



**Consultation conclusions on proposals to (i) introduce a statutory scheme of arrangement and compulsory acquisition mechanism for real estate investment trusts and (ii) enhance the SFO market conduct regime for listed collective investment schemes**

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**October 2024**

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## Executive summary

1. On 28 March 2024, the Securities and Futures Commission (SFC) issued a consultation paper (Consultation Paper) on proposals (Proposals) to (i) introduce a statutory scheme of arrangement and compulsory acquisition mechanism for real estate investment trusts (REITs) (REIT Scheme Proposal) and (ii) enhance the Securities and Futures Ordinance (SFO) market conduct regime for listed collective investment schemes (CIS) (Listed CIS Proposal).
2. The SFC received 11 written submissions, including those from industry associations, a REIT manager, law firms, and advisory and professional bodies. A list of respondents is shown in the Appendix.
3. The Proposals received general support and were welcomed by many respondents. Respondents mainly sought clarifications on various technical issues. After careful consideration of the comments received and for the reasons set out in this paper, the SFC will adopt the Proposals with some clarifications and modifications.

### Key comments on the proposals

4. The REIT Scheme Proposal received broad support from respondents. They noted that the proposed regime, which is fundamentally based on Part 13 (CO Part 13) of the Companies Ordinance (CO), would enable REITs to navigate privatisation or other corporate restructuring in a transparent and orderly manner, while ensuring consistency of treatment and safeguards to unitholders' interests similar to those available to shareholders of a listed company.
5. Respondents also broadly supported the Listed CIS Proposal. Feedback received noted that the proposed enhancements present a practical approach, helping to bring greater clarity to the market, strengthen investor protection and contribute to the establishment of a robust corporate governance regime.
6. Regarding the REIT Scheme Proposal, a key technical comment received was that in modelling on CO Part 13, consideration should be given to the differences between REITs and companies, in particular that REITs are not subject to the winding up regime under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (CWUMPO). To clarify, as noted in the Consultation Paper, the proposed provisions for the regime will include appropriate modifications to cater for the nature and features of REITs. References to winding up and liquidators of companies in CO Part 13 will not be included in the proposed legislative amendments.
7. On the Listed CIS Proposal, one respondent sought clarification on whether the various definitions should also apply to trustees and custodians of listed CIS to ensure that enforcement action may be taken against their misconduct where they contravene the market conduct regimes<sup>1</sup> under the SFO. We have clarified below that the proposed regime will cover trustees and custodians.

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<sup>1</sup> Being (a) market misconduct regimes (Part XIII of the SFO for the civil regime and Part XIV of the SFO for the parallel criminal regime); (b) disclosure of inside information regime (Part XIV A of the SFO); and (c) disclosure of interests regime (Part XV of the SFO), as referred to in paragraph 9 of the Consultation Paper.

8. This paper sets out details of the key comments received along with our responses.

### **Implementation**

9. We will work with the Government to introduce into the Legislative Council (LegCo) a bill on the legislative amendments to implement the Proposals, with a target to complete the legislative process before the end of the current term of LegCo in December 2025.
10. The proposed new regime on the REIT Scheme Proposal will become effective upon the LegCo's passage of the bill. The regime on the Listed CIS Proposal will become effective as soon as possible on a date to be appointed by a commencement notice in the Gazette, subject to any subsidiary legislation revisions as may be required.
11. The SFC will issue further guidance to the industry following the passage of the bill where appropriate.
12. We would like to thank all respondents for their time and effort in reviewing the Proposals and providing us with their detailed and thoughtful comments.
13. The Consultation Paper, the responses (other than those requested to be withheld from publication) and this paper are available on the SFC website ([www.sfc.hk](http://www.sfc.hk)).

## Part I – Proposal to introduce a statutory scheme of arrangement and compulsory acquisition mechanism for REITs (REIT Scheme Proposal)

### Questions:

1. Do you agree with the proposal to introduce a statutory arrangement or compromise mechanism similar to that under the CO with the proposed features and modifications for REITs? Please explain your view.
2. Do you agree with the proposal to introduce a statutory compulsory acquisition mechanism similar to that under the CO with the proposed features and modifications for REITs? Please explain your view.
3. Do you have any comments on the proposed interpretations and definitions to be used in the new Part of the SFO which are modified from the CO to cater for the nature and features of a REIT?

