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

SFC
證監會

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

23 November 2012

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Foreword

The Securities and Futures Commission (SFC) invites market participants and interested parties to submit written comments on the proposals discussed in this consultation paper or to comment on related matters that might have a significant impact upon the proposals **no later than 24 December 2012**. Any person wishing to comment on the proposals should provide details of any organisation whose views they represent.

Please note that the names of the commentators and the contents of their submissions may be published, in whole or in part, on the SFC's website and in other documents to be published by the SFC. In this connection, please read the Personal Information Collection Statement attached to this consultation paper.

You may not wish your name and/or submission to be published by the SFC. If this is the case, please state that you wish your name and/or submission to be withheld from publication when you make your submission.

Written comments may be submitted as follows:

By mail to:	The Securities and Futures Commission 8th Floor, Chater House 8 Connaught Road Central Hong Kong Re: Consultation Paper on proposals to enhance the regulatory regime for non-corporate listed entities
By fax to:	(852) 2810-5385
By online submission at:	http://www.sfc.hk/edistributionWeb/gateway/EN/consultation/
By e-mail to:	SFOAmendments@sfc.hk

All submissions received before expiry of the consultation period will be taken into account before the proposals are finalised and a consultation conclusions paper will be published in due course.

Securities and Futures Commission
Hong Kong

23 November 2012

Personal information collection statement

1. This Personal Information Collection Statement (**PICS**) is made in accordance with the guidelines issued by the Privacy Commissioner for Personal Data. The PICS sets out the purposes for which your Personal Data[1] will be used following collection, what you are agreeing to with respect to the SFC's use of your Personal Data and your rights under the Personal Data (Privacy) Ordinance (Cap. 486) (**PDPO**).

Purpose of collection

2. The Personal Data provided in your submission to the SFC in response to this consultation paper may be used by the SFC for one or more of the following purposes:

   (a) to administer the relevant provisions[2] and codes and guidelines published pursuant to the powers vested in the SFC;

   (b) in performing the SFC's statutory functions under the relevant provisions;

   (c) for research and statistical purposes; or

   (d) for other purposes permitted by law.

Transfer of personal data

3. Personal Data may be disclosed by the SFC to members of the public in Hong Kong and elsewhere as part of the public consultation on this consultation paper. The names of persons who submit comments on this consultation paper, together with the whole or any part of their submissions, may be disclosed to members of the public. This will be done by publishing this information on the SFC website and in documents to be published by the SFC during the consultation period or at its conclusion.

Access to data

4. You have the right to request access to and correction of your Personal Data in accordance with the provisions of the PDPO. Your right of access includes the right to obtain a copy of your Personal Data provided in your submission on this consultation paper. The SFC has the right to charge a reasonable fee for processing any data access request.

Retention

5. Personal Data provided to the SFC in response to this consultation paper will be retained for such period as may be necessary for the proper discharge of the SFC's functions.

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[1] Personal Data means personal data as defined in the Personal Data (Privacy) Ordinance (Cap. 486).

[2] Defined in Schedule 1 of the Securities and Futures Ordinance (Cap. 571) (SFO) to mean provisions of the SFO and subsidiary legislation made under it; and provisions of Parts II and XII of the Companies Ordinance (Cap. 32) so far as those Parts relate directly or indirectly, to the performance of functions relating to prospectuses; the purchase by a corporation of its own shares; a corporation giving financial assistance for the acquisition of its own shares etc.

Enquiries

6. Any enquiries regarding the Personal Data provided in your submission on this consultation paper, or requests for access to Personal Data or correction of Personal Data, should be addressed in writing to:

   The Data Privacy Officer
   The Securities and Futures Commission
   8th Floor, Chater House
   8 Connaught Road Central
   Hong Kong

7. A copy of the Privacy Policy Statement adopted by the SFC is available upon request.

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

Introduction

1. The SFC invites comments on the proposals described in this consultation paper. The proposals are aimed at enhancing the regulatory regime with respect to entities that are listed on the Stock Exchange of Hong Kong Limited (**SEHK**) by:

   (a) amending Parts VIII, X, XIII, XIV and XV of the Securities and Futures Ordinance (Cap. 571) (**SFO**) so that these Parts expressly cover listed entities that are not in corporate form;

   (b) extending the statutory disclosure requirement for price sensitive information (**PSI**) under Part XIVA of the SFO to all listed entities (including listed collective investment schemes (**CIS**)) that are not in corporate form;

   (c) clarifying that, for listed depository receipts (**DRs**), the overseas issuer whose shares/units are the underlying shares/units (and not the relevant depository bank) is the "issuer" of the DRs so that the overseas issuer is the listed corporation in respect of the DRs; and

   (d) excluding from the disclosure of interests regime under Part XV of the SFO entities whose only listed securities are debentures.

