



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

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

27 March 2013



Table of contents

Introduction	1
Comments received and SFC's responses	3
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	3
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	9
Clarifying that, for listed DRs, the overseas issuer whose shares/units are the underlying shares/units (and not the relevant depositary bank) is the "issuer" of the DRs so that the overseas issuer is the listed corporation in respect of the DRs	13
Excluding from the disclosure of interests regime under Part XV of the SFO entities whose only listed securities are debentures	14
Drafting comments received	15
Consequential amendments to codes and rules	15
Way forward	16
Appendix A – List of respondents	17



Introduction

1. On 23 November 2012 the Securities and Futures Commission (**SFC**) issued a Consultation Paper inviting public comments on a number of proposals to enhance the regulatory regime with respect to entities that are listed on the Stock Exchange of Hong Kong Limited (**SEHK**).
2. The Consultation Paper invited comments on the following proposals:
 - (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 depositary receipts (**DRs**), the overseas issuer whose shares/units are the underlying shares/units (and not the relevant depositary 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.
3. The consultation period ended on 24 December 2012. We received 10 written responses from law firms, market participants and professional bodies. There was one respondent (a law firm) who responded on its own behalf and on behalf of two licensed corporations. A list of the respondents is set out in **Appendix A**.
4. Most respondents supported, in principle, the proposals set out in the Consultation Paper, subject to comments on technical issues. Comments related to the following main areas:
 - (a) Respondents generally supported the proposal to extend Parts XIII and XIV of the SFO to non-corporate listed entities, although some did not agree that the extended provisions should apply to exchange traded funds (**ETFs**).
 - (b) Respondents generally supported the proposal to extend Part XV of the SFO to non-corporate listed entities. Some of them asked for clarification on some technical issues.
 - (c) We received mixed views on the proposal to extend Part XIVA of the SFO to non-corporate listed entities. Those who disagreed took the view that Part XIVA of the SFO should not be extended to listed CIS, in particular ETFs.
 - (d) Respondents agreed that an entity that is listed only by virtue of its debentures being listed on the SEHK should be excluded from the disclosure of interests regime under Part XV of the SFO. One of them suggested that the exclusion should apply to all convertible bond issues, not only those which are convertible into shares listed on the SEHK.
5. In view of the support received, we will proceed with the proposals and make appropriate recommendations on the legislative amendments to the Government. The final form of



the legislative amendments to the SFO will be subject to the usual legislative process for amending primary law.

6. We welcome the responses and would like to thank everyone who has taken the time and effort to provide us with their detailed and thoughtful comments.
7. The Consultation Paper, the responses and this Conclusions Paper are available on the SFC website (www.sfc.hk).



Comments received and SFC's responses

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

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?

8. Most respondents supported this proposal. They were of the view that the proposal would offer greater certainty on the application of the market misconduct provisions of the SFO and provide more comprehensive investor protection. In view of the support received, we will proceed with the proposal.

Comments on specific issues – ETFs

Public comments

9. One respondent commented that the extended market misconduct provisions should not be applicable to passively managed ETFs that are established to track an index (whether physically or synthetically). Another respondent also took the view that if the SFC determines to proceed with the proposal, all ETFs should be expressly carved out from the provisions of Parts XIII and XIV.
10. The main reasons submitted are summarised as follows:
- (a) Index tracking ETFs must be able to buy and sell shares to replicate the composition of the underlying index therefore the market misconduct provisions should not apply to them.
 - (b) Given the passive, open-ended nature of ETFs, the trading price of an ETF is tied to its net asset value. As such, one respondent submitted that unlike the shares of a listed company, the trading price of the shares/units of an ETF should not be materially affected by the supply and demand in the market, but rather by the performance of the underlying index. Consequently it would be very difficult for any person to take advantage of any relevant information in respect of an ETF and deal in the listed securities of the ETF to gain a profit or avoid a loss. The respondent considered it doubtful as to whether there could be any information that could be "relevant information" in respect of an ETF. The respondent was also of the view that it is almost impossible for any person to manipulate all of the components comprising a stock basket which replicates an index.
 - (c) One respondent noted that the IOSCO Consultation Report on Principles for the Regulation of ETFs published in March 2012 did not reveal widespread ETF-related wrongdoing. The respondent noted that there are a very limited number of cases on insider dealing which involve ETFs and there is also no identified insider dealing case or decision in Hong Kong on insider dealing or other market misconduct involving, directly or indirectly, an ETF or any affiliates of ETFs.
 - (d) Most market misconduct offences under the current Parts XIII and XIV of the SFO, as well as certain provisions of the Code on Unit Trusts and Mutual Funds (**UT Code**) (e.g., 8.6(e) of UT Code) already cover non-corporate entities (including



