Consultation 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

March 2024

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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 27 May 2024. Persons submitting comments on the proposals on behalf of an organisation should provide details of the organisation whose views they represent.

Please note that the names of the commentators and the contents of their submissions may be published 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 the SFC to publish your name, submission or both. If this is the case, please state so in your submission.

Written comments may be sent to the SFC as follows:

By mail to:	Securities and Futures Commission 54/F, One Island East 18 Westlands Road Quarry Bay, Hong Kong Consultation 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
By fax to:	(852) 2877 0318
By online submission at:	http://www.sfc.hk/edistributionWeb/gateway/EN/consultation/
By e-mail to:	listedcis-consultation@sfc.hk

All submissions received before the end 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

28 March 2024

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 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[1] and codes and guidelines published pursuant to the powers vested in the SFC;

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   (d) for other purposes permitted by law.

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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.

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[1] The term "relevant provisions" is defined in section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571) and refers to the provisions of that Ordinance together with certain provisions in the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32), the Companies Ordinance (Cap. 622) and the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap. 615).

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.

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
   54/F, One Island East
   18 Westlands Road
   Quarry Bay, Hong Kong

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

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

Executive summary

1. This Consultation Paper is divided into two parts and seeks views on proposals (Proposals) to:

   (a) introduce a statutory scheme of arrangement and compulsory acquisition mechanism for real estate investment trusts (REITs); and

   (b) enhance the Securities and Futures Ordinance (SFO) market conduct regime for listed collective investment schemes (CIS)[2].

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

Background

2. Currently, there is a statutory mechanism for a company formed and registered under the Companies Ordinance (Cap. 622 of the Laws of Hong Kong) (CO) to effect corporate restructuring by way of a scheme of arrangement or to compulsorily acquire shares following a takeover offer or general offer for a share buy-back[3] under Part 13 of the CO. Since a REIT is not a company subject to the CO, such statutory mechanism is not applicable to REITs.

3. The industry has been calling for the introduction of a statutory scheme of arrangement and compulsory acquisition regime for REITs in Hong Kong to facilitate privatisation and other corporate restructurings[4]. At present, a REIT may be privatised indirectly through the disposal of all or a substantial part of its assets followed by a delisting and deauthorisation

[2] "Collective investment scheme" is defined in section 1 of Part 1 of Schedule 1 to the SFO.
[3] The detailed provisions are set out in Part 13 (Arrangements, Amalgamation, and Compulsory Share Acquisition in Takeover and Share Buy-back) of the CO.
[4] For example, as noted in the papers of Developing Hong Kong as a Capital Formation Centre for Real Estate Investment Trusts issued by the Financial Services Development Council (FSDC) on 1 November 2013, and Revitalisation of Hong Kong's Real Estate Investment Trusts Market – Promoting Liquidity issued by the FSDC on 18 May 2021.

in accordance with the Codes on Takeovers and Mergers and Shares Buy-backs (Takeovers and Buy-back Codes) and the Code on REITs (REIT Code)[5].

4. The industry would like to have a clearer exit option and a more direct mechanism similar to that under the CO. The suggestion was echoed in the Financial Services Development Council's (FSDC) research papers[6]. In this connection, we note that the laws in other jurisdictions such as Australia, Singapore and the UK[7] provide for a statutory compulsory acquisition regime for REITs. REITs in Australia and Singapore may also implement "trust schemes" to effect privatisation or mergers through contractual arrangements with unitholders, with court advice or sanction of the scheme[8]. However, similar "trust schemes" are not feasible in Hong Kong. In order for Hong Kong courts to be conferred jurisdiction to consider and approve a scheme involving REITs, it would be necessary for a statutory scheme to be devised.

5. In view of the above and the SFC's long-established policy to regulate REITs in the same manner as listed companies due to their similarities in terms of economic nature and investors' interests, we consider it appropriate to introduce the REIT Scheme Proposal.

Proposal

6. We propose to introduce a new Part in the SFO to establish a statutory mechanism for the scheme of arrangement and compulsory acquisitions of REITs. The proposed provisions will be fundamentally based on Part 13 of the CO, with appropriate modifications to cater for the nature and features of REITs and to provide for the roles and responsibilities of the management company and the trustee of a REIT in implementing the scheme or compulsory acquisition.