2. A consultation conclusions paper will be published after the end of the consultation period.

Amending Parts VIII, X, XIII, XIV and XV of the SFO so that these Parts expressly cover listed entities that are not in corporate form

Background

3. Currently, some provisions in the following parts of the SFO apply only to listed entities that are in corporate form:

   (a) Part VIII – the SFC's powers of supervision and investigations;

   (b) Part X – the SFC's powers of intervention and proceedings in respect of licensed corporations;

   (c) Part XIII – the civil regime in respect of market misconduct;

   (d) Part XIV – the criminal regime in respect of market misconduct; and

   (e) Part XV – the disclosure of interests provisions that apply to listed corporations' substantial shareholders, directors and chief executives.

4. In 2010, the SFC consulted[3] on proposals to:

   (a) amend Parts XIII and XIV of the SFO to make it explicit that these Parts are applicable to all listed CIS in whatever form a CIS takes (including real estate investment trusts (**REITs**)); and

   (b) amend Part XV of the SFO so that Part XV will apply to all listed CIS with an exemption for listed open-ended CIS. (**2010 Consultation**)

5. Respondents were generally supportive of the proposals and the SFC concluded that it would proceed to make recommendations on the legislative amendments to the Government.

6. Apart from corporations and CIS, other types of organisations or vehicles (such as business trusts and partnerships) may be listed on the SEHK.

7. Parts XIII and XIV of the SFO provide parallel civil and criminal regimes to combat market crime and misconduct.[4] However, some provisions in Parts XIII and XIV of the SFO currently apply only to listed entities that are in corporate form. In 2010, there was general support for the SFC's proposals to extend these provisions to listed CIS. There is no logical reason why these provisions should not also extend to non-CIS listed entities that are structured other than in corporate form. We consider that all provisions of Parts XIII and XIV of the SFO should apply to all listed entities that are not corporations to give investors the same protection against market misconduct as investors in listed corporations. Further, it is not meaningful to extend Parts XIII and XIV of the SFO to cover all listed entities in non-corporate form if some of the powers to investigate and take action concerning breaches (under Parts VIII and X of the SFO) are not available.

8. Similarly, in addition to listed CIS[5], Part XV of the SFO should also be extended to cover all listed entities that are not in corporate form. The purpose of Part XV is to keep the investing public informed about the ownership of listed companies and the public should be given the same information about the ownership of listed entities that are not in corporate form.

9. Accordingly, we are proposing to amend Parts VIII, X, XIII, XIV and XV of the SFO so that these Parts expressly cover all listed entities that are not in corporate form[6]. These will include listed business trusts that are organised as a trust and partnerships.

10. The proposals would promote consistency of regulation for all listed entities, enhance market transparency and bring our regulatory regime for listed entities more in line with those of overseas jurisdictions.

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[3] A Consultation Paper 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 was issued in January 2010 and the conclusions paper was issued in June 2010.

[4] Market misconduct includes insider dealing, market manipulation, disclosure of false or misleading information, etc.

[5] Other than listed open-ended CIS as proposed in the 2010 Consultation.

[6] Other than listed open-ended CIS for the purposes of Part XV of the SFO as proposed in the 2010 Consultation.

Proposals

Parts XIII and XIV of the SFO

11. Parts XIII and XIV of the SFO relate to market misconduct. The objective of the market misconduct regime is to promote fairness in the markets, protect the investing public and minimise crime and misconduct.

12. Some provisions of Parts XIII and XIV of the SFO currently apply only to entities that are in corporate form. In the 2010 Consultation, it was agreed that the market misconduct regime should apply to listed CIS as well as listed corporations. Since other types of organisations or vehicles (such as business trusts and partnerships) may also be listed on the SEHK, Parts XIII and XIV of the SFO should also extend to market misconduct in respect of these listed entities (in addition to listed CIS).

