



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

**CONSULTATION PAPER ON THE PROPOSED
AMENDMENTS TO THE GUIDELINES FOR THE
EXEMPTION OF LISTED CORPORATIONS FROM
PART XV OF THE SECURITIES AND FUTURES
ORDINANCE (DISCLOSURE OF INTERESTS)**

Hong Kong
May 2008

香港
2008年5月

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 Data¹ 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:
 - to administer the relevant provisions² and codes and guidelines published pursuant to the powers vested in the SFC;
 - in performing the SFC’s statutory functions under the relevant provisions;
 - for research and statistical purposes;
 - 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 part of their submission 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.

¹ Personal Data means personal data as defined in the Personal Data (Privacy) Ordinance.

² Defined in Schedule 1 of the 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.

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
8/F Chater House
8 Connaught Road Central
Hong Kong

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

Consultation Paper on the Proposed Amendments to the Guidelines for the Exemption of Listed Corporations from Part XV of the Securities and Futures Ordinance (Disclosure of Interests)

Introduction

1. The Securities and Futures Commission (“**SFC**”) invites comments on the proposed amendments to the Guidelines for the Exemption of Listed Corporations from Part XV of the Securities and Futures Ordinance (Disclosure of Interests) (the “**Guidelines**”).
2. The proposed amendments seek to extend the scope of exemption in the Guidelines to cover SFC-authorized collective investment schemes which take the form of mutual fund companies or otherwise in corporate form which are open-ended and listed on The Stock Exchange of Hong Kong Limited (“**Stock Exchange**”).
3. The aim of this Consultation Paper is to solicit public response to the proposed amendments which are marked up against the current version of the Guidelines and set out in Appendix 1.
4. A summary conclusion will be published after the end of the consultation period and all comments from the public will be carefully considered before the revisions are finalized and incorporated into the Guidelines.

Background

5. Part XV of the Securities and Futures Ordinance (“**SFO**”) requires corporate insiders¹ to give notice of their interests to the listed corporation and the Stock Exchange on occurrence of certain events.
6. A collective investment scheme (“**CIS**”) taking the form of a mutual fund company or otherwise in corporate form (“**corporate form CIS**”) and listed on the Stock Exchange technically falls within the definition of a listed corporation under Part XV of the SFO (“**Part XV**”) and its corporate insiders would therefore come under the disclosure obligations under Part XV.
7. As at end of March 2008, the 17 index tracking exchange traded funds (“**ETFs**”) listed on the Stock Exchange are all open-ended CIS but they are not subject to Part XV because they are either in trust or contractual form and not corporate form CIS.
8. The Guidelines previously published by the SFC pursuant to its powers under section 309 of the SFO provide for two categories of circumstances under which

¹ “Corporate insiders” is defined as substantial shareholders, directors, shadow directors and chief executives of a listed corporation in the Guidelines.

an exemption from the disclosure requirements under Part XV may be granted. Category 1 relates to dual-listed corporations which in some cases either have no share trading or only have nominal trading on the Stock Exchange, or in other cases the corporate insiders of such corporations will be subject to overseas statutory disclosure of interest obligations that are comparable to those of Part XV. Category 2 relates to issuers of securities other than shares. Open-ended corporate form CIS are not specifically covered under the Guidelines.

Proposal to exempt open-ended corporate form CIS from provisions of Part XV

9. The SFC proposes to amend the Guidelines by providing an additional category (3) for exemption in the Guidelines so as to cover any open-ended CIS, taking the form of mutual fund companies or otherwise in corporate form and which is listed or seeking listing on the Stock Exchange, and meets the general criteria for exemption as set out in the amended Guidelines under section 309(2) of the SFO. All applications for exemption under category (3) will be handled by the Investment Products Department of the SFC.