7. The proposal will provide REIT unitholders, especially minority unitholders, with various safeguards and protection embodied in the statutory regimes in addition to those currently available under the Takeovers and Buy-back Codes.

8. Details of the REIT Scheme Proposal are set out in Part I of this paper.

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[5] Including 11.13 of the REIT Code and Note 7 to Rule 2 of the Code on Takeovers and Mergers (Takeovers Code) and one REIT was privatised by way of such disposal in 2021. Please also see footnote 21.

[6] Please see footnote 4.

[7] Pursuant to the Australia's Corporations Act 2001, Singapore's Securities and Futures Act 2001 and the UK's Companies Act 2006.

[8] REITs in Australia and Singapore are constituted in the form of trust, and may enter into "trust schemes" pursuant to the Australia Takeovers Panel's Guidance Note and the Monetary Authority of Singapore's Code on Take-overs and Mergers, respectively. REITs in the UK are generally constituted in the form of companies, and they may enter into a scheme of arrangement and obtain court sanction of the scheme pursuant to the statutory regime under the Companies Act 2006.

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

Background

9. The following market conduct regimes (Market Conduct Regimes) under the SFO currently apply to listed securities in Hong Kong:

   (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 XIVA of the SFO); and

   (c) disclosure of interests regime (Part XV of the SFO).

10. Some of the provisions in these regimes apply only to listed corporations[9]. To provide greater certainty and make it explicit that they are applicable to all listed CIS, the SFC consulted the public on proposals to extend the Market Conduct Regimes[10] to REITs and other non-corporate listed entities in 2010 and 2012[11]. The proposals received general support.

11. Following the conclusion of the 2012 public consultation, we have worked closely with the Government to prepare the relevant legislative amendments. However, there were technical challenges identified during the legislative drafting process and further deliberation was required. Pending relevant legislative amendments, trading and market conduct of REITs and other listed CIS continue to be subject to ongoing close monitoring and surveillance of

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[9] For example, section 270 of the SFO on insider dealing applies specifically in relation to a listed corporation.

[10] The disclosure of inside information regime in Part XIVA was not covered in the 2010 public consultation as the regime had not been introduced at the time.

[11] The prior public consultations were: (1) 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 issued by the SFC on 8 January 2010, with the 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 issued by the SFC on 25 June 2010; and (2) Consultation Paper on proposals to enhance the regulatory regime for non-corporate listed entities issued by the SFC on 23 November 2012, with the Consultation Conclusions on proposals to enhance the regulatory regime for non-corporate listed entities issued by the SFC on 27 March 2013.

the SFC as well as various disclosure requirements[12]. SFC-licensed managers of these listed CIS are also subject to the SFC's supervision and conduct requirements.

Proposal

12. To address the technical complexities identified in the earlier drafting process, while maintaining sufficient protection for investors under the regimes, certain refinements are proposed to fine-tune the proposals. The key proposed refinements include:

    (a) limiting the scope of the extension to listed CIS (which is the only type of non-corporate entities currently listed on The Stock Exchange of Hong Kong Limited (Stock Exchange)) instead of covering all non-corporate listed entities; and

    (b) streamlining the proposed legislative amendments, including by (i) focusing the various obligations under the Market Conduct Regimes largely on the management company of the listed CIS (and CIS directors in the case of a corporate CIS) and (ii) not covering certain divisions in Part XV of the SFO in the exercise where similar regulatory requirements are already in place[13].

13. We believe that the refinements will be conducive to the proposals' implementation to enhance market integrity and maintain sufficient investor protection. Should any new form of non-corporate listed entity emerge in future, the applicability of the Market Conduct Regimes would be taken into account in the relevant policy consideration.

14. Details of the Listed CIS Proposal are set out in Part II of this paper. In line with the 2012 public consultation, the proposed legislative amendments also include complementary amendments to the investigation and intervention powers under the SFO (Part VIII and Part X of the SFO) to cover listed CIS.

General

15. We have consulted relevant market participants and stakeholders on the REIT Scheme Proposal. The respondents generally welcomed and supported the proposal, and their comments were mostly technical. General support was also received in the previous public consultations covering the proposals to extend the Market Conduct Regimes to listed CIS. In addition, we consulted the Committee on REITs on the Proposals and received general support. We have taken into account comments received to formulate the Proposals.