13. Accordingly, we propose to further extend all provisions of Parts XIII and XIV of the SFO to non-corporate listed entities in the same manner as they apply to listed corporations to give investors in all listed entities the same protection against market misconduct.

14. Some defined terms in Parts XIII and XIV of the SFO, such as "associate" and "controller", cater only to corporations. In the case of entities that are structured other than in corporate form, instead of directors and shareholders, there may be a trust with unit holders, trustees or a custodian appointed under a trust deed to hold the assets of the trust for the unit holders. A partnership is managed by partners.[7]

15. Accordingly, it is necessary to amend these defined terms so that the provisions in Parts XIII and XIV of the SFO apply to persons in these other listed entities who are equivalent to directors and shareholders of companies.

16. We propose the following amendments to Parts XIII and XIV (and other relevant provisions) of the SFO:

    (a) adding a new definition of "entity" in Schedule 1 to the SFO to mean:

        (i) a trust;

        (ii) a partnership[8]; and

        (iii) such other arrangement, or class of arrangements, which the Financial Secretary may by notice published in the Gazette prescribe as being regarded as an entity in accordance with the terms of the notice[9],

    but shall not include such other arrangement, or class of arrangements, which the Financial Secretary may by notice published in the Gazette prescribe as not being regarded as an entity in accordance with the terms of the notice;

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[7] For example, the definition of "associate" in section 245(1) of the SFO may not cover the manager, trustee, custodian or partner of the entity and each officer or employee of any such manager, trustee, custodian or partner.

[8] The term "partnership" follows the definition in section 3 of the Partnership Ordinance (Cap. 38) to mean the relation which subsists between persons carrying on a business in common with a view of profit but does not include the relation between members of a corporation.

[9] This paragraph would allow the definition to be extended in the event that some new form of listed vehicle (eg, a joint venture) was listed.

(b) amending the definitions of "corporation" and "company" in Schedule 1 to the SFO to include any entity for the purposes of all Parts of the SFO except Parts III and IV;

(c) amending the definition of "share" in Schedule 1 to the SFO, in relation to an entity, to include a unit in the listed entity for the purposes of all Parts of the SFO except Parts III and IV;

(d) adding a new definition of "unit" in Schedule 1 to the SFO, in relation to an entity, to mean the units, shares or some other unit of measurement of interest in the entity;

(e) amending the definition of "associate" in Parts XIII and XIV of the SFO to include reference to a person that is an entity and include the manager, trustee, custodian or partner of the entity and each officer or employee of any such manager, trustee, custodian or partner, and making similar amendments to the definitions of "controller", "persons connected with a corporation", "relevant information", "subsidiary", "related corporation", etc.; and

(f) other necessary amendments to make Parts XIII and XIV of the SFO applicable to listed entities that may be structured in other forms (such as in the form of a trust or a partnership) in the same manner as they apply to listed corporations.

17. The market misconduct regimes in Australia, Singapore and the United Kingdom (**UK**) cover all listed entities. Our proposals will bring our market misconduct provisions in line with major overseas markets.

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?

Parts XV of the SFO

18. Part XV of the SFO relates to disclosure of interests in the securities of listed corporations. Its overriding objective is to provide investors in listed corporations with more complete and better quality information on a timely basis to enable them to make informed investment decisions. This includes requiring the disclosure of information that can affect perceptions of the value of listed corporations. The regime is also designed to enable investors to identify the persons who control, or are in a position to control, interests in shares in listed corporations and those who may benefit from transactions involving associated corporations of listed corporations.

19. In the 2010 Consultation, 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[10].

[10] Pursuant to the Guidelines for the Exemption of Listed Corporations from Part XV of the Securities and Futures Ordinance (Disclosure of Interests), an exemption from the provisions of Part XV of the SFO is currently made available to open-ended CIS in corporate form on the basis that the total number of outstanding shares of an open-ended corporate form CIS is constantly changing, due to the frequent subscription and redemption of shares by investors, requiring compliance by an open-ended corporate form CIS and its corporate insiders with Part XV of the SFO may result in additional costs without contributing to an informed market for its shares.

20. As other types of organisations or vehicles (such as business trusts and partnerships) may also be listed on the SEHK, Part XV of the SFO should be extended to cover all other non-corporate form listed entities. Investors should be given information about the ownership of all listed entities, not only that of listed corporations and listed CIS[11].