### Statutory scheme of arrangement and compulsory acquisition mechanism for REITs

#### *Public comments*

14. Most respondents supported the proposal to introduce a statutory arrangement or compromise mechanism and compulsory acquisition mechanism for REITs similar to those under the CO.
15. A number of respondents noted that the REIT Scheme Proposal would provide a structured, transparent and orderly restructuring or exit mechanism for REITs, narrowing the gap between listed companies and REITs, while ensuring consistency of treatment and safeguards to unitholders' interests similar to those available to shareholders of a listed company, including protection for minority unitholders. One respondent also noted that the proposed mechanism modelled on the CO, together with the safeguards under the Codes on Takeovers and Mergers and Shares Buy-backs (Takeovers and Buy-back Codes), would ensure a high level of protection for all unitholders, especially those with smaller stakes. One respondent also considered the proposed modifications tailored for REITs to be reasonable.
16. One respondent raised concerns about the REIT Scheme Proposal, particularly the proposed introduction of a compulsory acquisition mechanism for REITs, and suggested implementing additional safeguards for minority unitholders.

#### *The SFC's response*

17. In view of the general support received, the SFC will adopt the REIT Scheme Proposal with some clarifications and modifications discussed below. The proposed mechanism is formulated based on CO Part 13, subject to court sanction as well as the safeguards under the Takeovers and Buy-back Codes. These measures should ensure adequate protection of minority unitholders while enabling REITs to undertake restructurings in a manner on par with listed companies in Hong Kong.

## CO references to winding up and liquidators of companies

### *Public comments*

18. A few provisions in CO Part 13 contain references to winding up and liquidators of companies<sup>2</sup>. A technical comment received was that in modelling the REIT Scheme Proposal on CO Part 13, consideration should be given to the differences between REITs and companies, in particular that REITs are not subject to the winding up regime under the CWUMPO.

### *The SFC's response*

19. As noted in the Consultation Paper, the proposed provisions for the regime will include appropriate modifications to cater for the nature and features of REITs. References to winding up and liquidators of companies in CO Part 13 will not be included in the proposed legislative amendments. There are only a few such references in CO Part 13, providing for the liquidator's responsibility to act on behalf of the company where it is being wound up (for example, in making applications to the court and issuing explanatory statements accompanying meeting notices). As there will be designated parties (being the management company and/or the trustee) to act on behalf a REIT, including where it is to be terminated, it is expected that the REIT Scheme Proposal can operate without adopting such references.

## Cancellation of treasury units

### *Public comments*

20. The amendments<sup>3</sup> to the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (Listing Rules) which took effect in June 2024 allow listed companies to hold repurchased shares in treasury, subject to the laws of their place of incorporation and their constitutional documents. Three respondents suggested that the REITs regime be aligned with the Listing Rules with regards to unit repurchase and resulting treasury units.

### *The SFC's response*

21. In a Circular issued by the SFC in May 2024<sup>4</sup>, it has been clarified that REITs would be allowed to hold treasury units in a similar manner as the holding of treasury shares by listed companies.
22. We will keep in view any legislative amendments regarding treasury shares that may be introduced to the CO and make appropriate refinements to the proposed legislative provisions for REITs so that the same treatment would be applied to REITs.

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<sup>2</sup> See, for example, sections 670, 671, 673, 699 and 717 of the CO.

<sup>3</sup> As set out in the [Consultation Conclusions on Proposed Amendments to Listing Rules Relating to Treasury Shares](#) issued by The Stock Exchange of Hong Kong Limited on 12 April 2024.

<sup>4</sup> The [Circular to Management Companies of SFC-authorised Real Estate Investment Trusts \(REIT\) – Treasury Units of SFC-authorised REITs](#) issued by the SFC on 24 May 2024.

## Application of the Takeovers and Buy-back Codes

### *Public comments*

23. Two respondents suggested that the definition of “associate” under the Takeovers and Buy-back Codes be suitable for the provisions of the REIT Scheme Proposal regarding a repurchasing REIT in a general offer.
24. One respondent noted that the provisions of the Takeovers and Buy-back Codes apply to delisted companies which remain public companies. The respondent sought clarification on whether these provisions will apply to REITs which go through a delisting.