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[12] For example, surveillance in respect of any untoward price or volume movements. REITs are also required to include disclosure of interests requirements substantially the same as those set out in Part XV of the SFO in their trust deeds.

[13] Please see paragraph 48.

16. Subject to consultation feedback, we will work with the Government to introduce legislative amendments to implement the Proposals into the Legislative Council (LegCo) with a target to completing the legislative process before the end of the current legislative term in December 2025.

Inviting comments

17. We invite comments on the Proposals no later than 27 May 2024. A consultation conclusions paper will be published as soon as practicable after the end of the consultation period.

Part I – Proposal to introduce a statutory scheme of arrangement and compulsory acquisition mechanism for REITs

Introduction

18. A REIT is a CIS authorised by the SFC under section 104 of the SFO that invests primarily in real estate with the aim to provide returns to unitholders derived from the recurrent rental income of the real estate.

19. Pursuant to the REIT Code, a REIT shall be constituted as a trust[14] and managed by a management company which is licensed by the SFC to carry out Type 9 regulated activity. A REIT must also appoint a trustee acceptable to the SFC to hold the assets of the REIT in trust for the benefit of its unitholders and to oversee the activities of the management company. In addition, a REIT must be listed on the Stock Exchange.

20. The laws in comparable overseas jurisdictions[15] provide for a statutory compulsory acquisition regime for REITs and enable REITs to implement "trust schemes" or similar arrangements to effect privatisation or mergers through contractual arrangements with unitholders, subject to court sanction or advice of the scheme[16].

21. The REIT Scheme Proposal will provide REIT unitholders, especially minority unitholders, with various safeguards and protection embodied in the statutory regimes which seek to provide a just and equitable framework for schemes of arrangement and compulsory acquisitions to be conducted for the purposes of corporate restructurings or privatisations. These include mandating disclosure of timely and adequate information to unitholders, imposing various voting thresholds to ensure a scheme must be approved by a super majority of at least 75% of the voting rights of the unitholders and to allow a scheme to be blocked by 10% or more of the voting rights of disinterested unitholders[17], as well as a court sanction mechanism for schemes[18]. Accordingly, REIT unitholders would enjoy a similar level of protection as shareholders of listed companies incorporated under the CO.

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[14] A REIT may also adopt a stapled structure by stapling its units with securities of another listed entity so long as similar governance and investor protection measures are in place and the requirements of the REIT Code are complied with in substance.
[15] Such as Australia, Singapore, and the UK.
[16] REITs in Australia and Singapore may enter into a "trust scheme" and obtain court advice and sanction respectively for the scheme. REITs in the UK are in company form and can enter into a scheme of arrangement pursuant to the Companies Act 2006.
[17] Please see paragraph 27.
[18] For example, under case law, in exercising its power of sanction in respect of a scheme of arrangement, the court will take into account, among other things, whether the statutory provisions have been complied with, whether the class was fairly represented by those who attended the meeting and whether the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent.

22. These together with the safeguards and framework provided under the Takeovers and Buy-back Codes[19] which are applicable to all takeovers, mergers and share buy-backs affecting companies and REITs with a primary listing in Hong Kong, would ensure unitholders (including minority unitholders) of Hong Kong REITs would be afforded fair treatment in the case of takeovers, corporate restructurings and privatisations.

Scheme of arrangement

Position under the CO

23. Currently, there is a statutory mechanism for a company formed and registered under Part 13 of the CO to effect corporate restructuring by way of a scheme of arrangement.

24. The CO provides for the sanctioning of a scheme of arrangement or compromise of a company by the court[20]. Where an arrangement or compromise is initiated, the court may, upon application of the relevant parties, order a meeting of members or creditors to consider the proposed scheme. There are prescribed requirements as to the contents and manner for issuing a notice for the meeting to provide timely and adequate information to the relevant parties to enable them to make an informed decision. Where the arrangement or compromise is approved at the meeting by the requisite threshold, the court may then sanction the arrangement or compromise and a copy of the order must be delivered to the Registrar of Companies for registration.