21. Accordingly, we propose to amend Part XV of the SFO so that it will apply to all listed entities[12], regardless of their legal form.

22. As we propose to extend the application of Part XV of the SFO to all non-corporate form listed entities[13], we believe it is desirable to make provision for an exemption that may be granted for designated listed entities. The class of "designated listed entities" proposed to be exempted will be confined to open-ended CIS.

23. We propose the following amendments to Part XV (and other relevant provisions) of the SFO:

(a) adding a new definition of "voting shares" in section 308 of the SFO in place of shares comprised in the "relevant share capital" of a listed corporation to provide that "voting shares, in relation to a listed corporation –

(i) means the listed corporation's issued shares of a class the shares in which carry rights to vote in all circumstances at general meetings of the corporation; and

(ii) includes unissued shares in the listed corporation's share capital of a class which, if issued, would carry rights to vote in all circumstances at general meetings of the corporation;"

(b) changing the definition of "issued equity share capital" to "issued equity voting shares" which, in relation to a listed corporation, means the listed corporation's issued shares of a class the shares in which carry rights to vote in all circumstances at general meetings of the corporation;

(c) amending the definition of "underlying shares" to remove the references to "relevant share capital" and add reference to "voting shares"; and

(d) other consequential and further amendments to make Part XV of the SFO applicable to listed entities that may be structured in other forms (such as in the form of a trust or a partnership) in the same manner as it applies to listed corporations.

24. We believe that our proposed approach in respect of disclosure of interests is generally in line with the regulatory approach adopted in Singapore, the UK and Australia.

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?

[11] Other than listed open-ended CIS as proposed in the 2010 Consultation.

[12] Other than listed open-ended CIS as proposed in the 2010 Consultation.

[13] Other than listed open-ended CIS as proposed in the 2010 Consultation.

Parts VIII and X of the SFO

25. Part VIII of the SFO provides the SFC with supervisory and investigation powers so that action can be taken in respect of breaches of SFO requirements, including Parts XIII to XV of the SFO. Part X of the SFO provides the SFC with powers to intervene in a regulated intermediary's affairs by administrative order and to apply to court for injunctions and other orders to remedy or regulate crime, misconduct, inadequate disclosure or oppression in the affairs of a listed company.

26. The application of some of the provisions in Parts VIII and X of the SFO are limited to corporations[14]. This creates a difficulty with a listed vehicle structured as a trust or a partnership since a trust or partnership is not a "corporation" or a "person" but is simply an arrangement.

27. It is not meaningful to extend the market misconduct provisions (under Parts XIII and XIV of the SFO) to cover all listed entities in non-corporate form if some of the powers to investigate and take action concerning breaches (under Parts VIII and X of the SFO) are not available.

28. Accordingly, we propose to amend Parts VIII and X of the SFO so that the SFC's powers under these Parts are extended to cover all listed entities.

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?

[14] For example, section 183 of the SFO opens with the words "The person under investigation" and section 214 of the SFO opens with the words "where, in relation to a corporation which is or was listed…." the court can make certain orders to remedy unfair prejudice.

Extending the statutory disclosure requirement for price sensitive information in respect of listed corporations under Part XIVA of the SFO to listed CIS and other listed entities that are not in corporate form

Background

29. The passage of the Securities and Futures (Amendment) Ordinance added a new Part XIVA to the SFO which is due to come into effect on 1 January 2013. Part XIVA imposes a statutory disclosure obligation on listed corporations to disclose PSI, or "inside information" (as defined), on a timely basis.

30. The statutory disclosure obligation under Part XIVA of the SFO does not currently apply to listed CIS and other listed entities that do not take a corporate form.

31. In order to provide a comparable PSI regime to enhance investor protection as well as the transparency of all listed entities (including listed CIS), we propose to extend the statutory disclosure requirement for PSI to all listed CIS and other listed entities that do not take a corporate form, with consequential modifications to the SFO. This proposal is consistent with the trend in other international markets which have statutory PSI regimes applicable to listed corporations, listed CIS[15], listed trusts and other listed vehicles.

32. There are two main types of listed CIS[16] in Hong Kong at present, namely REITs and exchange traded funds (**ETFs**)[17].