### *The SFC’s response*

25. Regarding the definition of “associate” for the purpose of the REIT Scheme Proposal under the SFO, it is expected that the definition to be adopted would be consistent with that under CO Part 13. As noted in the Consultation Paper, in addition to the proposed provisions in the SFO, compliance with the Takeovers and Buy-back Codes, in particular Schedule IX (REIT Guidance Note), should continue to be observed where applicable in the case of a takeover, merger, or unit buy-back involving a REIT.
26. As the circumstances under which a REIT would be delisted may vary, the management company and trustee of the REIT involved should consult the SFC as soon as practicable on the detailed application of the relevant rules and principles regarding the particular situation<sup>5</sup>, including the application of the Takeovers and Buy-back Codes.

## Trust deed compatibility

### *Public comments*

27. One respondent suggested that the SFC consult trustees and/or management companies on whether the existing trust deeds of REITs would be inconsistent with the proposed amendments to the SFO. The respondent added that if considered necessary, the amendments to the SFO may include provisions to deem the conduct of a REIT privatisation or other restructuring transactions as compatible with the objectives of the REIT.

### *The SFC’s response*

28. Similar to CO Part 13, the new provisions in the SFO for implementing the REIT Scheme Proposal would be applicable to REITs without the need for any amendment to the trust deeds.

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<sup>5</sup> See requirements under 11.12 and 11.13 of the Code on Real Estate Investment Trusts (REIT Code).

## Compulsory acquisition-specific comments

### Notification to overseas unitholders

#### *Public comments*

29. Two respondents inquired as to whether a default manner of notification to unitholders registered in the overseas branch register (if any) of a REIT would be appropriate (for example, by way of email to the registered email address of an overseas unitholder), noting that a REIT may be dual-listed on another stock exchange with overseas unitholders on its overseas branch register without any Hong Kong addresses.

#### *The SFC's response*

30. As set out in the Consultation Paper, the REIT Scheme Proposal will be introduced by way of adding a new Part to the SFO. The general provisions on services of notices<sup>6</sup> in the SFO would apply accordingly.

### Deviations from CO Part 13 requirements

#### *Public comments*

31. Two respondents suggested adopting different thresholds which deviate from CO Part 13 for the REIT Scheme Proposal. One respondent suggested shortening the period that a trustee should hold the consideration for unfound unitholders from 12 years to 6 years, and permitting new expenses be paid out of such consideration held for the unitholders. The other respondent suggested raising the unitholders' acceptance threshold for compulsory acquisition from 90% to 95%, to provide additional safeguards for minority unitholders.

#### *The SFC's response*

32. We note that most of the respondents supported the proposed fundamental approach for provisions of the REIT Scheme Proposal to be based on CO Part 13, which will provide REIT unitholders, including minority unitholders, with congruous safeguards and protection. In consonance with this, we consider adoption of requirements in line with CO Part 13 to be appropriate.

### Explanatory statement

#### *Public comments*

33. Two respondents inquired about the application of the requirements concerning explanatory statement under CO Part 13<sup>7</sup>. Under CO Part 13, an explanatory statement must state the directors' material interests and effect of the arrangement or compromise on those interests

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<sup>6</sup> Under section 400 of the SFO, any written notice or other document required to be issued to any person, other than the SFC, for the purposes of the SFO shall be regarded as duly issued if it is issued in the manner stipulated under that section (for example, in the case of an individual, this includes delivery by hand, post, facsimile transmission and electronic mail transmission).

<sup>7</sup> See section 671 of the CO on the requirements concerning an explanatory statement accompanying a meeting notice for an arrangement or compromise.



where the effect differs from that on others. Where the arrangement or compromise affects the rights of the company's debenture holders, the explanatory statement must include a similar statement from the trustees of the deed securing the debenture's issuance.

34. They sought clarification on who should make the statement of material interests and to whom it should be made, the liabilities for failure of compliance, who constitutes the 'officers' of the management company for non-compliance, as well as the applicability of the CO-equivalent defences. They also suggested adding statutory provisions to ensure that the requirements regarding the explanatory statement and any court order on amendments to the trust deed are complied with.