ETFs), which render the SFC's proposal to amend Parts XIII and XIV of the SFO unnecessary.

- (e) Due to the special nature of ETFs and the inherent differences between corporates and non-corporate entities, amending Parts XIII and XIV of the SFO to cover ETFs will create uncertainty as to the legitimacy of certain activities of ETFs which are important in the operation of ETFs such as distribution, creation and redemption and market making. In addition, there are legal and practical difficulties for ETFs to comply with the provisions under Parts XIII and XIV.

SFC's response

11. Our proposal to amend Parts XIII and XIV of the SFO to make it explicit that they are applicable to all listed CIS in whatever form had received general support during our market consultation in 2010¹ (**2010 Consultation**), based on which recommendations had been made on the legislative amendments to the Government. The focus of the current consultation is to extend Parts XIII and XIV of the SFO to other non-CIS listed entities that are structured other than in corporate form, rather than those listed CIS which had been the subject of the 2010 Consultation.
12. The objective of the current proposal is to extend the provisions of Parts XIII and XIV of the SFO to all non-corporate form listed entities to give investors the same protection against market misconduct as investors in listed corporations. The proposals are to promote consistency of market misconduct regulations for all listed entities, enhance market transparency and align our market misconduct regime with those in major overseas jurisdictions.
13. As mentioned in the Consultation Paper, market misconduct offences in relation to ETFs may be less numerous in comparison to listed corporations and other closed-end non-corporate entities. We also note that circumstances in relation to a traditional index tracking ETF which may give rise to "relevant information" are likely to be less extensive than in the case of listed companies. Such circumstances are however not non-existent for ETFs, particularly in the case of synthetic ETFs which may invest extensively in financial derivative instruments, such as swaps or other over-the-counter instruments. A synthetic ETF may, for example, suffer significant losses if its counterparty defaults. In addition, there are other events that may impact upon the net asset value of an ETF, such as changes in tax or regulatory requirements applicable to the ETF. Suspension of creation and/or redemption of units in the ETF may also affect the trading price of an ETF. Accordingly, we maintain our view that Parts XIII and XIV of the SFO should be extended to cover all non-corporate form listed entities, including ETFs. This is also in line with the regulatory approach adopted in major overseas markets.
14. We note one respondent's comment that the existing rules and legislation on market misconduct may already cover non-corporate form listed entities. The current exercise is to make such provisions explicitly applicable to listed entities of all forms, thereby eliminating any ambiguities in the rules and legislation. Hence we maintain our proposal that Parts XIII and XIV be extended to cover all non-corporate form listed entities.

¹ A Consultation Paper on (1) the proposal to extend the application of the Codes on Takeovers and Mergers and Share Repurchases to SFC-authorized 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 a conclusions paper was issued in June 2010.



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?

15. Respondents generally agreed with the proposal, subject to specific comments in relation to technical issues (as summarised below). In view of the general support received, we will proceed with the proposal.

