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13 December 2012

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Dear Sirs,

Re: Consultation Paper on proposals to enhance the regulatory regime for non-corporate listed entities

I attach the Law Society's Submissions on the captioned Consultation for your consideration.

The Law Society has no objection to its Submissions being posted on your website.

Yours sincerely,

Secretary General
秘書長

Encl.

Heidi K.P. Chu
朱潔冰

Deputy Secretary General
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THE
LAW SOCIETY
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SFC CONSULTATION PAPER ON PROPOSALS TO ENHANCE THE REGULATORY REGIME FOR NON- CORPORATE LISTED ENTITIES

Law Society's Submissions

The underlying purpose and justification for the proposed changes set out in the Consultation Paper are in our view a logical extension of the matters raised in the 2010 consultation exercise along similar lines. They cater for the developing listed products in the Hong Kong market and we agree that they broadly mirror the treatment of these issues in comparable jurisdictions.

The intention expressed in paragraph 16(a)(iii), and the following text, to allow flexibility as regards what will and will not be treated as an "entity" for the purposes of the regime going forwards is welcome so as to allow for adaptation to new forms and variations of vehicle, as appropriate.

Question 1: Do you agree that Parts XIII and XIV of the SFO should be amended so that these Parts expressly cover listed entities that are not in corporate form?

Law Society's response:

The proposal allows for a more consistent treatment of "listed" entities and is in our view a helpful development. The proposed definition changes in paragraph 16 sufficiently deal with expanding the coverage of the relevant Securities and Futures Ordinance provisions to encompass non-corporate listed entities.

One query is the use of the phrase "or some other equivalent unit of measurement of interest in the entity" (Suggested amendment highlighted). As drafted, there would seem to be a potential for an extremely wide interpretation of the phrase which may lead to confusion.

Question 2: Do you agree that Part XV of the SFO should be amended so that it expressly covers listed entities that are not in corporate form?

Law Society's response:

We have no quarrel with the proposal which accords with the (albeit slightly narrower) position reached in the 2010 consultation.

As a more general point, we would say that there are widely recognised deficiencies in the Part XV regime (including the outline guidance) which make for an uncertain environment for market participants and practitioners. This is particularly the case in the derivatives space.

While the proposed amendments do not appear to exacerbate the inherent problems with the regime, they do act as a helpful reminder of its complexities, which can sometimes lead to uncertainties and bizarre outcomes in terms of disclosure obligations. None of that is helpful to the Hong Kong market at a broader level.

We would urge a review and overhaul of the Part XV disclosure regime as soon as possible to clarify the various anomalies and inconsistencies, particularly given the wider coverage under the proposals contained in this consultation.

Question 3: Do you agree that Parts VIII and X of the SFO should be amended to extend the SFC's powers under these Parts to all listed entities?

Law Society's response:

Yes. It is logically consistent to adopt this approach.

Question 4: Do you have any comments on the proposal to extend the statutory disclosure requirement for PSI in respect of listed corporations under Part XIVA of the SFO to listed CIS and other listed entities?

Law Society's response:

Again, this is a logically consistent approach in principle.

A drafting point to bear in mind (noting the intention in paragraph 38(c) to make other "necessary amendments") is that, although the definition of "inside information" is proposed to be amended to cater for non-corporate listed entities, the references to "officer" in sections 307B and 307G will need to be appropriately amended or augmented.

In section 307B, it is important to determine at what point the "entity" is treated as having acquired the information (more difficult potentially in the context of non-corporates). The reference to "officer" is not directly compatible with non-corporates. In section 307G, who will be responsible for taking all the reasonable measures?

Question 5: Do you have any comments on the examples of events or circumstances where the management company of a listed CIS/other listed entity should consider whether a disclosure obligation of PSI would arise under the SFO?

Law Society's response:

The examples set out in paragraph 35 of the Guidelines on Disclosure of Inside Information provide a useful flavour of the types of issues which may trigger a disclosure obligation for non-corporate listed entities. Having said that, a number of them are corporate-specific and have no obvious analogy in relation to non-corporates.

It would be appropriate to overhaul these guidelines to ensure their relevance across the broader range of listed entities.

The REIT Code examples of disclosable events under paragraph 10.3 would provide a useful starting point, in principle, for a wider set of examples under the Inside Information Guidelines. However, of course, not all of the events listed would necessarily fall within paragraph 10.3(c).

In relation to ETFs, the SFC/SEHK circular in November 2010 again provides a useful starting point.

The Guidelines as a whole would accordingly need to be updated and harmonised across the relevant types of listed vehicle to cater for their individual circumstances.

Question 6: Do you have any comments on our proposal set out in paragraph 45 above?

Law Society's response:

The proposed approach is in our view sensible.

Question 7: Do you agree with our proposals set out in paragraphs 58 and 59 above?

Law Society's response:

Yes. This would be a welcome change, codifying what has become market practice, and reducing what are viewed in the market as unnecessary delays caused by the need for essentially routine exemption applications.

**The Law Society of Hong Kong
Investment Products and Financial Services Committee
13 December 2012**