

HKE_x GUIDANCE LETTER
HKE_x-GL40-12 (August 2012)

Summary	
Subject	The Exchange's approach to listing of: <ul style="list-style-type: none">• Business trusts• Stapled securities
Listing Rules	General principles for listing of business trusts and stapled securities
Related Publications	N/A
Author	Listing Division

Important note: *This letter does not override the Listing Rules and is not a substitute for advice from qualified professional advisers. If there is any conflict or inconsistency between this letter and the Listing Rules, the Listing Rules prevail. You may consult the Listing Division on a confidential basis for an interpretation of the Listing Rules, or this letter.*

A. PURPOSE

1. This letter is intended to assist listing applicants by setting out the principles that we apply and key issues that a listing applicant should address when considering listing a business trust. It also sets out our approach on the application of Listing Rules to business trusts. This letter does not apply to Real Estate Investment Trusts (REITs).

B. INTRODUCTION

Different forms of trust

Business Trust

2. A business enterprise may be set up as a trust and managed by a trustee-manager. The trustee-manager operates the business and holds legal title to assets for beneficiaries. It is established and governed by a trust deed. In general, it has the following features:

- (a) Its purpose is to enable holders of its units to participate in or receive profits, income or other payments or returns arising from the management of the business assets or operation of a business.
- (b) It has a trustee-manager who holds the business assets for the benefit of all unitholders and manages and operates the trust's business.
- (c) The unitholders do not have day-to-day control over the management of the property.
- (d) The units in the trust are not redeemable.

Corporate Trust

- 3. A company may incorporate features of a trust into its Articles of Association. The company operates the business and holds the business assets in this case.

Early consultation is strongly recommended

- 4. The issues and approaches set out in this letter are not exhaustive or definitive. We will consider listing applications for business trusts or corporate trusts on a case-by-case basis. We may or may not consider that the listing applicant has sufficiently addressed relevant issues depending on the detailed structure and facts of the listing applicant. In appropriate cases, we may impose other requirements and/or modifications to the Listing Rules that we consider necessary.
- 5. We strongly recommend listing applicants and their advisers to consult us at an early stage on any proposed listing of business trusts, stapled securities or corporate trusts. We would recommend that consultations are carried out before submitting a formal listing application.

C. GUIDANCE

- 6. A listing applicant may consider listing a business trust, a corporate trust, or a company that owns a business trust by balancing the commercial needs and the regulatory issues that it needs to overcome.
- 7. Relevant Securities and Futures Ordinance ("SFO"), Companies Ordinance ("CO") provisions and Listing Rules generally apply to a corporate trust or a company that owns a business trust. Business trusts, unlike companies, are not subject to the provisions for shareholder protection under the CO (or equivalent company laws of the jurisdiction where a company is incorporated), the SFO and other laws and regulations applicable to listed companies. The Listing Rules do not currently contain provisions which expressly deal with the listing of business trusts.

Overriding principle

8. Our principle is to ensure that holders of units in business trusts are subject to investor protection standards comparable to those required of Hong Kong corporate issuers. To this end, unitholders must be given the same level of protection as shareholders and key relevant SFO provisions must apply.
9. A listing applicant will need to address the issues and the additional requirements and modifications discussed below. This Guidance Letter suggests possible approaches listing applicants may consider in order to address a particular issue. It is for the listing applicant to ensure that the relevant key provisions of the SFO apply to its proposed structure as a whole. The listing applicant will also need to confirm or obtain legal opinions satisfactory to the SFC that the key provisions of the SFO would apply.
10. Having addressed the regulatory issues, we will consider listing applications and regulate business trusts by applying the same principles as those applying to any company seeking a listing on the Exchange. To achieve this, we will modify the current regulatory framework for listed companies in the Listing Rules on a case-by-case basis to apply to business trusts in a manner that fully preserves all the current Listing Rule requirements for investor protection, disclosure and corporate governance.