Types of non-corporate listed entities

Public comments

16. One respondent questioned whether the SFC should introduce Part XV of the SFO to closed-end funds or other types of vehicles such as business trusts and partnerships. Given the complexity of Part XV, the respondent was concerned that investors in such entities will be burdened with some of the complex features currently found in Part XV.
17. Respondents generally agreed that open-ended CIS such as ETFs should be exempted from Part XV regime. One respondent took the view that the SFO should be amended to provide a blanket exemption and the exemption for open-ended CIS should also state clearly the criteria for determining whether or not a CIS is to be treated as open-ended for the purpose of Part XV, e.g. at least one regular dealing day per month (which is the requirement under 6.13 of the UT Code).
18. The same respondent asked whether or not Part XV of the SFO also applies to certain civil law contractual arrangements such as Fonds Commun de Placement (**FCPs**) which are not separate legal entities but which issue “shares”. It was suggested that guidance should be given by way of revising the Outline of Part XV of the Securities and Futures Ordinance (Cap. 571) – Disclosure of Interests to cover limited partnerships, limited liability partnerships, limited liability corporations, business trusts and unit trusts as well as FCPs and such outline should also address the issue of umbrella funds and segregated portfolio or protected cell entities.
19. One respondent asked for a review and overhaul of the Part XV disclosure regime. This is however outside the scope of the current consultation.

SFC’s response

20. The over-arching objective of Part XV of the SFO 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. Investors in CIS and other types of non-corporate listed entities (such as business trusts and partnerships) should also be given the same type of information to enable them to make informed investment decisions. Hence Part XV should be extended to cover all non-corporate form listed entities.
21. As noted in SFC’s consultation conducted in 2008², it is the SFC’s policy intent to exempt open-ended CIS from Part XV of the SFO 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. Hence requiring

² A 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) was issued in May 2008 and a conclusions paper was issued in October 2008.



compliance with Part XV by an open-ended corporate form CIS and its corporate insiders may result in additional costs without contributing to an informed market for its shares. We believe the same is true for open-ended non-corporate form CIS and an exemption for all listed open-ended CIS has been proposed. We will, where appropriate, take into account the drafting comments received in making our recommendations to the Government with regards to the legislative amendments to provide for an exemption for open-ended CIS.

22. As set out in paragraph 16(a) of the Consultation Paper, a new definition of “entity” will be added to the SFO which will mean (i) a trust; (ii) a partnership; and (iii) such other arrangement, or class of arrangements, which may be prescribed by the Financial Secretary, but does not include any arrangement, or class of arrangements, which may be prescribed by the Financial Secretary as not being an entity. This definition sets out the non-corporate listed entities that are intended to be covered. Since the definition of “entity” is clearly set out in the SFO, it is not necessary to provide guidance on the types of non-corporate listed entities to be covered.

Calculation of percentage level and figure

Public comments

23. One respondent took the view that the amendments should set out clearly how investors in a non-corporate form CIS should calculate the percentage level and percentage figure of their interests, given such investors will be holding “units” or “interests” instead of “shares”, and taking into account the fact that there will not be any issued or authorized share capital nor any voting shares, per se, in such non-corporate form CIS entities.
24. The same respondent also asked for clarification as to whether or not each sub-fund within an umbrella fund should be treated as a separate listed entity for the purpose of Part XV or whether they should instead be treated in the same way as different share classes of one single listed company.

SFC’s response

25. As mentioned in paragraph 65 of the Consultation Paper, we are proposing to amend Part XV of the SFO so that the disclosure mechanism is based upon the number of voting shares³ 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. Further, the definition of “share” in Schedule 1 to the SFO will also be amended to include a unit in a listed entity. Hence the amended disclosure mechanism will also work for those listed entities that do not have share capital and whose units have no nominal value such as real estate investment trusts (REITs).
26. Where the sub-funds of an umbrella fund are themselves separately listed entities, investors would generally have a duty under Part XV of the SFO to disclose their interests in both the umbrella fund and the sub-fund (if they are interested in 5% or more of the units in these funds). At present, all listed closed-end CIS⁴ adopt a single fund structure.

³ A new defined term “voting shares” will replace the term “relevant share capital” (which will be deleted) in section 308(1) of the SFO.

⁴ These refer to CIS authorized by the SFC and listed pursuant to Chapter 20 of the Listing Rules.