25. As REITs are constituted in the form of trusts and not companies under the CO, the above mechanism is not applicable to them. At present, a REIT may be privatised indirectly through the disposal of all or a substantial part of its assets followed by a delisting and deauthorisation in accordance with the Takeovers and Buy-back Codes and the REIT Code[21].

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[19] The primary purpose of the Takeovers and Buy-back Codes is to afford fair treatment for shareholders/unitholders who are affected by takeovers, mergers and share buy-backs. The Takeovers and Buy-back Codes seek to achieve fair treatment by requiring equality of treatment of shareholders/unitholders, mandating disclosure of timely and adequate information to enable shareholders/unitholders to make an informed decision as to the merits of an offer, etc. The Takeovers and Buy-back Codes also provide an orderly framework within which takeovers, mergers and share/unit buy-backs are to be conducted.

[20] See sections 668 to 677 of the CO.

[21] Under 3.2 of the REIT Code, a REIT seeking authorisation from the SFC must have dedicated investments in real estate that generate recurrent rental income. In view of this requirement, where a REIT has disposed of all or a substantial part of its assets, it is expected that the authorisation of the REIT and hence its listing will no longer be maintained. Relevant requirements including those under 11.13 of the REIT Code and Note 7 to Rule 2 of the Takeovers Code will be applicable. Accordingly, such proposal will, among other things, be subject to the voting requirements under Rule 2.10 of the Takeovers Code.

Proposal

26. We propose that a new Part to be introduced in the SFO for a REIT be allowed to implement an arrangement or compromise by a similar mechanism under the CO, with similar requirements for due disclosure, approval thresholds and court sanction to provide commensurate protection of investors' interests.

27. Specifically, similar to the approach under the CO, such a scheme should be subject to the approval at the meeting by:

    (a) for a scheme entered into with a REIT's creditors (or a class of creditors) - a majority in number representing at least 75% in value of the creditors (or the class of creditors) present and voting; or

    (b) for a scheme entered into with a REIT's unitholders (or a class of unitholders) -
        i. unitholders representing at least 75% of the voting rights of the unitholders (or the class of unitholders) present and voting and, unless the court orders otherwise, a majority in number of the unitholders (or the class of unitholders) present and voting; or

        ii. where the arrangement involves a general offer or a takeover offer, unitholders representing at least 75% of the voting rights of the unitholders (or the class of unitholders) present and voting; and the votes cast against the arrangement do not exceed 10% of the total voting rights attached to all disinterested units (or all disinterested units of the class) in the REIT,

    following which an application may be made for the court's sanction of the scheme.

28. The provisions are proposed to be modified and tailored for REITs such that:

    (a) an application to the court to order a meeting of the unitholders or creditors or both for the purpose of considering the proposed arrangement or compromise and to sanction it may be made by the REIT's management company, trustee, unitholders or creditors;

    (b) the REIT's trustee, management company and each of its directors must disclose any material interests under the arrangement or compromise in the explanatory statement to be sent to the unitholders or creditors of the REIT;

    (c) an arrangement or compromise of a REIT sanctioned by the court is binding on the relevant parties including the trustee of the REIT and management company of the REIT (who will effect the arrangement or compromise on behalf of the REIT), and the unitholders or creditors of the REIT; and

(d) the court order sanctioning the arrangement or compromise has no effect until a copy of the order is delivered to the SFC for filing, in light of the SFC's role as the primary regulator of REITs[22].

Question:

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.

Compulsory acquisition

Position under the CO

29. The CO[23] provides for the compulsory acquisition of shares following a takeover offer[24] by the offeror and contains similar provisions in relation to the compulsory acquisition following a general offer[25] to buy back shares by the repurchasing company. In both scenarios, the offeror or the repurchasing company can complete the offer through a "squeeze-out" or "sell-out".

30. The "squeeze-out" provisions, broadly speaking, provide for the powers of an offeror or repurchasing company, having acquired or bought back at least 90% in number of the shares or the shares of any class to which the offer relates, to give notice to the minority shareholders of its desire to acquire or buy back their remaining shares. The minority shareholders are also given a statutory right to apply for and obtain a court order to the effect of stopping the compulsory acquisition[26].