33. From an investor's perspective, a REIT and a listed property company are in substance very similar to each other economically and in terms of the basic rights and interests attached to units in a REIT and shares in a listed company, despite their different legal form and structure. The management of a REIT is usually conducted by the REIT manager in a fashion which is similar to the management of a listed company by its board of directors. It would be a natural investor expectation that a statutory disclosure obligation would be substantially the same for REITs and listed companies.

34. ETFs are passively managed funds that invest in a portfolio of securities and/or financial instruments to replicate the performance of a financial index or benchmark. In general, ETF managers are unlikely to have any influence or control over the operation or management of the companies that ETFs invest in. Because of that, industry has expressed the view that for traditional non-synthetic ETFs, there are hardly any events that could have a material effect on the price of the ETF's units and therefore there would be few, if any, circumstances justifying PSI disclosure. In principle, we are of the view that for this reason the circumstances triggering the statutory PSI obligation in respect of traditional non-synthetic ETFs should be less extensive than those applicable to synthetic ETFs.

35. As the market evolves, apart from physical ETFs that invest directly in the assets needed to replicate the performance of the indices or benchmarks, there are an increasing number of synthetic ETFs listed in Hong Kong and in other markets. Synthetic ETFs

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[15] For example, the UK, Australia and Singapore have statutory PSI regimes applicable to listed CIS.

[16] These refer to CIS authorised by the SFC and listed pursuant to Chapter 20 of the Listing Rules.

[17] There is only one listed CIS authorised by the SFC in Hong Kong which is neither a REIT nor an ETF. This CIS is an actively managed closed-ended unit trust that invests primarily in A shares (directly and indirectly). We believe it should be subject to the same disclosure obligation on PSI as in the case of an investment company listed under Chapter 21 of the Listing Rules, despite its different legal form and structure.

may invest extensively in financial derivative instruments, such as swaps or other structured products which are often over-the-counter, tailor-made instruments and have no liquid markets, designed to replicate the performance of underlying indices/benchmarks. These ETFs are therefore exposed to additional risks, including the credit and default risks of their derivatives counterparties, and may suffer significant losses up to the full value of the derivatives issued by a counterparty upon its default. Given the rapid development of ETF products, it would be justifiable to enhance transparency, and to bring the disclosure of PSI in respect of ETFs onto the same statutory platform as listed companies.

36. At present, all listed CIS (being SFC-authorised CIS) are subject to non-statutory requirements to disclose PSI under the relevant SFC product codes and also the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (**Listing Rules**)[18].

Proposals

37. We propose to extend the statutory disclosure requirement for PSI in respect of listed corporations under Part XIVA of the SFO to all listed CIS and other listed entities that do not take a corporate form.

38. We propose the following additional amendments to Part XIVA of the SFO:

(a) extending the definition of "inside information" to include information about:

(i) the entity;

(ii) a unit holder of the entity;

(iii) a trustee, manager, custodian or partner of the entity;

(iv) an officer of the manager of the entity; and

(v) the listed units in the entity or their derivatives;

(b) extending the power of the court to sanction:

(i) a trustee, manager, custodian or partner of the entity; or

(ii) an officer of the manager of the entity; and

(c) other necessary amendments to make Part XIVA of the SFO applicable to listed entities that do not take a corporate form (such as in the form of a listed CIS, business trust or partnership) in the same manner as they apply to listed corporations.

[18] The relevant obligations are set out in 11.1B of the Code on Unit Trusts and Mutual Funds; 10.3 of the Code on Real Estate Investment Trusts; and Part G of Appendix 7 to the Listing Rules.

39. The general principles and guidance set out in the Guidelines on Disclosure of Inside Information (**Guidelines**)[19] issued by the SFC will apply to listed CIS and other listed entities that do not take a corporate form with necessary modifications.

40. It is also proposed that further guidance shall be provided where appropriate by way of supplement to the Guidelines to assist listed CIS and other listed entities to comply with their obligations to disclose PSI under the statutory disclosure requirements.

41. It is envisaged that many of the examples set out in paragraph 35 of the Guidelines are equally applicable to REITs, with necessary modifications. In addition, a REIT should also have regard to the examples set out in paragraph 10.4 of the Code on Real Estate Investment Trusts. ETFs would be expected to have regard to the examples of potential events that may trigger the ongoing disclosure requirements under the Code on Unit Trusts and Mutual Funds and the Listing Rules as set out in the joint circular issued by the SFC and SEHK on 18 November 2010.