REITs and trust deeds

Public comments

27. Respondents were supportive of the proposed codification of disclosure of interest requirements in the SFO so that they apply to SFC-authorized REITs. One respondent asked for confirmation that (a) corresponding amendments to the trust deeds of REITs that may be necessary as a result of the amendments to the SFO will not require specific approval from unitholders under 9.6 of the Code on Real Estate Investment Trusts (**REIT Code**); and (b) the SFC will provide a reasonable period of time for trustees and REIT managers to prepare supplemental deeds and relevant unitholder announcements.
28. Another respondent asked for clarification that SFC authorization of any closed-end CIS established as a trust, such as a REIT, will no longer be conditional upon the trust deed including provisions requiring the disclosure of interests if listed trusts are covered by Part XV of the SFO.

SFC's response

29. 9.6(a) of the REIT Code provides that the constitutive documents of a REIT may be altered by the management company and trustee without consulting holders, provided that the trustee certifies in writing that in its opinion the proposed alteration, among other things, is necessary to comply with fiscal or other statutory or official requirements. Amendments to the trust deeds of REITs as a result of amendments to the SFO would generally be considered as falling within the ambit of 9.6(a) of the REIT Code and similar to past practice, a reasonable time will be given to management companies and trustees to make the necessary amendments. REITs managers should however note that the extended legislative provisions must be complied with as soon as they become effective. We do not foresee any particular difficulties in this regard, since it is already an existing requirement of the SFC that provisions substantially equivalent to those in Part XV of the SFO be adopted in trust deed of REITs⁵.
30. Upon legislative amendments taking effect, the adoption of such provisions in the trust deeds of REITs would no longer be necessary.

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?

Public comments

31. All respondents who commented on this proposal were supportive. They agreed that it would not be practical to give effect to the proposals in respect of Parts XIII, XIV and XV without extending the SFC's powers under Parts VIII and X of the SFO.
32. One respondent mentioned the recent actions brought by the SFC under section 214 of the SFO which resulted in the court making compensation and/or disqualification orders against listed company directors for misconduct. The respondent was of the view, in light of these actions, that it would be important to define more precisely in the SFO the nature and extent of liability of the relevant parties involved in the conduct of the business or affairs of the various non-corporate entities contemplated by the proposals.

⁵ See press release on "Notification of Interests in REITs" dated 15 December 2005.



SFC's response

33. In view of the support received, we will proceed with the proposal. To address concerns about the nature and extent of liability of the relevant parties involved in the conduct of the business or affairs of the various non-corporate entities, certain defined terms will be amended to cover equivalent persons in relation to an entity as are presently covered in relation to a listed company.



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

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?

34. We received mixed views on this proposal. Whilst some respondents agreed with the proposal to extend the statutory disclosure requirement for PSI under Part XIVA of the SFO to all non-corporate listed entities, a few respondents who disagreed took the view that Part XIVA of the SFO should not be extended to listed CIS, in particular ETFs. In order to provide a comparable PSI regime to enhance investor protection as well as transparency of all listed entities, and in view of the support received, we will proceed with the proposal.

Listed CIS / ETFs

Public comments

35. Amongst the respondents who agreed with our proposal, one respondent commented that it is appropriate to provide a comparable statutory disclosure regime for the benefit of investors in all listed entities. Others took the view that the requirements must be extended for the protection of investors and that this is a logically consistent approach in principle.
36. Those respondents who disagreed with the proposal took the view that listed CIS / ETFs should not be subject to the disclosure obligations under Part XIVA. One of them did however agree that the disclosure requirement must be extended to certain other non-corporate listed entities and another also agreed that the disclosure requirement should be imposed on REITs in view of their business and operational model.
37. The main reasons submitted by respondents who disagreed with the proposal are summarised as follows:
- (a) CIS traditionally operate on a low total expense ratio and imposing disclosure requirements on these CIS could increase the compliance burden and cost significantly.
 - (b) Given their passive and index tracking nature, some respondents were doubtful as to the types of information that would amount to “inside information” for ETFs and took the view the obligation to disclose PSI is of significantly lower relevance. One respondent commented that while there are “additional risks” for synthetic ETFs, such risks should already be disclosed in the product documentation and should not give rise to more disclosure situations.
 - (c) The reporting of material changes in an ETF is already required under Chapter 11 of the UT Code and the Joint Circular issued by the SFC and SEHK on 18 November 2010 (**Joint Circular**). Similarly, investment managers or advisors of listed CIS are subject to the more stringent staff dealing policy under the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (June 2012) (**Code of Conduct**). The existing safeguards render the current proposals excessive and unnecessary.