#### *The SFC's response*

35. As set out in the Consultation Paper, the statement of material interests should be made by the management company, each of the management company' directors and the trustee of the REIT. Particulars of their material interests should be provided to the management company for this purpose. An officer of the management company may be liable for the management company's failure in discharging its duty to ensure that the relevant meeting notices are accompanied by the explanatory statement. For this purpose, "officer" refers to an officer as defined by section 1 of Part 1 of Schedule 1 to the SFO, as the provisions for the REIT Scheme Proposal will be part of the SFO. Requirements in CO Part 13 regarding the explanatory statement, including the liabilities and defences, will be applied similarly to REITs. We consider that the legal remedies for contraventions under the proposed regime, which will be akin to those under the CO, to be sufficient in ensuring compliance.

#### **Question:**

4. Do you have any comments on the proposed deeming provisions to be introduced in the new Part of the SFO having regard to the REIT structure?

#### *Public comments*

36. Most respondents were supportive of the proposed deeming provisions on parties with the authority to act on behalf of a REIT. A respondent noted that similar deeming provisions can also be found in the Singapore Code on Take-Overs and Mergers.
37. Three respondents supported the proposed regime's introduction of deeming provisions and sought clarification on whether the deeming would only apply where the trustee and the management company take actions in their respective capacities for and on behalf of the REIT, but not in their personal capacities. Two respondents made suggestions regarding the designation of responsibilities to the management company and the trustee when modelling CO Part 13.
38. A respondent suggested that a statutory provision be added to require a management company and a trustee of a REIT to prioritise unitholders' interests over their own interests in the event of conflict of interests where the parties act for the REIT.

*The SFC's response*

39. Under the REIT Scheme Proposal, the deeming provisions to be introduced will cover only certain actions taken and/or certain powers exercised on behalf of a REIT by its trustee (in its capacity as the trustee of the REIT) and/or the management company or its directors (in their respective capacity on behalf of the REIT), but not actions taken and/or powers exercised in their personal capacities. The designation of responsibilities to the management company and the trustee under the proposed regime will have regard to their respective roles and functions and existing regulatory requirements.
40. Separately, regarding conflicts of interests, the management company and trustee<sup>8</sup> of a REIT, being regulated entities under the SFO, are subject to fiduciary duties under general law as well as the SFC's regulatory requirements<sup>9</sup> on avoidance and management of conflicts and to act in the best interests of unitholders.

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<sup>8</sup> With effect from 2 October 2024, trustees and custodians of relevant SFC-authorized CIS including REITs will have to be licensed or registered with the SFC for Type 13 regulated activity (providing depositary services for relevant CISs) under the SFO.

<sup>9</sup> For example, GP6 of the REIT Code requires that the management company shall act in the best interests of the REIT's holders, to whom it owes a fiduciary duty. Under 4.1A of the REIT Code, the trustee has the fiduciary duty to hold the assets of a scheme in trust for the benefit of the holders. Paragraph 1.5 of the Fund Manager Code of Conduct also requires that where an actual or potential conflict arises, the conflict should be managed and minimised by the management company by appropriate safeguards and measures to ensure fair treatment of fund investors.

## Part II – Proposal to enhance the SFO market conduct regime for listed CIS (Listed CIS Proposal)

**Question:**

5. Do you have any comments on the proposed amendments?

### *Public comments*

41. The Listed CIS Proposal was generally supported by the respondents. A number of respondents noted that due to technical complexities identified during the preceding legislative drafting process<sup>10</sup>, the extension of the SFO market conduct regime was unable to proceed. They agreed that the Listed CIS Proposal, which focuses on listed CIS only, is a practical and sensible approach to enabling the legislative exercise to proceed.
42. Two respondents considered the enhancements will bring greater clarity to the market, strengthen investor protection, and contribute to the establishment of a robust corporate governance regime. They also noted that the proposed approach is consistent with regulatory practices observed in comparable jurisdictions such as the United Kingdom, Australia and Singapore. A respondent further noted that the proposed enhancements align with compliance management responsibilities and contribute to effective oversight of REITs.
43. Regarding the proposed streamlining of certain definitions under the Listed CIS Proposal, two respondents suggested including trustees in various definitions given their fiduciary and oversight roles. One of these respondents sought elaboration on the rationale for not including trustees and custodians in various definitions such as the definitions of “inside information”, “associate”, and “persons connected with a corporation”. It considered that the market conduct regime should also apply to trustees and custodians given their role to exercise fiduciary oversight over listed CIS. The respondent further noted that in the SFC’s 2012 public consultation<sup>11</sup>, it was proposed that a new definition of “entity” be added which would include a trust.