42. Listed CIS and management companies are reminded that the safe harbours in respect of the statutory PSI regime for listed corporations would equally apply to listed CIS. These safe harbours will also apply to non-CIS listed entities structured other than in corporate form.

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?
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?

[19] The Guidelines were issued by the SFC in June 2012 to assist corporations to comply with their obligations to disclose inside information under Part XIVA of the SFO.

Clarifying that, for listed DRs, the overseas issuer whose shares/units are the underlying shares/units (and not the relevant depository bank) is the "issuer" of the DRs so that the overseas issuer is the listed corporation in respect of the DRs

Background

43. Chapter 19B of the Listing Rules provides for the listing and trading of depositary receipts (**DRs**) in Hong Kong.[20] DRs are negotiable certificates issued by a depositary bank and represent shares/units of an overseas issuer that are held with the depositary, or its custodian in the home market of the overseas issuer. There may be some ambiguity over whether the overseas issuer (whose shares/units are the underlying shares/units, or the depositary bank, with whom the underlying shares/units are deposited and who physically issues the DRs) is the "issuer" of the DRs for the purposes of the SFO.

44. We therefore propose to amend section 7 of Schedule 1 to the SFO to clarify that the overseas issuer whose shares/units are the underlying shares/units (and not the relevant depository bank) is the "issuer" of the DRs so that the overseas issuer is the listed corporation in respect of the DRs. This amendment makes it clear that references to "relevant information" in Parts XIII and XIV of the SFO, and "inside information" in Part XIVA of the SFO refer to information concerning the overseas issuer (and its shareholders, officers and listed securities etc.) and not information concerning the relevant depositary bank (or its shareholders and officers etc.). This is in line with existing practice in the market and the SFC's policy intent.

Proposals

45. We propose to amend section 7 of Schedule 1 to the SFO to clarify that:

    (a) the overseas issuer, whose shares/units are the underlying shares/units, is the issuer of the DRs so that the overseas issuer becomes a listed corporation when DRs in respect of its shares/units are issued[21]; and

    (b) the depository bank that physically issues the DRs is not the issuer.

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

[20] The primary principle underlying Chapter 19B of the Listing Rules is that the holders of depositary receipts are to be treated as generally having equivalent rights and obligations as those afforded to shareholders in an issuer listed in Hong Kong.

[21] As we are proposing to (a) amend the definitions of "corporation" and "company" to include any entity; and (b) amend the definition of "share" to include a unit in the listed entity, our proposal will also cover DRs in respect of interests in overseas entities. This means that an overseas entity whose equity interests underly a DR will be the issuer in respect of the DR and not the relevant bank.

Excluding from the disclosure of interests regime under Part XV of the SFO entities whose only listed securities are debentures

Background

46. Part XV of the SFO requires substantial shareholders, directors, shadow directors and chief executives (**corporate insiders**) of a "listed corporation" (see paragraph 47) to disclose their holdings in securities of the listed corporation. Directors (including shadow directors) and chief executives are required to disclose their holdings in both shares and debentures in the listed corporation (or any of its associated corporations), while substantial shareholders are merely required to disclose their interests in shares of the listed corporation.

47. The principal function of the disclosure of interests requirements under Part XV of the SFO is to provide information to the market and to listed corporations on persons who have significant interests in listed corporations, their dealings in such interests, and on the interests in shares and debentures of the listed corporation and any associated corporation of the listed corporation held by directors and chief executives. This will enable those investing in listed corporations to obtain relevant information on a timely basis so they can make informed investment decisions by identifying:

    (a) the persons who control, or are in a position to control, interests in shares in a listed corporation; and

    (b) those who may benefit from transactions involving the listed corporation or any associated corporation of the listed corporation.

48. Under Part XV of the SFO, a corporation becomes a "listed corporation" when any of its "securities" are listed on the SEHK[22]. "Securities" is broadly defined to include, among other interests, shares and debentures of a corporation. Accordingly, a corporation having only debentures listed on the SEHK and not having any of its shares listed is still regarded as a "listed corporation" under the SFO. Its corporate insiders must comply with the disclosure of interests requirements in the SFO. As discussed earlier in this consultation paper, entities that are not in corporate form can also be listed on the SEHK (eg, a trust or a partnership) and we propose to amend Part XV of the SFO so that it will apply to all listed entities[23], regardless of their legal form.

