 11.13 and the applicable provisions in the Takeovers Code have been duly complied with in the circumstances.](#)*
- (2) *The trustee shall ensure that the liquidation exercise is completed within twelve months from the date the termination takes effect. Where the trustee considers it is in the best interests of the holders, the liquidation exercise may be completed for such longer period (in total not to exceed 24 months) as the trustee deems appropriate. Holders shall be informed by way of announcement.*
- (3) *All cash proceeds derived from the liquidation of the scheme shall be distributed to holders on a pro rata basis. Where the liquidation exceeds six months, an interim distribution shall be made in respect of the sale proceeds received by the end of every six-month period, except where no sales were made during such period. Upon completion of the liquidation, a one-off distribution*



shall be made within one month from the date of completion.

(4) *Distributions to holders upon termination of the scheme shall be made in cash only.*

11.12 Where a scheme is involved in ~~the scheme undertakes~~ any form of merger, takeover, amalgamation ~~or~~ and restructuring ~~other than a termination as stated in 11.1,~~ the Takeovers Code must be complied with and the scheme's trustee and/or management company shall as soon as practicable consult with the Commission on the manner in which such activities could be carried out so that it is fair and equitable to all holders.

11.13 Where a delisting of a scheme from the Exchange is proposed, all rules and principles as applicable to listed companies under the Exchange's Listing Rules regarding withdrawal of listing should be complied with in substance, with necessary changes being made, as if such rules and principles were applicable to the scheme. The scheme's trustee and/or management company shall as soon as practicable consult with the Commission on the detailed application of such rules and principles with respect to the particular situation.

Appendix D

Contents of the Trust Deed

6. Management Company

(b) A statement that the management company shall be appointed, removed or retire as set out in Chapter 5.



Final form of amendments to the Codes

Amended section 1.5 of the Introduction section of the Codes:

- 1.5 The responsibilities provided for in the Codes apply to:-
- (a) directors of companies that are subject to the Codes;
 - (b) management companies (and their directors) and trustees of REITs (see Definitions section of the REIT Guidance Note in Schedule IX) that are subject to the Codes;
 - ~~(b)(c)~~ persons or groups of persons who seek to gain or consolidate control of companies that are subject to the Codes;
 - ~~(c)~~(d) their professional advisers;
 - ~~(d)~~(e) persons who otherwise participate in, or are connected with, transactions to which the Codes apply; and
 - (f) persons who are actively engaged in the securities market.

Amended section 4.1 of the Introduction section of the Codes:

- 4.1 The Codes apply to takeovers, mergers and share repurchases affecting public companies in Hong Kong, ~~and~~ companies with a primary listing of their equity securities in Hong Kong and REITs (as defined in the REIT Guidance Note) with a primary listing of their units in Hong Kong. Subject to the factors in section 4.2 below, the Codes may apply to REITs listed in Hong Kong other than by way of a primary listing. As a result, although it is generally the nature of the offeree company, the potential offeree company, or the company in which control may change or be consolidated that is relevant, there are also circumstances, specified in Rule 2 of the Takeovers Code, in which it is necessary to consider the treatment of the offeror's shareholders in order to carry out the objective of the Takeovers Code. The Executive will normally grant a waiver from the requirements of the Share Repurchase Code for companies with a primary listing outside Hong Kong provided that shareholders in Hong Kong are adequately protected.



New Schedule IX:

SCHEDULE IX

REIT GUIDANCE NOTE

1. Introduction

- (a) The provisions of the Codes including the parts of the Codes respectively entitled “Introduction”, “Definitions”, “General Principles”, “Takeovers Code”, “Share Repurchase Code” and “Schedules” apply to REITs subject to the modifications set out in this Guidance Note.
- (b) This Guidance Note is intended to provide all those involved in REITs with guidance as to how the Codes apply to REITs. The guidelines are not exhaustive. The Panel and the Executive will apply this Guidance Note in accordance with its spirit as well as its letter so as to achieve the underlying purpose.
- (c) The General Principles of the Codes apply equally to a transaction involving a REIT.

2. Definitions

Unless the context otherwise requires in the context of a REIT:-

“Acting in concert”: In addition to the presumptions set out in the Definitions section of the Codes, persons in the following class will be presumed to be acting in concert with others in the same class unless the contrary is established:-

(10) a REIT, its management company (together with persons controlling[#], controlled by or under the same control as the management company) and any director (together with their close relatives, related trusts and companies controlled[#] by any of the directors, their close relatives or related trusts) of such management company; and

Notes:

1. *The Executive must be consulted where a management company acts at the same time for more than one of the following:-*

(i) offeror or possible offeror;

(ii) competing offeror or possible competing offeror; and

(iii) offeree REIT.

2. *The role carried out by a management company pursuant to its obligations under the REIT Code should be distinguished from a fund manager under class (4) and a financial or other professional adviser under class (5). Nonetheless, classes (4)*



and/or (5) will also apply to a management company where the management company is acting in such capacity for a REIT.

(11) a REIT and its trustee acting in such capacity.

