Charltons - Hong Kong Law Newsletter - 05 December 2012

[online version](http://www.charltonslaw.com/sfc-consultation-service-on-statutory-psi-disclosure-regime-and-sfc-consults-on-proposals-to-enhance-the-regulatory-regime-for-non-corporate-listed-entities/)

# Hong Kong Law Issue 173

## 1. SFC Consultation Service On Statutory PSI Disclosure Regime Commenced 1 December 2012

The SFC announced on 29 November that its consultation service for listed corporations on their obligations under the new statutory regime for disclosure of price sensitive information (**PSI**) would commence on 1 December 2012. The new statutory disclosure regime set out in Part XIVA of the Securities and Futures Ordinance will take effect on 1 January 2013. It imposes an obligation on listed corporations to disclose PSI to the public as soon as is reasonably practicable after they know of the PSI. For a detailed analysis of the new regime, please see [our newsletter of May 2012](/newsletters/hklaw/en/2012/155/nl-hklaw-20120511-155.html).

The consultation service provided by the SFC takes the form of verbal discussions and views expressed are stated to be preliminary only and non-binding in nature. The service may be reached in the following ways:

Tel:

+(852) 2231 1009

Fax:

+(852) 2810 5385

Mail:

Corporate Disclosure Team Securities and Futures Commission 8th Floor, Chater House 8 Connaught Road Central Hong Kong

The [SFC’s Guidelines on Disclosure of Inside Information](http://en-rules.sfc.hk/net_file_store/new_rulebooks/h/k/HKSFC3527_4262_VER10.pdf) ([see archive](SFCGuidelinesInsideInformation.pdf)) also took effect on 1 December.

## 2. SFC Consults On Proposals To Enhance Regulatory Regime For Non-Corporate Listed Entities

### Introduction

The Securities and Futures Commission (**SFC**) published a consultation paper (**Consultation Paper**) on 23 November 2012 to seek views and comments on its proposals (the **Proposals**) concerning the regulatory regime for non-corporate listed entities. These include collective investment schemes (**CIS**) (including real estate investment trusts (**REITs**)), business trusts that are organised as a trust and partnerships. The consultation period will be one month ending on 24 December 2012.

The Proposals seek to amend the Securities and Futures Ordinance (**SFO**) so that it expressly applies to listed entities that are not in corporate form. The key changes which the Proposals would implement are:

* the extension of the market misconduct regime under Parts XIII and XIV SFO and the disclosure of interests obligations under Part XV SFO to all forms of listed entities (except open-ended CIS for the purpose of Part XV SFO);
* the extension of the SFC’s powers to investigate and take action against breaches under Parts VIII and X SFO to cover all listed entities, irrespective of their legal form;
* the extension of the statutory obligation to disclose price sensitive information (**PSI**) under new Part XIVA SFO (which comes into effect on 1 January 2013) to all listed CIS and other non-corporate listed entities;
* clarification that, for the purposes of the SFO, the “issuer” or the “listed corporation” of a listed depository receipt is the issuer of the underlying shares or units and not the depository bank; and
* the exclusion from the disclosure of interests regime under Part XV entities whose only listed securities are debentures.

The Proposals also include consequential amendments required by the enactment of the new Companies Ordinance which will come into effect in 2014 and other non-statutory amendments[[1]](#footnote-29).

The Consultation Paper is available on the SFC’s website [here](http://www.sfc.hk/edistributionWeb/gateway/EN/consultation/openFile?refNo=12CP4) ([see archive](CP23112012.pdf)).

The questions raised by the Consultation Paper can be viewed in Appendix A below.

### Background

In March 2011, Hutchison Whampoa Limited (0013.HK) spun off its port business in Shenzhen and Hong Kong by way of a business trust listed separately in Singapore. This raised concerns that Hong Kong could lose out to Singapore by not establishing a concrete mechanism for the listing of business trusts. After consultation with the Exchange and the SFC, in November 2011, PCCW Limited (0008.HK) spun off and listed its fixed-line and mobile phone services under a business trust on the Exchange using a form of “Stapled Securities” structure[[2]](#footnote-33) so that the key provisions of the SFO and the Listing Rules apply to give trust unitholders the same level of protection as shareholders of listed companies. The Exchange published a guidance letter in August 2012 setting out the key principles and issues that potential listing applicants should address when considering listing a business trust[[3]](#footnote-34).