Reasons for the proposal

Nature of open-ended collective investment schemes

10. For open-ended corporate form CIS, the manager may generally issue and redeem units without holders' approval. As such, 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. The disclosure of interests provisions would not be meaningful and would be extremely difficult (if not impossible) for investors to observe in view of the open-ended nature of such CIS.
11. In addition, the listed open-ended CIS currently in Hong Kong are mostly index tracking ETFs, which are generally more transparent and track a recognizable index by investing in fungible, regularly priced and liquid underlying securities, thus, the risk of manipulation or the demand for information on its ownership would be less cogent than for close-ended vehicles.
12. Further, these index tracking ETFs as currently listed in Hong Kong are either in unit trust or contractual form and hence not subject to the disclosure requirements under Part XV. It would be illogical to subject corporate form ETFs to such disclosure requirements simply by virtue of them using a corporate form.

Market facilitation

13. Hong Kong saw the highest volume of trading in ETF units in Asia (ex Japan) in 2007. The SFC believes that there will be increasing interest in ETFs that track different indices/markets. As it is also common for ETFs to be organised in corporate form (e.g. ETFs in the US), we believe the scope of exemption in the

Guidelines should be expanded to listed, open-ended corporate form CIS to facilitate their offering in Hong Kong.

14. The SFC keeps an open dialogue with different fund managers and in our discussions, some have indicated concerns that ETFs organised in corporate form under the current regime would be at a regulatory disadvantage because they would be subject to Part XV whereas ETFs organised in trust or contractual form are not.

Alignment with international requirements

15. Our proposed amendments also serve to bring Hong Kong's approach in this respect in line with the general regulatory approach in markets like the United Kingdom ("UK"), Australia, Singapore and Luxembourg where investors in open-ended investment funds are exempted from the disclosure of interests requirements. Given that the majority of our authorised funds are overseas domiciled (with more than 70% by net asset value are UK or Luxembourg funds), the proposed amendments are necessary to enhance Hong Kong's position as a hub for ETFs and to attract more of these funds to come to Hong Kong and getting listed on the Stock Exchange. This is also in alignment with the SFC's policy to facilitate ETFs in the Hong Kong market.

Proposed amendments to the Guidelines

16. The proposed amendments to the Guidelines are set out in the draft Guidelines for the Exemption of Listed Corporations from Part XV of the Securities and Futures Ordinance (Disclosure of Interests) in Appendix 1. The proposed changes are incorporated in paragraphs 1 to 5 of the Guidelines and essentially provide as follows.

Paragraph 1 – Definitions

17. Definitions for collective investment schemes ("CIS") and corporate form CIS have been added to complement the extension of the scope of exemption under the Guidelines to open-ended corporate form CIS listed on the Stock Exchange.

Paragraph 2 – Nature and Purpose of these Guidelines for Exemption

18. A new paragraph 2.4 is added to provide for the proposed new category of exemption for open-ended corporate form CIS listed or to be listed on the Stock Exchange, together with the rationale for the introduction of this new category.

Paragraph 3 – Application for Exemption under section 309(2)

19. Paragraph 3.2 is amended to clarify that application in respect of Category 1 or Category 2 shall be directed to SFC's Corporate Finance Division and application in respect of Category 3 shall be directed to the Investment Products Department.

Paragraph 4 – General Criteria for Exemption under section 309(2)

20. A new paragraph 4.3 is added to provide for the matters that the SFC will take into account in deciding whether to grant an exemption to a corporate form CIS listed or is seeking a listing in the Stock Exchange. Under the proposed amendments, the following matters will be considered:

- the extent to which shares of such CIS can be issued/created without reference or consent from existing holders, and repurchased/redeemed, directly or indirectly, at the request of the holder of such shares (which may be subject to conditions or limitations as customarily or commonly found in open-ended CIS or otherwise acceptable to the SFC), taking into account factors including the dealing frequency, the period required for subscription or repurchase or redemption proceeds to be paid and whether shareholders' approval is required for such issue/creation and/or repurchase/redemption; and
- whether such CIS is authorised by the SFC under section 104 of the SFO.

Paragraph 5 – Complete Exemption under section 309(2)

21. A new paragraph 5.5 is added to clarify that the SFC will normally consider granting a complete exemption to an application made under Category 3, subject to its powers and the other matters described in paragraph 2 of the Guidelines, which include its power to grant a partial exemption, which is described in paragraph 6 of the Guidelines.