Notes:

1. *The Executive must be consulted where a trustee acts at the same time in its capacity as trustee for more than one of the following:-*
 - (i) offeror or possible offeror;*
 - (ii) competing offeror or possible competing offeror; and*
 - (iii) offeree REIT.*
2. *For the purpose of calculating the voting rights held by a group acting in concert, the voting rights held by a trustee in its capacity as trustee of unrelated trusts will not normally be counted. In case of doubt, the Executive must be consulted.*

“Associate”: In addition to the persons listed under the definition of “associate” in the Definitions section of the Codes, the term “associate” normally includes the following:-

- (8) any trustee (in its capacity as trustee of a REIT) of an offeror, the offeree REIT or any company in class (1); and
- (9) any management company (together with persons controlling[#], controlled by or under the same control as the management company) of an offeror, the offeree REIT or any company in class (1).

“Board”: should be taken as a reference to include a management company and/or its board of directors.

“Company”: should be taken as a reference to a REIT and/or a company as the context requires.

Note:

In the context of a REIT, the concept of parent, subsidiary, fellow subsidiary and associated company should apply to REITs (see also the Notes to Definitions in this Guidance Note).

“Connected fund manager and connected principal trader”: In addition to the four classes of persons listed under the definition of “connected fund manager and connected principal trader” in the Definitions section of the Codes, a new class (5) is introduced:-

(5) the management company of an offeror REIT or an offeree REIT.

“Constitutive documents”: has the meaning attributed to such term by the REIT Code.

“Director(s)”: should be taken as a reference to include a management company and/or any one or more of its directors and/or persons with whose instructions a management company or its directors or a director of such management company is accustomed to act.



Note:

With respect to classes (2) and (6) of the presumptions of acting in concert set out in the Definitions section of the Codes, references to “directors” will also be taken as references to include the management company of a REIT (together with persons controlling[#], controlled by or under the same control as the management company).

“Employee share scheme”: includes any employee share scheme of a management company adopted in connection with the REIT it manages.

“General meeting”: should be taken as a reference to a meeting of the unitholders of a REIT held in accordance with the REIT’s constitutive documents.

“Management company”: has the meaning attributed to such term in the REIT Code.

“Pension funds”: includes any pension funds of a management company established in connection with the REIT it manages.

“Provident funds”: includes any provident funds of a management company established in connection with the REIT it manages.

“REIT”: has the meaning attributed to such term by the REIT Code.

“REIT Code”: means the Code on Real Estate Investment Trusts.

“Shares”: should be taken as a reference to the units of a REIT.

“Share capital”, “Issued share capital”, “Equity share capital” or “Equity shares”: should be taken as references to the units of a REIT which are issued and outstanding from time to time.

“Shareholders”: should be taken as a reference to unitholders of a REIT.

“Special purpose vehicles”: has the meaning attributed to such term by the REIT Code.

“Trustee”: means a person appointed to act as trustee of a REIT.

Notes to Definitions:-

1. *Action by a trustee, a management company and/or any of its directors*

Where an action is taken by a trustee (in its capacity as trustee of a REIT) or a management company and/or any of its directors (in their respective capacity on behalf of a REIT), that action will be deemed to be an action taken by such REIT. In case of doubt, the Executive must be consulted.

2. *Voting rights owned, controlled or held by a trustee, a management company and/or any of its directors*

Any voting rights owned, controlled or held by a trustee (in its capacity as trustee of a REIT) or a management company and/or any of its directors (in their respective capacity on behalf of a REIT) will be deemed to be voting rights owned, controlled or held by such REIT of which any of the trustee/the management company and/or any of its directors acted on its behalf. In case of doubt, the Executive must be consulted.



3. *Assets owned, controlled or held by special purpose vehicle(s)*

Any assets owned, controlled or held by any special purpose vehicle will be deemed to be assets owned, controlled or held by the REIT that owns or controls the special purpose vehicle(s) in accordance with the REIT Code. In case of doubt, the Executive must be consulted.

3. Clarification of various provisions of the Codes

(a) Application of Note 7 to Rule 2 of the Takeovers Code

In the context of a REIT, paragraph (i) of Note 7 to Rule 2 of the Takeovers Code should be replaced by "as a result of such proposal the REIT may not be regarded as suitable to remain authorised by the SFC under section 104 of the Securities and Futures Ordinance (Cap. 571); or".

(b) Directors of a company (Rule 2.8 and Note 2 to Rule 7 of the Takeovers Code)

For the purpose of Rule 2.8 and Note 2 to Rule 7 of the Takeovers Code, "director(s)" of a company will be construed as "director(s) of the relevant management company". In case of doubt, the Executive must be consulted.

(c) Announcement of firm intention to make an offer (Rule 3.5(b) of the Takeovers Code)

In cases where the offeror is a REIT, in addition to disclosing the relevant information under Rule 3.5(b) of the Takeovers Code, the relevant announcement must also contain the identity of each of the management company and the trustee of such REIT.