49. Debentures, whether called bonds or notes, represent loans. Unless they are also shareholders, holders of debentures are not the owners of an entity, rather they are its creditors. Requiring corporate insiders of companies that have only debentures listed on the SEHK to comply with the disclosure of interests obligations does not contribute to an informed market for Hong Kong investors and brings with it significant compliance costs.

50. Under the SFO, the SFC has powers to exempt any person from all or any of the provisions of Part XV. In 2003, the SFC published the Guidelines for the Exemption of Listed Corporations from Part XV of the SFO (Disclosure of Interests). These guidelines set out certain criteria pursuant to which the SFC may grant waivers of the disclosure of interests obligations. It has become routine for corporations seeking to list debentures on the SEHK to obtain an exemption from the disclosure of interests obligations.

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[22] We propose to amend the definitions of "corporation" and "company" to include any entity. See paragraph 16.

[23] Other than listed open-ended CIS as proposed in the 2010 Consultation.

51. Before 2010, there were relatively few issues and listings of debentures in Hong Kong. The cost and time spent by issuers of debentures applying for exemptions and the regulatory resources taken up by the SFC in dealing with these applications were relatively limited. Since 2010, the number of listings of debentures has increased substantially. The number of applications to the SFC for exemptions from Part XV disclosure obligations has increased significantly.

52. The SFC has recently received comments from the public and market practitioners questioning the need to apply for disclosure of interests exemptions. The SFC considers that there is no benefit in requiring disclosure of interests by corporate insiders of interests in debentures of entities (regardless of their legal form) whose only listed securities in Hong Kong are debentures. The current practice of routine exemptions adds time and costs to listings of debentures for no value. Therefore the SFC believes that an entity that is listed only by virtue of its debentures being listed on the SEHK (**listed debenture issuer**) should be excluded from the disclosure of interests regime under Part XV of the SFO.

53. Where a listed debenture issuer which is an associated corporation of a listed entity with shares/units listed on the SEHK is excluded from the disclosure of interests regime under Part XV of the SFO, the obligations of corporate insiders of that listed entity to make disclosures of their holdings in the debentures of the listed debenture issuer by virtue of it being an associated corporation of the listed entity would not be altered.

54. Some debentures can be convertible into shares/units of the listed debenture issuer or shares/units of another entity related to the listed debenture issuer. All investors, including holders of these convertible debentures who have an interest in the shares/units into which the debentures may be converted, would benefit from disclosure of interests information concerning the listed debenture issuer. Accordingly, the exclusion should not apply where the listed debentures are convertible into the shares/units of the listed debenture issuer or an entity related to the listed debenture issuer.

55. Where the listed debentures are convertible into shares/units of a related entity that is already itself a listed entity where persons interested in shares/units of the related entity are subject to the disclosure of interests obligations, these obligations provide all the information about interests in that entity considered necessary for investors in that related entity. Accordingly, all investors, including the holders of the convertible debentures, have the necessary information about interests in that entity by virtue of it being a listed entity. Thus the exclusion should apply where the listed debentures are convertible into shares/units of a related entity that is itself a listed entity where persons interested in shares/units of the related entity are subject to the disclosure of interests obligations.

56. In cases where the listed debentures are convertible into shares/units of an unrelated entity, any disclosure of interests about the listed debenture issuer would provide no information relevant to an assessment of the shares/units of the unrelated entity into which the debentures may be converted. Accordingly, the exclusion should apply where the listed debentures are convertible into shares/units of an unrelated entity.

57. An exclusion from Part XV disclosure of interests regime for a listed debenture issuer will not in any way change the disclosure of interests obligation that the listed debenture issuer has in respect of the shares/units of that other listed entity or that a holder of the convertible debentures has in respect of its interests in that other listed entity.