Application fees

22. Pursuant to Schedule 1 of the Securities and Futures (Fees) Rules, the fee payable on an application under section 309 of the SFO for exemption from all or any of the provisions of Part XV is HK\$24,000. For avoidance of doubt, the fee payable for an application in respect of an umbrella fund together with one or more sub-funds within the same umbrella fund is the same, i.e. HK\$24,000.

Proposed implementation timetable

23. Pursuant to section 309 of the SFO, the SFC will, subject to the result of the public consultation, consult the Financial Secretary on the proposed amendments to the Guidelines.

24. Subject to consultation with the Financial Secretary, the SFC proposes that the amendments will come into effect upon gazettal of the amended Guidelines.

Consultation questions

25. The Commission is seeking comments on the above proposal and particularly in the following areas. Please provide reasons for your views.
- Do you agree with the proposed amendments to the Guidelines to extend the scope of exemption in the Guidelines to cover listed, open-ended corporate form CIS?
 - Do you agree with the general criteria for exemption as discussed in paragraph 20 that the SFC will take into account in deciding whether to grant an exemption for a corporate form CIS listed or is seeking listing in the Stock Exchange?

Conclusion

26. The Commission welcomes any comments from the public and the industry on the proposals made in this paper. Please submit comments to us in writing by no later than 6 June 2008. A final set of proposals and the relevant changes to the Guidelines will be published upon consideration of the comments received in the consultation.

Appendix 1 - Proposed amendments to the Guidelines for the Exemption of Listed Corporations from Part XV of the Securities and Futures Ordinance (Disclosure of Interests)

Proposed amendments to the Guidelines for the Exemption of Listed Corporations from Part XV of the Securities and Futures Ordinance (Disclosure of Interests)

PART XV of the SECURITIES AND FUTURES ORDINANCE (CAP. 571) (Disclosure of Interests)

Under Section 309 of the Securities and Futures Ordinance (Cap. 571), the Securities and Futures Commission, after consulting the Financial Secretary, publishes these guidelines for the exemption of listed corporations from all or any of the provisions of Part XV the Securities and Futures Ordinance

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

1. Definitions

Terms that are defined in section 308 of the SFO and Schedule 1 to the SFO have the same meaning in these Guidelines. In addition:

“corporate insiders” means substantial shareholders, directors, shadow directors and chief executives of a listed corporation;

“CIS” means collective investment schemes;

“corporate form CIS” means a CIS which takes the form of a mutual fund company or otherwise in corporate form;

“Guidelines” means these guidelines made pursuant to Section 309(1) of the SFO;

“SFC” means the Securities and Futures Commission;

“SFO” means the Securities and Futures Ordinance (Cap. 571);

“Part XV” means Part XV of the SFO;

“Stock Exchange” means the Stock Exchange of Hong Kong Limited; and

“substantial shareholder” means a person or corporation who has an interest in shares comprising 5% or more of a listed corporation’s relevant share capital.

2. Nature and Purpose of these Guidelines for Exemption

- 2.1 Part XV requires the disclosure by corporate insiders of their interests in the securities of listed corporations. Disclosure of information to investors and the market is the cornerstone of a fair and orderly securities market. Disclosure of interests of corporate insiders is an important element of an informed market. Except in limited circumstances, the SFC would not propose to exempt a listed corporation and its corporate insiders from the obligation to provide disclosure of interests to the market. Circumstances where the SFC will consider granting an exemption fall into ~~two~~three categories.

Category 1 – Dual listing

- 2.2 For some corporations, either already listed or seeking a listing, the principal share trading market in their securities exists or will exist on a stock exchange other than Hong Kong. In some cases either no share trading or only nominal trading will take place on the Stock Exchange. In other cases the corporate insiders of such corporations will be subject to statutory disclosure of interest obligations in another jurisdiction that are comparable to those of Part XV. Requiring compliance by these corporate insiders with Part XV may result in additional costs without contributing to an informed market for the shares of the relevant corporation.

Category 2 – Issuers of securities other than shares

- 2.3 A corporation that has any of its securities listed on the Stock Exchange is regarded as being listed and its corporate insiders come under disclosure obligations under Part XV even if shares in the corporation are not listed on the Stock Exchange. Requiring compliance by the corporation and its corporate insiders with Part XV may result in additional costs without contributing to an informed market for the securities that are listed.