(d) No frustrating action (Rule 4 of the Takeovers Code)

In accordance with Rule 4 of the Takeovers Code and its notes, in cases where the offeree company is a REIT, no frustrating action should be taken by any of the offeree REIT, the management company and/or any of its directors and/or the trustee (in its capacity as trustee of such offeree REIT). In particular, in addition to the matters set out under Rule 4 of the Takeovers Code, the relevant parties must not, without the approval of the unitholders of the offeree REIT, do or agree to do the following:-

- (a) alter the terms of engagement between the offeree REIT and its management company; or
- (b) enter into, or alter the terms of, the service contracts between the management company of the offeree REIT and any of its directors otherwise than in the ordinary course of business.

(e) Service contracts (Rule 4, Rule 8.5, Note 1(j) to Rule 8 of the Takeovers Code and paragraph 13 of Schedule II to the Codes)

References to "directors' service contracts or service contracts of the directors" will be construed to include (i) any service contract between the management company and each of its directors; and (ii) any service contract in whatever form with the management company of the REIT in such capacity. In case of doubt, the Executive must be consulted.



(f) Availability of information – information issued by associates (Note 4 to Rule 8.1 of the Takeovers Code)

With respect to Note 4 to Rule 8.1 of the Takeovers Code, attention should also be drawn to classes (8) and (9) of the definition of “associates” under this Guidance Note.

(g) Resignation and appointment of the management company and its directors (Rule 7 and Rule 26.4 of the Takeovers Code)

In cases where any management company and/or any of its directors have difficulty in complying with Rule 7 and Rule 26.4 of the Takeovers Code due to compliance with any other rules, regulations and/or the constitutive documents of the REIT such management company manages, the Executive must be consulted.

(h) Documents to be on display (Note 1 to Rule 8 of the Takeovers Code)

In cases where the offeror or the offeree company is a REIT, in addition to the documents set out in Note 1 to Rule 8 of the Takeovers Code, copies of the relevant constitutive documents must also be made available for inspection in accordance with such note.

(i) Dividend forecasts (Rule 10.6(d) of the Takeovers Code)

A dividend forecast of a REIT is normally considered a profit forecast under Rule 10. In case of doubt, the Executive should be consulted.

(j) Appropriate offers for convertibles, warrants, etc. (Rule 13 of the Takeovers Code)

References to convertible securities in the context of a REIT in Rule 13 of the Takeovers Code will be construed to include those convertible securities issued by a REIT’s special purpose vehicle(s) that are convertible into units of and whether or not guaranteed by such REIT (through its trustee acting in such capacity).

(k) Offer to remain open for a longer period after unconditional in all respects (Rule 15.3 of the Takeovers Code)

Where an offer is made to the unitholders of a REIT in relation to or together with:-

- (i) a proposal to withdraw the listing of the units of the REIT on the Stock Exchange; or
- (ii) a proposal which might result in the REIT being not regarded as suitable to remain authorised by the SFC under section 104 of the Securities and Futures Ordinance (Cap. 571); and

where such offer becomes or is declared unconditional in all respects, it should remain open for acceptance for a longer period than normally required by Rule 15.3. A corresponding extension of the written notice period will also be required. In the circumstances, a clear explanation of the implications of the proposal should be clearly and prominently disclosed in the offer document sent to those unitholders who have not accepted the offer.



(l) Lowest percentage holding for the 12 month period preceding 25 June 2010 (Rule 26.1 of the Takeovers Code)

For the purpose of Rule 26.1, the percentage holding of a person at the beginning of 25 June 2010 shall be deemed to be the lowest percentage holding of that person for the 12 month period preceding 25 June 2010.

(m) Requisitioning shareholder meetings after an offer becomes unconditional in all respects (Rule 31.5 of the Takeovers Code)

In cases where the offeree company is a REIT, the trustee (in its capacity as trustee of such offeree REIT) must also comply with Rule 31.5(ii). In case of doubt, the Executive should be consulted.

(n) Intentions regarding the offeree REIT (paragraph 3 of Schedule I and paragraph 4 of Schedule III to the Codes)

If the offeree company is a REIT, instead of the disclosure requirements under paragraph 3 of Schedule I or paragraph 4 of Schedule III (as the case may be), the offeror's intentions regarding the following should be disclosed:-

- (i) the continued operation of the REIT;
- (ii) any major changes to be made to the operation of the REIT, including any redeployment of the assets of such REIT, any proposed change of the property management company and any transitional arrangements;
- (iii) any major changes to be made to the investment policy of the REIT;
- (iv) any plan to remove the current management company (and/or its directors) and appoint a new management company (and/or its directors) and any corresponding transitional arrangements;
- (v) the long-term commercial justification for the proposed offer; and
- (vi) the listing status of the REIT.

(o) Further information in cases of securities exchange offers (paragraph 17 of Schedule I to the Codes)

If the offeror is a REIT, instead of the disclosure requirements under paragraph 17 of Schedule I, the date of establishment and the governing law of the offeror should be disclosed.

4. Early consultation

Consultation with the Executive at an early stage is essential.