Issues to consider in listing a business trust

Application of the SFO

11. We and the SFC consider that it is essential for unitholders of listed business trusts to have the same level of protection as shareholders of listed companies. The key relevant provisions in the SFO must apply to business trusts as they apply to listed companies. The key provisions include:
 - (a) Market manipulation: Parts XIII and XIV of the SFO cover civil and criminal liabilities for market manipulation in respect of listed securities of listed corporations. It covers aspects such as false trading, price rigging, disclosure of information about prohibited transactions, disclosure of false or misleading information inducing transactions and stock market manipulation;
 - (b) Insider dealing: Parts XIII and XIV cover civil and criminal liabilities for insider dealing. Generally, insider dealing takes place when a person connected with a corporation with relevant information deals in, or procures others to deal in, the listed securities of the corporation. Relevant information refers to information about a corporation or the listed securities of the corporation which if known is likely to affect the share price;

- (c) Disclosure of interests in shares: Part XV of the SFO imposes duties to disclose interests in shares of listed corporations and short positions of the shares on those who acquire or dispose of the interests or have or cease to have the positions;
- (d) Powers of the SFC to apply to the courts for certain orders if the business or affairs of a listed corporation have been conducted in a manner that is oppressive to its members, involves misconduct towards its members etc., under section 214 of the SFO;
- (e) Powers of the SFC to require production of documents concerning the affairs of a listed corporation under section 179 of the SFO; and
- (f) Powers for shareholders of a listed corporation to require the listed corporation to investigate those interested in its shares under sections 329 and 331 of the SFO.

Issue 1: A listed business trust is not a “listed corporation”

- 12. The provisions in paragraph 11 apply to “listed corporations” as defined in the SFO. However, listed business trusts are not “listed corporations” and unitholders are not shareholders of “listed corporations”.

Possible Approach

- 13. A listing applicant should consider a structure that will result in the key relevant provisions of the SFO being applicable to the business trust and its unitholders. One approach to satisfy this requirement could be through using a form of “Stapled Securities” structure, which is discussed in paragraphs 29 to 33 and illustrated in Appendix 1. Other approaches may include a HKT Trust structure (stock code: 6823). As mentioned in paragraph 6, a listing applicant may also consider listing a corporate trust or a company that owns a business trust.

Issue 2: Directors or employees of the trustee-manager are not persons connected with the corporation

- 14. Directors or employees of the trustee-manager are not persons connected with the corporation under section 247 of the SFO for insider dealing as a business trust is not a corporation.

Possible Approach

- 15. The trustee-manager and its directors/employees should have day-to-day management or business relationships with the business subsidiaries or related corporations of the holding company or operating company and these individuals could be persons connected with the corporation under section 247 of the SFO.

The business trust and the holding company/listed company could also have the same board of directors. This approach is illustrated in Appendix 1.

Issue 3: Relevant information for the business trust may not be relevant information for the corporation

16. Relevant information for the business trust may not be relevant information for the corporation as defined in section 245 of the SFO for insider dealing.

Possible Approach

17. The business trust could have a duty to account for a percentage of earnings (plus all assets on wind-up) to the holding company/operating company so relevant information for the business trust could become relevant information for the corporation, and in addition could also list the corporation that operates the trust assets. The business trust and the corporation will both be “listed issuers” under the Listing Rules and subject to the provisions of the Listing Rules and the SFO. This approach is illustrated in Appendix 1.

Issue 4: The affairs of the business trust are not the affairs of the corporation

18. The affairs of the business trust are not the affairs of the corporation under section 214 that can be the subject of a complaint if conducted in an oppressive or unfairly prejudicial manner.

Possible Approach

19. The trust deed could provide that the holding company/operating company has the right and duty to enforce a deed covenant in favour of its members (who are also unitholders under the Stapled Securities arrangement) so that the affairs of the business trust could be the affairs of the holding company/operating company. This approach is illustrated in Appendix 1.

Application of the Takeovers Code

20. A listing applicant should consider a structure that can ensure the compliance with and application of the Takeovers Code. An example of such is the HKT Trust (stock code 6823).

Application of the Listing Rules

Issue 1: Potential conflict between duties of the trustee-manager to its shareholders and those to the trust’s unitholders

21. In a business trust, the trustee-manager has legal ownership of the trust property and manages it for the benefit of the unitholders. The trustee-manager and its controller (usually its shareholder which established the business trust) can control or exercise significant influence over the trust. There is a potential conflict between the duties of the trustee-manager to its controller and those to the trust's unitholders.