SFC's response

38. As mentioned in the Consultation Paper, although the circumstances justifying PSI disclosure may be few for ETFs that are passively managed, such circumstances are not non-existent. For example, as mentioned in Paragraph 13 above, a synthetic ETF may invest extensively in financial derivative instruments and may suffer significant losses if its counterparty defaults; changes in tax or regulatory requirements applicable to the ETF may impact upon the net asset value of an ETF; and suspension of creation and/or redemption of units in the ETF may also affect the trading price of an ETF.
39. Our current proposal is aimed at extending the statutory disclosure requirement for PSI to all listed entities that do not take a corporate form in order to enhance investor protection and achieve transparency of all listed entities, regardless of their legal form. The proposal is consistent with the regulatory approach in other major international markets which have statutory PSI regimes applicable to listed corporations, listed CIS (including ETFs)⁶, listed trusts and other listed vehicles. Hence we maintain our proposal to extend the provisions under Part XIVA of the SFO to cover all non-corporate form listed entities.
40. In respect of synthetic ETFs, we do not agree with comments that the disclosure of additional risks in the product documentation should not lead to more disclosure situations. As noted in our Consultation Paper, such "additional risks" include the credit and default risks of derivatives counterparties, which may result in significant losses up to the full value of the derivatives issued by the counterparty upon default. The events currently set out in the Joint Circular are indeed examples of the type of information which may be necessary to enable holders to appraise the position of the scheme and may also constitute inside information of an ETF.
41. In view of the rapid development of ETF products, the SFC believes the extension of statutory PSI disclosure obligations to be a necessary step for enhancing market transparency and bringing the PSI disclosure in respect of ETFs onto equal statutory platform as listed companies.

Definition of "inside information"

Public comments

42. Some respondents queried the proposed amendment to the definition of "inside information" to include information about "a unit holder of the listed entity". One respondent noted that, unlike substantial shareholders of listed companies, unitholders of a substantial amount of ETF units will not have the same level of influence and control over the management of the ETF and, given the units of almost all ETFs in Hong Kong are held by HKSCC Nominees Limited for and on behalf of the investors as the beneficial owner, it is also impracticable for ETF managers to monitor the activities of all of their investors. The respondent further pointed out with reference to 11.1(b) of the UT Code that it is difficult to see how inside information on an investor in an open-ended listed CIS such as an ETF is necessary to be disclosed to the market. As such, the respondent did not see the benefit of requiring ETF managers to disclose PSI about the unitholders of an ETF.
43. Another respondent queried the proposed amendment to the definition of "inside information" to include information about "a trustee, manager, custodian or partner of the

⁶ For example, the United Kingdom, Australia and Singapore have statutory PSI regimes applicable to listed CIS.



entity” as the existing definition does not seek to capture information about counterparties with whom that listed corporation has a relationship. The respondent was of the view that, in the context of REITs, the proposed amendments would be likely to capture additional types of information that were not previously contemplated by 10.4 of the REIT Code. The respondent also commented that the proposed amendments would be difficult to apply in practice given the trustee or custodian are independent, and typically, unrelated parties.

SFC’s response

44. We note the respondents’ comments regarding the proposed inclusion of information about “a unit holder of the listed entity” and also information about “a trustee, manager, custodian or partner of the entity” in the definition of “inside information”. It should however be noted that specific information about such persons shall not constitute “inside information” which has to be disclosed under Part XIVA, unless the specific information is not generally known to the persons who are accustomed or would be likely to deal in the listed securities but would, if generally known to them, be likely to materially affect the price of the listed securities.
45. To implement the proposal, corresponding amendments will be made to extend the existing defined terms in Part XIA to cover equivalent persons in relation to a CIS or other non corporate form listed entity as are presently covered in relation to a listed corporation. We will, where appropriate, take into account the drafting comments received in making our recommendations to the Government with regards to the legislative amendments.