[22] Under the CO, the equivalent court order is filed with the Registrar of Companies.
[23] See sections 687 to 704 of the CO.
[24] "Takeover offer" means an offer to acquire all the shares, or all the shares of any class, in the target company, except those that, at the date of the offer, are held by the offeror and the terms of the offer are the same in relation to all the shares or shares of each class to which the offer relates, see section 689 of the CO.
[25] "General offer" means an offer from the repurchasing company to buy back all the shares, or all the shares of any class, in the company, except those that, at the date of the offer, are held by members residing in a place where such an offer is contrary to the law of the place (or are held by the repurchasing company) and the terms of the offer are the same in relation to all the shares or shares of each class to which the offer relates, see section 707 of the CO.
[26] Under case law, the court may take into account relevant factors including any unfairness to the dissenting minority in the process.

31. The “sell-out” provisions, broadly speaking, provide for the power of the minority shareholders to require the offeror or repurchasing company to acquire or buy back the remaining shares when the offeror or repurchasing company, by virtue of the acceptances of the takeover offer or general offer for the share buy-back, has attained control of at least 90% in number of the shares in the company at any time before the offer period ends.

Proposal

32. It is proposed that the provisions for compulsory acquisition under the CO be replicated in the SFO to provide for “squeeze-out” and “sell-out” in a takeover offer or in a general offer for a unit buy-back, respectively, for all the units, or all the units of any class, of a REIT (except for the units already held by the offeror or repurchaser, as the case may be).

33. In respect of the “squeeze-out” and “sell-out” provisions following a takeover offer, they will be broadly aligned with the provisions under Division 4 of Part 13 of the CO. As for the parallel provisions following a general offer for a unit buy-back, those provisions will be based on Division 5 of Part 13 of the CO.

34. The procedure on compulsory acquisition following a takeover offer or general offer for a buy-back of units in a REIT will be in line with the existing statutory mechanism to acquire or buy back shares in a company under Part 13 of the CO, with modifications to the limited extent required to let the management company or trustee of an offeror or a repurchaser which is a REIT to discharge certain functions on behalf of the REIT. These include applying to the court for an order authorising the management company or the trustee of the offeror or repurchaser to give an acquisition notice to buy out those remaining units, and to apply to the SFC for directions as to delivery of notice where a unitholder’s address is absent from the register of holders. The proposed manner and timing of the offeror or repurchaser’s issuance of an acquisition notice will be the same as the mechanism under the CO. Please see Appendix for further details on the modifications proposed to the compulsory acquisition mechanism for REITs.

Question:

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.

REIT-specific interpretation and modifications

35. In view of the nature and features of REITs, it is proposed that the interpretation section under the new Part of the SFO should adopt the definitions used in the CO[27] with appropriate modifications and include additional terms (for example “management company” and “REIT”) to cater to the operation of a scheme in the context of a REIT.

36. In addition, certain deeming provisions are also proposed to be introduced in the new Part for a REIT (which lacks a legal personality) to take action and/or exercise powers through its (i) trustee (in its capacity as trustee of the REIT) and/or (ii) management company or its directors (in their respective capacity on behalf of a REIT). These include:

    (a) where an action or power is taken or exercised by the (i) trustee or (ii) management company and/or its directors, that action will be deemed to be an action or power taken or exercised by the REIT;

    (b) the obligations and powers imposed or conferred on the REIT will be deemed to be imposed or conferred on the trustee or management company (as appropriate);

    (c) any voting rights owned, controlled or held by (i) a trustee or (ii) a management company and/or any of its directors will be deemed to be voting rights owned, controlled or held by such REIT;

    (d) any property, undertaking or liabilities, or any rights attached thereto, held or exercised by (i) a trustee or (ii) a management company and/or any of its directors will be deemed to be property, undertaking, liabilities or rights held or exercised by such REIT;

    (e) a creditor of a REIT will mean a person to whom the REIT incurs liability, including liability incurred on behalf of the REIT by its trustee and/or the management company; and

    (f) as the management company of a REIT performs a similar role to a board of directors of a listed company, the concept of “responsible person” of a company provided under section 3 of the CO will be extended to cover those of the management company such that an officer of the management company who participated in a contravention or a failure to comply with the new Part would commit an offence.

[27] See sections 666 and 667 of the CO.