Possible Approach

22. Since the trustee-manager operates the trust, our approach is to apply all the Listing Rule requirements relating to an issuer's directors to the trustee-manager's directors, including provisions for unitholders to elect or remove these directors by ordinary resolution.
23. To afford further investor protection, we will impose additional requirements including:
 - (a) The business trust must have a trustee-manager acceptable to the Exchange. We would normally expect that the trustee-manager does not carry on any business other than the management and operation of the business trust as its trustee-manager.
 - (b) The trustee-manager must prepare and publish its accounts under the standards and requirements in the Listing Rules applicable to listed companies.
 - (c) The trust deed must provide that the business trust's unitholders can remove the trustee-manager by ordinary resolution in general meeting.
 - (d) The trustee-manager's directors must give priority to the interests of the unitholders as a whole if these conflict with the trustee-manager's own interests. The trust must include in its corporate governance report the policies and measures taken by the trustee-manager to manage conflicts and potential conflicts of interests between (a) the business trust and (b) its controlling unitholder, or any director or controlling shareholder of the trustee-manager.
 - (e) The definitions of connected person will be extended to include the trustee-manager, its directors and controlling shareholder, and any of their associates.

Issue 2: Distributions

24. Unlike a company, a business trust can make distributions to unitholders in excess of its net profits. The company law restrictions on the amount of dividends that can be paid do not apply to business trusts.

Possible Approach

25. We will require that when the trust announces any distribution to its unitholders, the trustee-manager's board of directors must on reasonable grounds confirm that, immediately after making the distribution, the trustee-manager will be able to meet, from the trust property, the liabilities of the trust as they fall due.
26. Each listing applicant will be required to sign a listing agreement with us before the commencement of dealing in its units on the Exchange. **Appendix 2** provides a general form of the addendum to the listing agreement, which sets out the principles described above and the additional requirements and modifications we will impose on the trust.
27. Companies incorporated in certain jurisdictions can make distributions to their shareholders in excess of their net profits.

Other issues - Governance issues

28. A listing applicant should also address, among other things, the following issues:
 - (a) risks and consequences if the trustee-manager becomes insolvent;
 - (b) consequences of breach of trust;
 - (c) redemption or repurchase of the stapled units;
 - (d) segregation of the trustee-manager's assets from the trust's assets;
 - (e) exercise of the trustee-manager's powers and its ability to invest and manage the trust's assets and other assets/business operations.

Stapled Securities

29. Stapling is an arrangement under which different securities, such as units of a business trust and shares of a holding company/operating company, are listed on the basis that they are legally bound together and cannot be transferred or traded separately. This arrangement can be structured to satisfy the requirements mentioned in paragraph 11.
30. Once the applicant satisfies the SFC on the applicability of the SFO requirements to its stapled securities structure, our approach is to treat the stapled securities as a "combined security" for the purposes of the Listing Rules. The issuer's constitutive documents must contain adequate arrangements to maintain the stapled structure after listing. It will be a condition of listing that the securities remain "stapled" at all times.

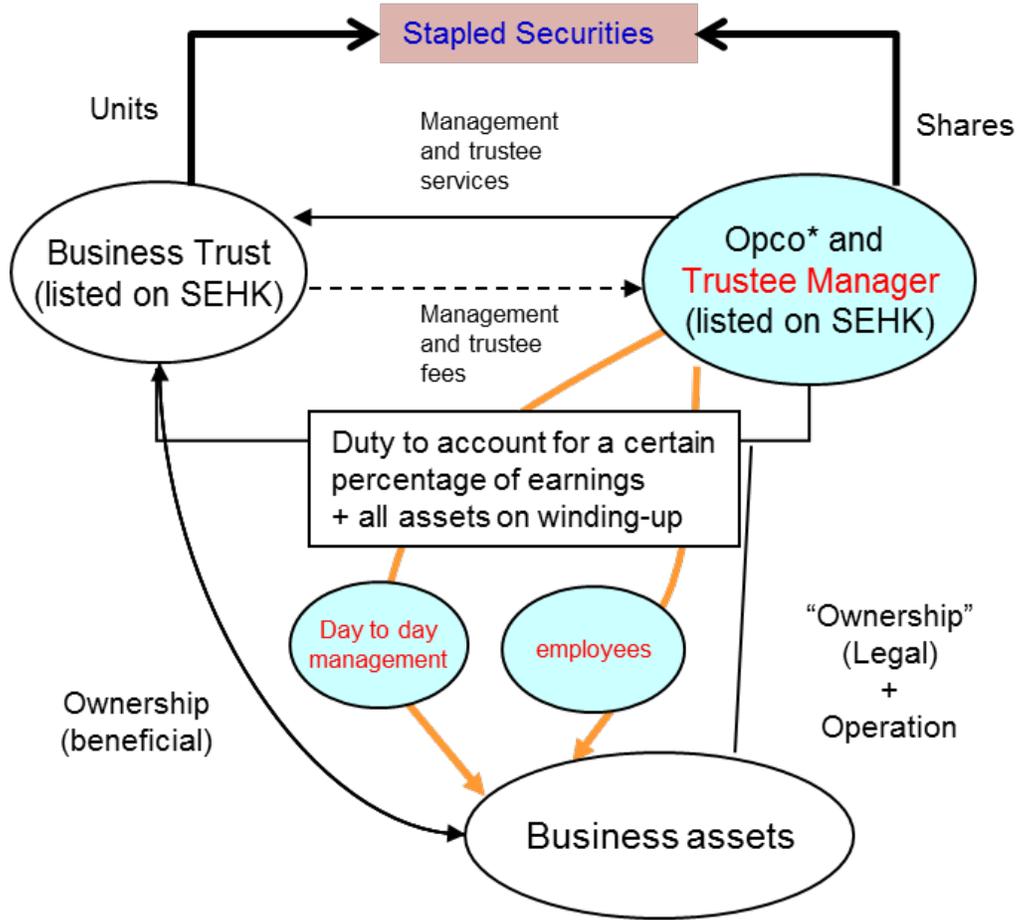
31. When securities of different issuers are stapled together, we may treat the issuers as a “combined entity” on the basis that they have identical investors and operate in a coordinated manner. In this situation the Listing Rules will apply to them as if they were one issuer.
32. In the stapled securities scenario, it is possible for units of the business trust to be stapled to shares of the trustee manager, or shares of the holding company of the trustee manager. This approach is illustrated in Appendix 1.
33. **Appendix 3** sets out the principles that we apply to listing of stapled securities.