Category 3 – Open-ended CIS in corporate form

- 2.4 An open-ended CIS, which is in corporate form and listed on the Stock Exchange, is technically a listed corporation under Part XV and its corporate insiders therefore come under the disclosure obligations under Part XV. 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 may result in additional costs without contributing to an informed market for its shares.

Enabling provisions and general qualification

- 2.4-5 Section 309(2) of the SFO gives the SFC the power to exempt any listed corporation from all or any of the provisions of Part XV, subject to such conditions as it thinks fit, having regard to the Guidelines. Section 309(2) is the enabling provision for exemptions granted in circumstances falling within Categories 1, 2 and ~~2-3~~.
- 2.5-6 The Guidelines set out the criteria that the SFC will take into account when deciding whether to grant an exemption. The Guidelines are not exhaustive. They are simply intended to assist applicants in understanding the matters that the SFC will take into consideration when deciding whether to exercise its discretion to grant an exemption. They may be modified or varied as circumstances require. Similarly an exemption, once granted, can be revoked or any conditions attached modified or varied by the SFC as circumstances change.
3. Application for an Exemption under section 309(2)
- 3.1 Only a listed corporation or corporation applying for listing may apply, in writing, to the SFC for an exemption from Part XV under section 309(2).
- 3.2 An application in respect of Category 1 or Category 2 must be directed to the Corporate Finance Division of the SFC. An application in respect of Category 3 must be directed to the Investment Products Department of the SFC.
- 3.3 The applicant, when deciding what matters to include in its written application, should have regard to the Guidelines. The SFC may request additional information or make such enquiries as it considers appropriate when considering any application.
- 3.4 These Guidelines provide for complete or partial exemptions. Exemptions, whether complete or partial, may be made subject to such conditions as the SFC reasonably considers appropriate.
4. General Criteria for Exemption under section 309(2)
- 4.1 The SFC will take account of the following matters in deciding whether to grant an exemption for corporations with a dual listing (i.e. a Category 1 application):
- (i) the volume of the applicant corporation's worldwide share turnover (or in the case of a new applicant for listing, the anticipated turnover) that takes place on the Stock Exchange and on any other stock exchange or securities market;

- (ii) the extent to which an applicant corporation's corporate insiders are subject to statutory disclosure requirements in any other jurisdiction that are comparable to those existing in Hong Kong; and
 - (iii) the reasons for the applicant corporation listing in Hong Kong including whether it intends raising capital or not.
- 4.2 The SFC will take account of the following matters in deciding whether to grant an exemption for a corporation and its corporate insiders seeking to issue securities other than shares that are to be listed on the Stock Exchange (i.e. a Category 2 application):
- (i) whether the issuer has raised, or proposes to raise, publicly traded equity capital in Hong Kong;
 - (ii) whether shares of the issuer are traded, or are proposed to be traded on the Stock Exchange;
 - (iii) whether an exemption has previously been given under section 309 for securities that the issuer has issued or proposes to issue and to list on the Stock Exchange;
 - (iv) whether the underlying shares of the securities that it proposes to issue are shares of the issuer or a member of the issuer's group;
 - (v) whether the securities that it proposes to issue are convertible into shares of the issuer or a member of the issuer's group; and
 - (vi) if a related corporation of the issuer is listed on the Stock Exchange, whether the chief executive or any director of the issuer is also the chief executive or a director of such listed corporation.