At present, some provisions in the SFO applicable to a listed corporation do not apply to a business trust, notably provisions governing market misconduct and disclosure of interests in shares. In response to a question from the Legislative Council, the Government stated that its overriding objective is to ensure that the regulatory regime for a listed business trust mirrors that of a listed company.

In 2010, following a consultation, the SFC made recommendations on the legislative amendments to relevant parts of the SFO to extend the regulatory regime to all listed collective investment schemes (**CIS**) including real estate investment trusts (**REITs**).

With the current Proposals, the SFC aims to promote consistency of regulation for all listed entities, enhance market transparency and bring the regulatory regime for listed entities more in line with those of overseas jurisdictions.

### Summary Of Proposals

#### 1. Supervisory and Investigation Powers of the SFC

Part VIII of the SFO provides the SFC with supervisory and investigation powers while Part X provides the SFC with powers to intervene in a regulated intermediary’s affairs so that action can be taken in respect of breaches of the SFO, especially market misconduct and inadequate disclosure.

However, some of the provisions in Parts VIII and X of the SFO do not apply to non-corporate listed entities. For instance, section 179 of the SFO provides the SFC with the power to require production of records only in relation to misconduct of a listed corporation. Section 214 similarly provides the SFO with the power to apply for court orders only in relation to misconduct of a listed corporation.

Therefore the SFC proposes to amend Parts VIII and X of the SFO so that the SFC’s powers under these Parts are extended to cover all listed entities.

#### 2. Market Misconduct

Parts XIII and XIV of the SFO regulate market misconduct. However, not all provisions of the market misconduct regime apply to entities that are not in corporate form. For example, the offence of insider dealing under section 270 applies only to a listed corporation, while the definition of “associate” under section 245(1) does not cover the manager, trustee, custodian or partner of the entity to cater for trusts and partnerships. The market misconduct regimes in Australia, Singapore and the United Kingdom (the **UK**) cover all listed entities regardless of their form.

Accordingly, the SFC proposes the following amendments to Parts XIII and XIV and other relevant provisions of the SFO:

1. adding a new definition of “entity” in Schedule 1 to the SFO to mean:
   1. a trust;
   2. a partnership; and
   3. such other arrangement, or class of arrangements, which the Financial Secretary may by notice published in the Gazette prescribe as being regarded as an entity in accordance with the terms of the notice,

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

1. amending the definitions of “corporation” and “company” in Schedule 1 to the SFO to include any entity for the purposes of all Parts of the SFO except Parts III and IV;
2. amending the definition of “share” in Schedule 1 to the SFO, in relation to an entity, to include a unit in the listed entity for the purposes of all Parts of the SFO except Parts III and IV;
3. adding a new definition of “unit” in Schedule 1 to the SFO, in relation to an entity, to mean the units, shares or some other unit of measurement of interest in the entity;
4. amending the definition of “associate” in Parts XIII and XIV of the SFO to include reference to a person that is an entity and include the manager, trustee, custodian or partner of the entity and each officer or employee of any such manager, trustee, custodian or partner, and making similar amendments to the definitions of “controller”, “persons connected with a corporation”, “relevant information”, “subsidiary”, “related corporation”, etc.; and
5. other necessary amendments to make Parts XIII and XIV of the SFO applicable to listed entities that may be structured in other forms (such as in the form of a trust or a partnership) in the same manner as they apply to listed corporations.

#### 3. Extending the Statutory Disclosure Requirement for PSI

The statutory obligation to disclose PSI (defined as **inside information**) under new Part XIVA of the SFO, which will come into effect on 1 January 2013, does not currently apply to listed CIS (including REITs) and other non-corporate listed entities.[[4]](#footnote-41) The UK, Australia and Singapore have statutory PSI regimes applicable to listed CIS. At present, all listed CIS (including REITs) are subject only to non-statutory requirements to disclose PSI under the SFC codes and the Listing Rules.