### *The SFC’s response*

44. We wish to clarify that under the Listed CIS Proposal, trustees and custodians would not be excluded from the market conduct regimes. Where they commit any misconduct under the regimes, they will be liable. Under the market conduct regimes, most of the market misconduct under the civil regime in Part XIII of the SFO and the corresponding offences under the criminal regime in Part XIV of the SFO (for example, false trading, price rigging, stock market manipulation) can be committed by any person carrying out the contravening act.
45. As for insider dealing, it will apply, under the Listed CIS Proposal, to a person connected with the listed CIS (in a similar manner as it currently applies to one “connected with a corporation”). Such person would encompass, among others, one who occupies a position

<sup>10</sup> See paragraph 11 of the Consultation Paper.

<sup>11</sup> See footnote 11 of the Consultation Paper.

which may reasonably be expected to give him access to the inside information in relation to the CIS by reason of having a professional or business relationship between himself or his employer and the CIS or its management company in line with the existing provisions<sup>12</sup>. A trustee or custodian of a CIS would generally fall within the scope accordingly.

46. In formulating the various definitions in the market conduct regimes to be adopted under Listed CIS Proposal, we have had regard to the context of those definitions as well as the differing roles and nature of the management company and the trustee of a listed CIS. For example, on 'inside information', the *subject* of the inside information under the proposed regime focuses on the listed CIS itself, and its management company which is akin to directors of listed companies in making executive decisions for the listed CIS, rather than the inside information of trustees, which are typically part of banking groups and exercise an independent oversight function.
47. This is also consistent with the long-established policy of the SFC to require a REIT manager and its directors to observe the equivalent requirements as directors of a listed company (such as disclosure of interests obligations, and responsibility for information disclosed in prospectuses, circulars and announcements) given their same executive roles and functions.
48. As noted in the Consultation Paper, to address the technical complexities identified in the earlier drafting process, while maintaining sufficient protection for investors under the regimes, a key proposed refinement is to limit the scope of the extension to listed CIS. Broad support was received for such proposed refinement. The "entity" concept is therefore no longer relevant under the revised proposal. Corresponding revisions will be made in the proposed legislative amendments, including those catering for non-corporate form listed CIS, which is not a legal person.

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<sup>12</sup> See sections 247(1)(c) and 287(1)(c) of the SFO.

## Implementation timelines

**Question:**

6. Do you have any comments on the proposed implementation timelines?

*Public comments*

49. Most of the respondents supported the proposed implementation timeline for the amendments. One respondent raised concerns given the current low valuations of Hong Kong REITs and other market conditions.

*The SFC's response*

50. Considering the support received and for the reasons set out above, we consider it appropriate to proceed with the proposed implementation timelines.

## Conclusion and way forward

51. In view of general support from respondents, the SFC will proceed with the Proposals.
52. We will work with the Government to introduce into LegCo a bill on the legislative amendments to implement the Proposals with a target to complete the legislative process before the end of the current term of LegCo in December 2025.
53. The proposed new regime on the REIT Scheme Proposal will become effective upon the LegCo's passage of the bill. The regime on the Listed CIS Proposal in the bill will become effective as soon as possible on a date to be appointed by a commencement notice in the Gazette, subject to any subsidiary legislation revisions as may be required.
54. Once again, the SFC takes this opportunity to thank all the respondents for their submissions.

### List of respondents

(in alphabetical order)

1. Association of Hong Kong Capital Market Practitioners Limited
2. Baker & McKenzie
3. CFA Society Hong Kong
4. Hong Kong Bar Association
5. Hong Kong Institute of Certified Public Accountants
6. Hong Kong REITS Association Limited
7. Jeffrey Mak Law Firm
8. Link Asset Management Limited
9. Standing Committee on Company Law Reform
10. The Hong Kong Chartered Governance Institute
11. The Law Society of Hong Kong