Implementation of the Listing Rules

34. We will invoke Rule 2.04 to impose additional requirements and modifications to the Listing Rules on a case-by-case basis to address the issues arising from listing of business trusts and stapled securities.

APPENDIX 1

Possible business trust structure



*Opco has right and duty to enforce deed covenant in favour of unitholders/members

APPENDIX 2

Addendum to Listing Agreement for Business Trusts

A. General

1. The Listing Rules apply to business trusts subject to the additional requirements and modifications set out in this addendum. These requirements and modifications are imposed by the Exchange under rule 2.04.
2. The principle underlying this addendum is to ensure holders of units in business trusts are subject to appropriate standards of investor protection comparable to those afforded to shareholders of Hong Kong issuers. The Exchange preserves its right to impose additional requirements under rule 2.04 if it considers them necessary or desirable to ensure that this principle is met.
3. Terms in this addendum have the same meanings as in the Listing Rules unless otherwise stated.

B. Definitions and interpretations

4. The definitions and interpretations in the Listing Rules are modified as follows:
 - (a) The reference to “issuer” in the Listing Rules includes a business trust whose units are the subject of a listing application or are already listed. The term “trustee-manager” means the trustee-manager of the business trust.
 - (b) Reference in the Listing Rules to:
 - (i) “board of directors” of an issuer includes the trustee-manager and its board of directors;
 - (ii) “committee” established by an issuer’s board of directors includes the committee established by the trustee-manager’s board of directors;
 - (iii) “company secretary”, “director” or “member of the senior management” of an issuer includes company secretary, director or member of the senior management respectively of the trustee-manager;
 - (iv) “shares” or “equity securities” includes units in the business trust;
 - (v) “shareholder” or “member” of an issuer includes the holder of units in the business trust.

C. Trustee-manager and its directors

5. The following additional requirements apply:

- (a) The business trust must have a trustee-manager acceptable to the Exchange.

Note: The Exchange normally expects the trustee-manager to be a company which does not carry on any business other than the management and operation of the business trust as its trustee-manager.

- (b) The trustee-manager must prepare and publish its accounts under the financial reporting standards and requirements in the Listing Rules applicable to listed companies.
- (c) The business trust's unitholders can appoint or remove any trustee-manager by ordinary resolution in general meeting. The rights of unitholders to nominate, appoint or remove the trustee-manager must be comparable to those available to members of a Hong Kong issuer for nomination, appointment or removal of a director of the issuer.
- (d) The trustee-manager must not resign except upon the appointment of a new trustee-manager in the manner set out in the trust deed.
- (e) In the case of a change of trustee-manager, the outgoing trustee-manager must hand over the books and records relating to the trust to the new trustee-manager and provide reasonable assistance to facilitate the change.
- (f) The Listing Rules relating to an issuer's directors apply to the trustee-manager's directors, including the provisions for unitholders to elect or remove the trustee-manager's directors.