4.3 The SFC will take account of the following matters in deciding whether to grant an exemption for a corporate form CIS that is listed or seeking a listing on the Stock Exchange (i.e. a Category 3 application):

- (i) the extent to which shares of such CIS can be issued/created without reference or consent from existing holders and, repurchased/redeemed, directly or indirectly, at the request of the holder of such shares (which may be subject to conditions or limitations as customarily or commonly found in open-ended CIS or otherwise acceptable to the SFC), taking into account factors including the dealing frequency, the period required for subscription or repurchase or redemption proceeds to be paid and whether shareholders' approval is required for such issue/creation and/or repurchase/redemption; and
 - (ii) whether such CIS is authorised by the SFC under section 104 of the SFO.
5. Complete Exemption under section 309(2)
- 5.1 When a complete exemption is granted under section 309(2) Part XV, in its entirety, will not apply to the corporation concerned and its corporate insiders in

- relation to that corporation. Disclosures of interests made by an applicant and its corporate insiders in any other jurisdiction in relation to that corporation will not be required to be filed with Hong Kong regulatory authorities.
- 5.2 The SFC will take into account all relevant facts and circumstances, including those matters set out in section 4 above, in considering an application for a complete exemption.
- 5.3 An applicant for a complete exemption under Category 1 must satisfy the SFC that only a nominal percentage of the average daily volume of its worldwide share turnover does, or is reasonably anticipated to, take place on the Stock Exchange. A nominal percentage will normally be 1% or less of the average daily volume of an applicant's worldwide share turnover. Average daily volume of worldwide share turnover shall be calculated on the basis of share turnover during the twelve month period immediately preceding the date of any application for exemption.
- 5.4 The SFC would not normally grant a complete exemption if the applicant corporation or its predecessor has raised capital, or if the applicant intends to raise capital, in Hong Kong. However, the fact that a corporation raises a pro-rata proportion of its capital in Hong Kong, for example through a rights offering or by way of a professional offering in Hong Kong that was part of a worldwide offering, would not automatically result in revocation of its exemption.
- 5.5 The SFC would normally consider granting a complete exemption to an application made under Category 3, subject to its powers and other matters described in section 2 above, which include the power to grant a partial exemption (as described in section 6 below).
- 5.6 The SFC does not propose to revoke a complete exemption or modify or vary any conditions attached thereto unless there is a material change in circumstances. The SFC will give reasonable notice of its intention to revoke or vary a complete exemption. If, after an application for complete exemption is granted, a corporation's daily volume of share turnover on the Stock Exchange exceeds 1% of worldwide turnover calculated over a 12 month period then the exemption may be varied to a partial exemption, so that the corporation will be required to file any disclosures of interest made in another jurisdiction with the Stock Exchange.
6. Partial Exemption under section 309(2)
- 6.1 When a partial exemption is granted the corporation concerned and its corporate insiders will not be required to prepare registers, maintain records or file with Hong Kong regulatory authorities disclosure of interest reports pursuant to Part XV. An applicant corporation will be required to file with the Stock Exchange any disclosures of interests made in another jurisdiction as soon as is practicable. The Stock Exchange will publish these disclosures in the same way as those it receives from other listed corporations pursuant to Part XV.

- 6.2 Divisions 5, 11 and 12 of Part XV will continue to apply to the applicant corporation and its corporate insiders in the case of a partial exemption. Divisions 5 and 11 of Part XV sets out the powers of the listed corporation and the Financial Secretary to investigate listed corporation ownership and related matters and Division 12 sets out the orders that can be made imposing restrictions on shares and equity derivatives.
- 6.3 The SFC will take account of all relevant facts and circumstances, including those set out at section 4 above, in considering an application for a partial exemption but will take particular account of:
- (i) The location of the principal trading market in an applicant corporation's securities. An application for a partial exemption is unlikely to be granted if 20% or more of the applicant corporation's average daily worldwide share turnover during a twelve month period immediately preceding the date of the application for exemption takes place on the Stock Exchange.
 - (ii) The nature and scope of any statutory disclosure of interest obligations that apply to an applicant corporation and its corporate insiders other than those imposed by Part XV. A partial exemption from Part XV will not normally be granted to an applicant corporation if no statutory disclosure of interest obligations comparable to those imposed by Part XV apply to its corporate insiders in any other jurisdiction.
- 6.4 The fact that a corporation has or proposes to raise capital in Hong Kong will not prevent it from obtaining a partial exemption from Part XV.
- 6.5 The SFC does not propose to revoke a partial exemption or modify or vary any of the conditions attached thereto unless there has been a material change in circumstances. Except in exceptional circumstances, the SFC will give six months notice to the listed corporation concerned of its intention to revoke a partial exemption.