There are two main types of listed CIS in Hong Kong at present, namely REITs and exchange traded funds (**ETFs**). The management of a REIT is usually conducted by the REIT manager in a fashion similar to the management of a listed company by its board of directors. ETFs are passively managed funds that invest in a portfolio of securities and/or financial instruments to replicate the performance of a financial index or benchmark. ETF managers are normally unlikely to have any influence or control over the operation or management of the companies in which ETFs invest. For that reason, the industry considers that for traditional non-synthetic ETFs, there are few events that could materially affect the price of an ETF’s units and therefore there would be few, if any, circumstances requiring disclosure of PSI. The SFC therefore considers that, in principle, the circumstances triggering the statutory PSI disclosure obligation in respect of traditional non-synthetic ETFs should be considerably less than those for synthetic ETFs.

As the market evolves, there are increasing numbers of synthetic ETFs listed in Hong Kong and in other markets. Synthetic ETFs may invest extensively in financial derivative instruments exposing them to additional risks, including the credit and default risks of their derivatives counterparties and may suffer significant losses up to the full value of the derivatives issued by a counterparty on its default. The SFC therefore proposes to require disclosure of PSI by ETFs.

##### Proposals

The SFC therefore proposes the following amendments to Part XIVA of the SFO:

1. extending the definition of “inside information” to include information about:
   1. the entity;
   2. a unit holder of the entity;
   3. a trustee, manager, custodian or partner of the entity;
   4. an officer of the manager of the entity; and
   5. the listed units in the entity or their derivatives;
2. extending the power of the court to sanction:
   1. a trustee, manager, custodian or partner of the entity; or
   2. an officer of the manager of the entity; and
3. making other necessary amendments to make Part XIVA of the SFO applicable to listed entities that do not take a corporate form (such as in the form of a listed CIS, business trust or partnership) in the same manner as they apply to listed corporations.

The general principles and guidance set out in the SFC’s Guidelines on Disclosure of Inside Information (the **Guidelines**) will apply to listed CIS and other listed entities in non-corporate form with necessary modifications. The SFC also proposes to provide further guidance to assist listed CIS and other listed entities to comply with the statutory PSI disclosure requirement in a supplement to the Guidelines.

The safe harbours in Part XIVA will also apply to listed CIS and other non-corporate listed entities.

#### 4. Disclosure of Interests

Part XV of the SFO regulates the disclosure of interests in the securities of listed corporations. In order to enable investors in all listed entities to make informed investment decisions regardless of the entity’s legal form, the SFC proposes the following amendments to Part XV (and other relevant provisions) of the SFO so that the obligation of disclosure of interests is extended to cover all non-corporate listed entities:

1. adding a new definition of “voting shares” in section 308 of the SFO in place of shares comprised in the “relevant share capital” of a listed corporation to provide that “voting shares, in relation to a listed corporation:
   1. means the listed corporation's issued shares of a class the shares in which carry rights to vote in all circumstances at general meetings of the corporation; and
   2. includes unissued shares in the listed corporation's share capital of a class which, if issued, would carry rights to vote in all circumstances at general meetings of the corporation;”
2. changing the definition of "issued equity share capital” to “issued equity voting shares" which, in relation to a listed corporation, means the listed corporation’s issued shares of a class the shares in which carry rights to vote in all circumstances at general meetings of the corporation;
3. amending the definition of “underlying shares” to remove the references to “relevant share capital” and add reference to “voting shares”; and
4. other consequential and further amendments to make Part XV of the SFO applicable to listed entities that may be structured in other forms (such as in the form of a trust or a partnership) in the same manner as it applies to listed corporations.

#### Exemption[[5]](#footnote-44) for Open-ended CIS

Open-ended CIS will however be exempted from the disclosure obligation on the basis that the total number of outstanding shares of an open-ended CIS is constantly changing, due to the frequent subscription and redemption of shares by investors. Requiring compliance would result in additional costs without contributing to an informed market for its shares.

##### Exemption for Entities whose only Listed Securities are Debentures

At present, under Part XV of the SFO, a corporation becomes a listed corporation when any of its “securities” are listed on the Exchange. “Securities” is broadly defined to include, among other interests, shares and debentures of a corporation. Accordingly, a listed entity which only has debentures listed on the Exchange is subject to the disclosure of interests obligations under the SFO. However, it has become routine for corporations seeking to list debentures on the Exchange to obtain an exemption from the obligations. As the SFC considers that there is no benefit in requiring disclosure of interests by corporate insiders (regardless of their legal form) whose only listed securities are debentures, the SFC proposes to exclude from the disclosure of interests regime under Part XV of the SFO any listed debenture issuer where:

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

The exemption will not apply where:

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

The approach to exemptions proposed by the SFC is broadly in line with the practice in the UK, Australia and the United States.