Note: Appointment of a director must be voted on individually. Unanimous approval of unitholders is required to pass a resolution permitting appointment of two or more directors by a single resolution.

- (g) The business trust must include in its corporate governance report the policies and measures taken by the trustee-manager to manage conflicts and potential conflicts of interests between (a) the business trust and (b) its controlling unitholder, or any director or controlling shareholder of the trustee-manager.

6. Rule 2A.10 is modified to include the trustee-manager as one of the parties who may be subject to rule 2A.09.

7. Rule 3.08 is modified to include an additional requirement that the trustee-manager and its directors must give priority to the interests of the unitholders as a whole if these conflict with the trustee-manager's interests.

8. Rules 9.11(38) and 13.51(2) are modified to require the trust to submit a declaration and undertaking, in the form set out in Form B in Appendix 5 with appropriate modifications, duly signed by each director of the trustee-manager.

D. Connected persons

9. The definitions of connected person in rules 1.01 and 14A.11 are extended to include the trustee-manager, its directors and controlling shareholder, and any of their associates.
10. The following rules are modified so that the references to an issuer's "controlling shareholder" in the rules also include the trustee-manager and its controlling shareholder:
 - (a) Rules 6.12 and 6.13 (withdrawal of listing) and rules 7.19 and 7.24 (large scale rights issue or open offer) – The trustee-manager, its controlling shareholder and their associates who are unitholders of the business trust must abstain from voting on the matters referred to in the Listing Rules.
 - (b) Rule 8.10 (competing business) – The trust must comply with the rule if the trustee-manager or its controlling shareholder has an interest in a business that competes with the trust's business.

E. Continuing obligations

11. The following additional requirements apply:

Disclosure

- (a) The business trust must publish an announcement as soon as practicable to disclose:
 - (i) a change in the trustee-manager; or

Note: The announcement of resignation of the trustee-manager must disclose the reasons for its resignation, and whether there are any matters that need to be brought to the attention of unitholders.

- (ii) any of the events described in rule 13.25 (winding-up and liquidation) in respect of the business trust, trustee-manager or its controlling shareholder.

Distribution

- (b) When the trust announces any distribution to its unitholders, the trustee-manager's board of directors must on reasonable grounds confirm that, immediately after making the distribution, the trustee-manager will be able to fulfil, from the trust property, the liabilities of the trust as they fall due, and disclose this confirmation in the announcement.

Matters requiring unitholders' approval

- (c) The following matters must be approved by unitholders on terms comparable to those required of a Hong Kong issuer:
 - (i) change of the trust's constitutive documents;
 - (ii) change of the rights attached to any class of units in the trust;
 - (iii) consolidation or sub-division of units;
 - (iv) voluntary winding up of the trust; and
 - (v) appointment, removal and remuneration of auditors.

General meetings

- (d) General meetings must be called and conducted on terms comparable to those required of a Hong Kong issuer. The rights of unitholders at general meetings must be comparable to those available to members of a Hong Kong issuer.

F. Trust deed

- 12. The trust deed must contain provisions that comply with Appendix 3, and where not otherwise provided by the law governing the business trust, Appendices 13A and 13B to the Listing Rules.
- 13. The trust deed must also contain:
 - (a) The scope of the trust's business, its structure, and the nature of the units in it.
 - (b) Provision to the effect that the deed is binding on each unitholder as if he/she had been a party to it and so to be bound by its provisions and authorises and requires the trustee-manager to do as required of it by the terms of the deed.
 - (c) Unitholders' rights and liabilities. There must be provisions to limit the liability of a unitholder to the amount paid or payable for the purchase price of units held by the unitholder.

- (d) The trustee-manager's responsibilities and power relating to the management and operation of the trust's business, its power to borrow or raise money on behalf of the trust, the fees and charges payable to it, and the circumstances under which it may be indemnified out of the trust property.

Note: Nothing in the deed shall provide that the trustee-manager or its officers may be exempt from, or indemnified against, any liability for breach of trust through fraud or negligence or wilful default.