Power of the court to sanction / Liability for breach of obligations

Public comments

46. One respondent commented that it is not reasonable to extend the obligation or the power of the court to sanction non-compliance with the obligation to a trustee or custodian of the entity. The respondent also queried the need to extend the power of the court to sanction other parties for an ETF that is already in a corporate form and has a board of directors.
47. Another respondent commented that in the context of a REIT or ETF, liability for a failure to disclose PSI, or to take reasonable measures to ensure that proper safeguards exist to prevent a breach of the disclosure requirements, should be imposed only on the REIT or ETF manager and/or its officers.

SFC’s response

48. Under the existing section 307G of the SFO, every officer of a listed corporation must take all reasonable measures from time to time to ensure that proper safeguards exist to prevent a breach of a disclosure requirement in relation to the corporation. In making recommendations to the Government on extending the disclosure obligations under Part XIVA of the SFO to all listed entities in non-corporate form, we will consider the respondents’ concerns about the extent of liability of, and sanction imposed on, persons (e.g., trustees) who are not involved in the actual day-to-day management of the entity or its business.



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?

Public comments

49. Respondents commented that it would be important to provide further guidance to assist listed entities to comply with their PSI disclosure obligations having regard to their different structure and nature.
50. A respondent commented that the examples contained in the Guidelines on Disclosure of Inside Information issued by the SFC in June 2012 (**Guidelines**) provided a useful flavour of the types of issues which may trigger disclosure obligations for non-corporate listed entities.
51. Some respondents noted that a number of examples currently provided in the Guidelines may not be applicable in the context of ETFs and other non-corporate form entities. Respondents generally requested the SFC to provide more guidance and examples of events or circumstances where a listed entity should consider disclosing PSI that are applicable to different types of listed vehicles to assist them to comply with their obligations to disclose PSI if the proposal is to be implemented. These include the examples given in the REIT Code and those set out in the Joint Circular.

SFC's response

52. We agree that it would be important to provide further guidance to assist listed entities to comply with their PSI disclosure obligations having regard to their different structure and nature. As explained in the Consultation Paper, the general principles and guidance set out in the Guidelines will apply to listed CIS and other listed entities that do not take a corporate form, with necessary modifications. We shall provide further guidance 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, taking into account the comments received.



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

Question 6: Do you have any comments on our proposal set out in paragraph 45 of the Consultation Paper?

Public comments

53. All respondents who commented on this proposal were supportive. One respondent commented that the proposal is consistent with the listing regime (i.e., the “issuer” for the purposes of the listing application and the issuer’s continuing obligations is the issuer of the underlying shares) and with international market practice.

SFC’s response

54. In view of the support received, we will proceed with the proposal.



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

Question 7: Do you agree with our proposals set out in paragraphs 58 and 59 of the Consultation Paper?

Public comments

55. All respondents who commented on these proposals agreed that an entity that is listed only by virtue of its debentures being listed on the SEHK should be excluded from the disclosure of interests regime under Part XV of the SFO. One respondent commented that the exclusion is sensible and reflects the reality of the current situation.
56. One respondent suggested that the exclusion should apply to all convertible bond issues, not only those which are convertible into shares listed on the SEHK. The respondent submitted that in the case of a convertible bond issue where the bonds are convertible into shares listed on a stock exchange other than Hong Kong, investors can rely upon the disclosure obligations of this other jurisdiction. It would be onerous for directors of the issuer and its substantial shareholders to disclose their interests in the shares or debentures of the issuer under Part XV of the SFO as well as in the overseas jurisdiction. On the other hand, another respondent commented that the exception to the exclusion in certain cases of convertible debentures is crucial to the investors as the convertibility directly or indirectly affects the rights and interests of holders of debenture in the concerned corporation.