Questions:

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?

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?

Others

37. It is noted that Part 13 of the CO also includes a court-free regime for amalgamations. Given this court-free regime is confined to amalgamations of wholly-owned intra-group companies limited by shares and is not available for REITs in Australia, Singapore nor the UK, we do not propose to implement the same for Hong Kong REITs.

38. We will also introduce ancillary and consequential amendments to the SFO as appropriate, such as those provisions regarding service of notices[28].

39. It should be further noted that 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[29] where applicable in the case of a takeover or merger or unit buy-back involving a REIT. Guidance will be provided where appropriate to facilitate market understanding and compliance.

[28] See section 400 of the SFO.

[29] This includes, for example, the interpretation as to parties who may be read as "parties acting in concert", in Schedule IX of the Takeovers and Buy-back Codes, are not affected by the proposed new regime under the SFO.

Part II – Proposal to enhance the SFO market conduct regime for listed CIS

Introduction

40. In line with the proposals in the prior consultations[30] which received general support, legislative amendments are proposed to be made to the following parts of the SFO to extend the Market Conduct Regimes to listed CIS:

    (a) Part XIII (Market Misconduct Tribunal (MMT)) – this part lays down the civil regime in respect of market misconduct in relation to listed securities. The policy intent is to more clearly empower (i) the SFC to institute proceedings at the MMT with regard to market misconduct in relation to securities of a listed CIS in a similar manner and (ii) the relevant courts and the Secretary for Justice to handle proceedings and make orders correspondingly.

    (b) Part XIV (Offences Relating to Dealings in Securities and Futures Contracts, etc.) – this part lays down the parallel criminal regime in respect of market misconduct. The policy intent is to introduce amendments similar to those proposed for Part XIII above as the two parts are similar save that a contravention of Part XIII results in civil liabilities whereas a contravention with Part XIV results in criminal liabilities.

    (c) Part XIVA (Disclosure of Inside Information) – this part imposes a statutory disclosure obligation on listed corporations and their officers to disclose inside information on a timely basis. The policy intent is to impose similar requirements on listed CIS and corresponding duties on their officers (including management companies and their officers), so the SFC may institute proceedings at the MMT in case of breaches, and the relevant courts and the Secretary for Justice may handle proceedings and make orders correspondingly.

    (d) Part XV (Disclosure of Interests) – this part seeks to provide investors in a listed corporation with timely information for identification of its substantial shareholders, directors and chief executives (corporate insiders) who control interests in its shares and debentures. The policy intent is to impose similar disclosure requirements for substantial unitholders in, and relevant personnel of, listed closed-ended CIS[31].

41. To facilitate implementation of the above regimes in respect of listed CIS, complementary amendments will also be made to the investigation and intervention powers under the SFO (Part VIII and Part X of the SFO):

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[30] Please see footnote 11.

[31] As noted in previous consultations in 2010 and 2012 as referred to in footnote 11, listed open-ended CIS (consisting mostly of exchange-traded funds) will not be covered in line with the existing practice.

(a) Part VIII (Supervision and Investigations) – this part provides the SFC with supervisory and investigation powers to take action against breaches of the SFO. The policy intent is to clarify the powers of the SFC under this part so as to support investigations and interventions as may be required in respect of misconduct concerning listed CIS, as currently applied in respect of listed corporations.

(b) Part X (Powers of Intervention and Proceedings) – this part provides the SFC with the powers to apply to court for injunctions and other orders to remedy or regulate misconduct or oppression in the way the business or affairs of a limited company have been conducted. The policy intent is to ensure that the SFC is duly empowered to apply for court orders to seek similar redress in the case of listed CIS.

42. The above proposal to apply market conduct regimes to listed CIS is broadly in line with comparable overseas jurisdictions including Australia, Singapore and the UK[32].

Proposed refinements

43. We propose to refine the previous consulted proposals[33] as follows:

(i) Limiting the scope of the extension to listed CIS

44. We propose to focus the legislative amendments on listed CIS, instead of seeking to cover all other potential forms of non-corporate listed entities. In fact, all non-corporate entities listed so far on the Stock Exchange, including all REITs, are listed CIS.