- (e) The duties and obligations of the trustee-manager and its directors including those set out in rule 3.08.
 - (f) The circumstances and procedures for appointment, removal or resignation of the trustee-manager and its directors.
 - (g) The trust's distribution policy.
 - (h) Matters relating to the trust that require unitholders' approval and the approval thresholds.
 - (i) Proceedings for general meetings of unitholders.
 - (j) Provisions for amendments to the trust deed. A variation of the trust deed should be subject to unitholders' approval.
 - (k) The circumstances in which the trust can be wound-up or terminated, the procedures to be followed, and the rights of the unitholders in the process.
 - (l) The circumstances in which the minority unitholders may be bought out or may require an offeror to buyout their interests after a successful takeover or repurchase of units.
 - (m) The circumstances in which an interim trustee-manager may be appointed in the event that the trustee-manager has resigned or been removed, and the new trustee-manager has not been appointed.
14. A copy of the trust deed must be made available to the public without charge. The trust deed must also be published on the HKEx website and the trust's website.

APPENDIX 3

Guidance notes for stapled securities

1. This note sets out the principles that the Exchange applies to listing stapled securities.
2. Stapling is an arrangement under which different securities are listed on the basis that they are legally bound together and cannot be transferred or traded separately. Stapled securities may involve different classes of securities issued by an issuer or securities issued by different issuers. Typical stapling structures include (i) a “twin” structure where an issuer’s ordinary securities are stapled to another issuer’s ordinary securities; and (ii) a “parent/child” structure where an issuer’s ordinary securities are stapled to a special class of securities of its subsidiary.

Stapling provisions

3. When issuers apply for listing on the basis that their securities will be stapled, any listing approval, if granted, will be subject to the condition that the securities remain stapled at all times after listing. The Exchange may cancel the listing of all or any of these securities if they become unstapled.
4. The stapling provisions in the issuers’ constitutive documents must contain adequate arrangements to maintain the stapled structure after listing:
 - (a) The issuers must issue joint certificates, and maintain joint registers, for their stapled securities.
 - (b) The securities cannot be transferred separately. Each issuer must not register a transfer of its securities unless there is a matching transfer of the other issuer’s securities.
 - (c) The issuers must not issue unstapled securities. Each issuer must not issue new securities unless there is a matching issue of securities of the other issuer.
 - (d) They must treat their partly paid securities in the same way.
 - (e) They must not effect any corporate actions that would prejudice stapling.
 - (f) Any change to the stapling provisions must be approved by the Exchange.
5. The issuers must disclose the stapled structure in their listing documents and annual reports, and any proposed changes by way of announcements.

6. The issuers must address any material issues that may arise from the use of the stapled structure if the underlying securities are governed by different regulatory regimes.

Joint compliance with the rules

7. Stapled securities are generally regarded as a “combined security” for the purposes of the Listing Rules.
8. When securities of different issuers are stapled together, the issuers must cooperate with each other to ensure compliance with the stapling provisions and the Listing Rules.
9. The issuers will normally be required to:
 - (a) appoint the same persons as their authorised representatives required under rule 3.05; and
 - (b) provide their financial statements on a consolidated or combined basis under the financial reporting requirements in the Listing Rules.
10. The Exchange may treat the issuers as a “combined entity” for the purposes of the Listing Rules on the basis that they have identical investors and operate in a coordinated manner:
 - (a) The Exchange may assess whether the issuers meet the listing requirements collectively rather than individually, including the qualifications for new listing (e.g. the trading record requirements in rule 8.05) and the continuing listing requirements (e.g. the requirement to maintain sufficient operations or assets in rule 13.24).
 - (b) For rules 13.13 to 13.16 (advance to entity), Chapter 14 (notifiable transaction) and Chapter 14A (connected transaction), the Exchange may
 - (i) allow the issuers to calculate percentage ratios with reference to the size of the stapled group rather than individual issuers; and
 - (ii) waive the rules for transactions between issuers in the stapled group if the interests of holders in the stapled securities will not be affected by the transactions.
 - (c) Connected persons of each issuer will include connected persons of other issuer(s) in the stapled group.
 - (d) In the case of a business trust which is stapled to its trustee-manager (or the holding company of the trustee-manager):

- (i) The Exchange may relax the requirement described in the Note to Paragraph 5(a) in Appendix 2 to allow the trustee-manager to manage other businesses within the stapled group.
- (ii) The additional requirements or modifications described in the following paragraphs in Appendix 2 will not apply:
 - Paragraph (5)(b) if the stapled group provides consolidated or combined financial statements under the financial reporting requirements in the Listing Rules; and
 - Paragraphs 7 and 10.