SFC's response

57. In view of the general support received, we will proceed with the proposals.
58. In respect of the comment that the exclusion should apply to all convertible bond issues, not only those which are convertible into shares listed on the SEHK, we take the view that an exclusion is only appropriate if sufficient information about shareholding of the relevant company is already disclosed. If the company whose shares the bonds can be converted into is listed on the SEHK, this will be the case. If the company is listed overseas it may not be the case.
59. We therefore maintain the view that 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 unless shareholders of that entity are subject to appropriate disclosure of interests obligations. The issuer of listed debentures convertible into shares of entities listed on other exchanges may follow the current practice and obtain an exemption from the disclosure of interests obligations under Part XV. The SFC will decide whether to grant an exemption on a case by case basis.



Other matters

Drafting comments received

60. We have received various drafting comments in relation to certain existing defined terms and proposed new defined terms in Parts XIII, XIV and XIVA of the SFO, including the definitions of “unit” and “associate”⁷ and the meaning of “partner” under the definition of “inside information”. Some respondents were concerned that the proposed amended/new definitions would be too broad. Others sought clarification as to the application of certain defined terms as a result of the proposed extension of Parts XIII, XIV and XIVA of the SFO to all non-corporate form listed entities.
61. One respondent recommended the SFC to revise the definition of the “relevant securities” and/or “equity securities” in the Securities and Futures (Price Stabilizing) Rules (Cap. 571W of the Laws of Hong Kong) (**Price Stabilizing Rules**) to include CIS, so as to take into account the fact that this proposal will apply to non-corporate listed entities and to extend the safe harbour to those entities.⁸
62. With the proposed extension of Parts XIII, XIV and XIVA of the SFO to all non-corporate form listed entities, instead of a listed company with its directors and shareholders, there may be a CIS with unitholders, trustees or a custodian appointed under the trust deed to hold the assets of the CIS for the unitholders, and a separate manager of the CIS (normally a corporation with directors and employees). A partnership is managed by partners. As such, corresponding amendments are required to extend the existing defined terms and to add new defined terms in Parts XIII, XIV and XIVA to cover equivalent persons in relation to a CIS or other non-corporate form listed entity as are presently covered in relation to a listed corporation.
63. We will, where appropriate, take into account the drafting comments received in making our recommendations to the Government with regards to the legislative amendments.

Consequential amendments to codes and rules

64. Respondents queried whether consequential amendments will be made to the Code of Conduct, the existing SFC products codes and guidelines and other relevant codes and rules to accommodate the extension of Parts XIII to XV of the SFO to all non-corporate form listed entities, and to ensure that the proposed new definitions and amended definitions are consistently used throughout the legislation and relevant codes and rules.
65. As mentioned in the Consultation Paper, the SFC will, where necessary, make appropriate consequential amendments to relevant codes, rules and guidelines to align the proposed legislative amendments to the SFO once the legislative proposals are more advanced.

⁷ We have also received comments on certain references under the definition of “associate”, including the scope of the defined terms “manager”, “trustee”, “custodian”, “officer or employee”.

⁸ The Price Stabilizing Rules prescribe a “safe harbour” for permitted stabilization from market misconduct provisions set out in Parts XIII and XIV of the SFO, including stock market manipulation. The term “equity securities” is defined as “shares issued by, or which it is reasonably foreseeable will be issued by, a corporation, but does not include any interest in any collective investment scheme”.



Way forward

66. Following the publication of this Conclusions Paper, we will proceed to make appropriate recommendations on the legislative amendments to the Government. The final form of the legislative amendments to the SFO will be subject to the usual legislative process for amending primary law.



Appendix A

List of respondents

(in alphabetical order)

1. Baker & McKenzie
2. Clifford Chance
3. Guardian Regulatory Consulting Limited
4. Hong Kong Trustees' Association
5. Kinetic Partners (Hong Kong) Limited
6. Linklaters
7. OSK Securities Hong Kong Limited
8. Simmons & Simmons – on its own behalf and on behalf of:
 - Enhanced Investment Products Limited; and
 - Sensible Asset Management Hong Kong Limited
9. Suen Chi Wai
10. The Law Society of Hong Kong