45. By focusing the proposed legislative amendments on listed CIS and its management company, it will make the regime more targeted and more appropriately applied to listed CIS, and address technical complexities. Should any new form of non-corporate listed entity emerge in future, the applicability of the Market Conduct Regimes would be taken into account in the relevant policy consideration.

(ii) Streamlining of proposed legislative amendments

46. Given the management company of a listed CIS is more akin to directors of listed corporations in carrying out executive and managerial functions while the trustee or custodian of a listed CIS primarily undertakes a more oversight role, we propose to focus

[32] Listed CIS, regardless of whether they are in corporate or non-corporate form, are subject to market conduct provisions in the respective jurisdictions, these include for example, (i) in Australia pursuant to the Corporations Act 2001 and corresponding Listing Rules and AQUA Rules of the Australian Securities Exchange; (ii) in Singapore pursuant to the Securities and Futures Act 2001 and Securities and Futures (Disclosure of Interests) Regulations 2012; and (iii) in the UK pursuant to the UK Market Abuse Regulation, and Disclosure Guidance and Transparency Rules of the Financial Conduct Authority.
[33] Please see footnote 11.

the various obligations under the Market Conduct Regimes largely on the management company of a CIS (and CIS directors in the case of a corporate CIS).

47. As such, we propose not to include trustees and custodians of listed CIS in various definitions, including for example the definitions of "associate", "controller", "persons connected with a corporation", "inside information"[34], "subsidiary", "related corporation" in Parts XIII to XV of the SFO[35]. The trustee or custodian of a listed CIS will retain its role in Part VIII and Part X to support the SFC's supervisory and intervention work in respect of market misconduct given that it may be a party with the legal capacity to act on behalf of the CIS[36].

48. We also propose not to extend Divisions 5, 6, 10, 11 and 12 of Part XV of the SFO to listed CIS where similar regulatory requirements are already in place, for example, in relation to provision of information pursuant to constitutive documents, keeping of register of holders and investigation powers.

Consequential changes

49. Some consequential changes will also be made to complement the above proposed refinements. These include proposed revisions to clarify that all listed CIS[37] (including those structured in corporate form[38]) will be subject to the provisions of the Market Conduct Regimes applicable to listed CIS, but not those for listed corporations where there is any overlap.

50. In addition, to facilitate the application of Parts VIII, X, XIII to XV to listed CIS, consequential amendments will also be made to existing definitions in Part 1 of Schedule 1 (Interpretation and General Provisions) to the SFO. These include, for example, adding an interpretation of "officer" to encompass the management company of the CIS and its manager, director or secretary. Definitions for "fund subsidiary", "fund-holding entity" and "fund-related entity" will also be added, in line with the existing definitions of "subsidiary", "holding company" and "related corporation"[39].

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[34] Previously refer to "relevant information" in the SFO when the previous consultations of the proposal mentioned in footnote 11 took place.
[35] Save for references to any "person" in these parts which may cover any entity.
[36] These include for example including it as a party to assist the provision of information under section 179 of the SFO, and be a party enabled to bring in the listed CIS' name such proceedings the court considers appropriate under section 214 of the SFO, in line with the sections' current application in respect of listed corporations.
[37] Authorised by the SFC under section 104 of the SFO.
[38] Such as in the form of an open-ended fund company established under Part IVA of the SFO or other corporate funds established overseas.
[39] The thresholds for reaching what constitutes a "fund-subsidiary" (and thus "fund-holding entity") and "fund-related entity" are generally expected to be largely on par with the parallel existing definitions in the context of listed corporations, with appropriate modifications to take into account that (i) the holding

Question:

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

Others

51. Subject to the legislative process, consequential amendments may be made to existing subsidiary legislation under the SFO. An enabling power will be included in the proposed legislation to enable amendments to be made correspondingly. The legislative revisions will also incorporate the updates to the insider dealing-related provisions as contemplated in the consultation exercise concluded in August 2023[40].

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entity of a listed CIS may or may not be a listed CIS; and (ii) the subsidiary of a listed CIS may or may not be a listed CIS, and that the voting rights may be exercised by the trustee/management company or its directors on behalf of the listed CIS.

[40] The Consultation Conclusions on Proposed Amendments to Enforcement-related Provisions of the Securities and Futures Ordinance issued by the SFC on 8 August 2023.