#### 5. Depositary Receipts (DRs)

DRs are negotiable certificates issued by a depositary bank and represent shares/units of an overseas issuer that are held with the depositary, or its custodian in the home market of the overseas issuer. To clarify any ambiguity as to whether the overseas issuer or the depositary bank is the “issuer” of the DRs for the purposes of the SFO, the SFC proposes to amend section 7 of Schedule 1 to the SFO to provide that:

1. the overseas issuer whose shares/units are the underlying shares/units is the issuer of the DRs so that the overseas issuer becomes a listed corporation when DRs in respect of its shares/units are issued; and
2. the depository bank that physically issues the DRs is not the issuer.

This amendment will make it clear that references to “relevant information” in Parts XIII and XIV of the SFO, and “inside information” in Part XIVA of the SFO, refer to information regarding the overseas issuer (and its shareholders, officers and listed securities etc.) and not information relating to the relevant depositary bank (or its shareholders and officers etc.).

#### 6. Consequential Amendments Required by the Enactment of the new Companies Ordinance

The new Companies Ordinance adopts a mandatory system of no nominal value for all Hong Kong incorporated companies with a share capital. At present, Divisions 2 to 4 of Part XV of the SFO require a person who is interested in 5% or more of the nominal value of a listed corporation’s issued equity share capital to make a disclosure while Parts XIII and XIV of the SFO treat a person as a substantial shareholder if he/she holds 5% of the nominal value of the relevant share capital of the corporation.

Accordingly, the SFC proposes to amend Parts XIII, XIV and XV of the SFO by changing the way in which the relevant percentage shareholding is calculated. All calculations will be changed to be based on the number of voting shares of a listed entity (expressed as a percentage of the number of shares of the same class which have been issued by the listed entity) held by the substantial shareholder rather than the nominal value of those shares. Under the Proposals, a new definition of “voting shares” will also be added in section 308 of the SFO in place of shares comprised in the “relevant share capital” of a listed corporation (see paragraph 4(a) above). The amended disclosure mechanism will also work for those listed entities that do not have share capital and whose units have no nominal value (e.g. REITs).

### How To Respond To The Consultation Paper

Any person wishing to comment on the proposals should submit written comments no later than 24 December 2012:

By mail to:

Securities and Futures Commission 8th Floor, Chater House 8 Connaught Road Central Hong Kong Re: Consultation Paper on proposals to enhance the regulatory regime for non-corporate listed entities

By fax to:

+(852) 2810 5385

By on-line submission:

<http://www.sfc.hk/edistributionWeb/gateway/EN/consultation/>

By email to:

[SFOAmendments@sfc.hk](mailto:SFOAmendments@sfc.hk)

#### Appendix A – Questions of the Consultation Paper

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?
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?
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?
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?
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?
6. Do you have any comments on the proposal to amend section 7 of Schedule 1 to the SFO?
7. Do you agree with the proposals regarding disclosure of interests obligations of listed entities whose only listed securities are debentures?

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1. These include: Guidelines on Disclosure of Inside Information, Code on Real Estate Investment Trusts, Code on Unit Trusts and Mutual Funds, Outline of Part XV of the SFO – Disclosure of Interests and Guidelines for the Exemption of Listed Corporations from Part XV of the SFO (Disclosure of Interests) [↑](#footnote-ref-29)
2. Where a share in a company is “stapled” to a unit in a trust. [↑](#footnote-ref-33)
3. [HKEx Guidance Letter GL40-12](http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/iporq/Documents/gl40-12.pdf) [[Archived copy](GL4012.pdf)] [↑](#footnote-ref-34)
4. For more information regarding the new statutory regime for PSI disclosure, please refer to [Issue 155 of Charltons Newsletter – Hong Kong Law](/newsletters/hklaw/en/2012/155/nl-hklaw-20120511-155.html) [↑](#footnote-ref-41)
5. For more information on the power of the SFC to exempt compliance with Part XV of the SFO, please refer to the [Guidelines for the Exemption of Listed Corporations from Part XV of the SFO (Disclosure of Interests)](http://en-rules.sfc.hk/net_file_store/new_rulebooks/h/k/HKSFC3527_699_VER10.pdf) [[Archived copy](PartXV.pdf)] [↑](#footnote-ref-44)