Proposals

58. We propose to exclude from the disclosure of interests regime under Part XV of the SFO any listed debenture issuer (ie, an entity that is listed only by virtue of its debentures being listed on the SEHK) where:

    (a) the listed debentures are not convertible; or

    (b) the listed debentures are convertible in whole or in part, directly or indirectly, into shares/units of an entity related to the listed debenture issuer and such related entity is itself a listed entity where persons interested in shares/units of the related entity are subject to the disclosure of interests obligations; or

    (c) the listed debentures are convertible in whole or in part, directly or indirectly, into shares/units of an unrelated entity.

59. The exclusion will not apply where:

    (a) the listed debentures are convertible in whole or in part, directly or indirectly, into shares/units of the listed debenture issuer itself; or

    (b) the listed debentures are convertible in whole or in part, directly or indirectly, into shares/units of an entity related to the listed debenture issuer and such related entity is not itself a listed entity where persons interested in shares/units of the related entity are subject to the disclosure of interests obligations.

60. Where the listed debentures are convertible into shares/units in an entity that is itself a listed entity, the disclosure obligations of persons interested in that listed entity will not be changed by the exclusion of the issuer of the convertible listed debentures from the disclosure of interests regime under Part XV of the SFO.

61. In other major jurisdictions, disclosure of interest requirements normally do not apply to issuers of listed debt securities whose shares are not also listed. Disclosure of interest requirements in the United States only cover equity securities, while the listing rules in Australia and the UK explicitly or inexplicitly carve out debt listings from their disclosure of interest regimes.

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

Consequential amendments required by the enactment of the new Companies Ordinance

62. The new Companies Ordinance was enacted in July 2012 and is expected to take effect in 2014. The new Companies Ordinance adopts a mandatory system of no nominal value for all Hong Kong incorporated companies with a share capital. As a result, consequential amendments are necessary to align Part XV of the SFO with this new system.

63. Divisions 2 to 4 of Part XV of the SFO presently require a person who is interested in 5% or more of the shares in the "relevant share capital" of a listed corporation to make a disclosure[24]. These divisions rely on a shareholder expressing the aggregate "nominal value" of all the shares of a listed corporation in which he is interested, immediately before (or immediately after) the relevant time, as a percentage of the "nominal value" of the issued equity share capital of that listed corporation to determine whether he comes under a duty of disclosure[25]. This approach is not used in Divisions 7 to 9 of Part XV of the SFO for directors who simply have to disclose the number of shares they are interested in.

64. Pursuant to the new Companies Ordinance, shares are to have no nominal value and corporations have no issued share capital, hence there will be no means of calculating whether or not a person must make a disclosure under Divisions 2 to 4 of Part XV of the SFO. Accordingly, an alternative means of computation must be designed for disclosures required under Divisions 2 to 4 of Part XV of the SFO.

65. We propose to amend Part XV of the SFO so that the disclosure mechanism under Divisions 2 to 4 of Part XV of the SFO is based upon the number of voting shares of a listed entity (expressed as a percentage of the number of shares of the same class which have been issued by the listed entity) held by the substantial shareholder rather than the nominal value of those shares. The amended disclosure mechanism will also work for those listed entities that do not have share capital and whose units have no nominal value (eg, REITs).

66. We propose that the provisions in Parts XIII and XIV of the SFO which similarly treat a person as a substantial shareholder by virtue of a shareholding of 5% of the nominal value of the relevant share capital of the corporation (see sections 247(3) and 287(3) of the SFO) will also be changed to refer to the same percentage but calculated by reference to the number of shares held expressed as a percentage of the number of shares of the same class which have been issued by the listed entity.

[24] Section 310 of the SFO.

[25] Section 314(1) of the SFO, when read with sections 310 and 313 of the SFO.

Other consequential non-statutory amendments

67. To align with the legislative amendments to the SFO proposed in this consultation paper, we will make consequential amendments to the following in due course:

    (a) Guidelines on Disclosure of Inside Information[26];

    (b) Code on Real Estate Investment Trusts;

    (c) Code on Unit Trusts and Mutual Funds;

    (d) Outline of Part XV of the Securities and Futures Ordinance (Cap. 571) — Disclosure of Interests; and

    (e) Guidelines for the Exemption of Listed Corporations from Part XV of the Securities and Futures Ordinance (Disclosure of Interests).

Seeking comments

68. The SFC welcomes any comments from the public and the industry on the proposals made in this consultation paper. Please submit comments to the SFC in writing no later than 24 December 2012.

[26] The Guidelines will take effect on 1 January 2013.