Implementation timelines

52. The proposals set out in this paper will be subject to a two-month public consultation. Taking into account respondents' comments, a consultation conclusions paper will be issued. We will also consider consultation feedback in preparing the proposed legislative amendments. Formulation of the actual drafting of the legislative amendments, including any consequential changes, will be subject to the legislative process.

53. Subject to consultation feedback, we will work with the Government to introduce legislative amendments into the LegCo with a target to complete the legislative process before the end of the current legislative term in December 2025.

54. As the proposed legislative amendments to the SFO in Part I of this paper aim to provide more flexibility to REITs and those to Part II of this paper only apply where market misconduct occurs (Parts VIII, X and XIII to XIV) or represent a codification of existing practice (Parts XIVA and XV), a transition period before implementation is not considered necessary.

55. The proposed new regime on Part I of this paper is expected to come into effect upon the LegCo's passage. The regime on Part II is expected to come into effect as soon as possible on a date to be appointed by notice published in the Gazette, subject to any subsidiary legislation revisions as may be required.

56. The SFC will issue further guidance to the industry following passage of the bill where appropriate (for example, the Guidelines on Disclosure of Inside Information).

Question:

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

Seeking comments

57. The SFC welcomes 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 27 May 2024.

Appendix – Further details on the modifications proposed to the compulsory acquisition mechanism for REITs under the REIT Scheme Proposal

1. The proposed provisions regarding a takeover offer or a general offer for a unit buy-back are modified under the REIT Scheme Proposal to the extent required to let the management company or trustee of (i) an offeror which is a REIT or (ii) a repurchaser which is a REIT discharge certain functions on behalf of the REIT during a compulsory acquisition, including the following:

   (a) where an offeror or repurchaser has, by virtue of acceptances of the offer, acquired or bought back, or contracted unconditionally to acquire or buy back, no less than 90% in number of the units to which the offer relates, the management company or trustee of (i) the offeror or (ii) the repurchaser may apply to the court for an order authorising the management company of (i) the offeror or (ii) the repurchaser to give notice to buy out those remaining units to which the offer relates, provided the court is satisfied, among other things, that the consideration offered is fair and reasonable and it is just and equitable to do so having regard to all the circumstances; and

   (b) the management company or the trustee of the offeror or repurchaser may apply to the SFC for directions regarding the manner in which the notice should be given to a holder of units if it has no Hong Kong address registered in the register of holders of the REIT and the holder has not provided to the REIT a Hong Kong address for the giving of the notice.

2. The proposed form and timing of the acquisition notice are proposed to be the same as the mechanism under the CO:

   (a) in a “squeeze-out”, the offeror or repurchaser must give notice to minority unitholders to buy out their units within, whichever earlier, (i) three months beginning on the day after the offer period of the takeover offer or general offer ends; or (ii) six months beginning on the date of the takeover offer or general offer. A dissenting unitholder has the right to apply to the court for an order to adjudicate whether the offeror or repurchaser is entitled and bound to acquire or buy back the units or not; and

   (b) in a “sell-out”, the offeror or repurchaser must give notice to the minority unitholders of their rights to be bought out within one month after the first day on which the unitholders become entitled to a sell-out. If the notice is given before the end of the offer period of the takeover offer or general offer, it must state that the offer is still open for acceptance. Rights given to minority unitholders in a sell-out are exercisable within three months after the later of (i) the end of the offer period; or (ii) the date of the notice by the offeror or repurchaser.

3. In light of the SFC’s role in the regulation of REITs, apart from giving directions in the case of absence of unitholders’ address, it will also be empowered to specify the form of the acquisition notice.

4. In handling the consideration paid by the offeror or the repurchaser, as the REIT lacks a legal personality, it is proposed that the trustee (in its capacity as trustee of the REIT) must hold the consideration on trust for the entitled unitholders[41]. The trustee's role and liability with respect to handling such consideration is similar to its role and liability for safekeeping other assets of the REIT.

5. The trustee must register the offeror as the holder of the units acquired in a takeover offer and compulsory acquisition whereas it must cancel the relevant units in a general offer for a unit buy-back.

[41] See similar sections 698, 699, 716 and 717 of the CO.