



**ASSOCIATION OF HONG KONG CAPITAL MARKET PRACTITIONERS**

**21 WING WO STREET, CENTRAL, HONG KONG**

**SFC Consultation Paper**

Consultation on proposals to (i) introduce a statutory scheme of arrangement and compulsory acquisition mechanism for real estate investment trusts and (ii) enhance the SFO market conduct regime for listed collective investment schemes

No.	Comments and responses
1.	Do you agree with the proposal to introduce a statutory arrangement or compromise mechanism similar to that under the CO with the proposed features and modifications for REITs? Please explain your view.
	We generally agree with the proposals to introduce a statutory arrangement or compromise mechanism for REITs.
	<p>It may be desirable to privatise listed REITs due to various reasons, including market conditions. Currently there are no explicit provisions covering this as REITs do not fall within the ambit of the Companies Ordinance (Cap. 622 of the laws of Hong Kong) (the “CO”). The proposal would allow for a restructuring or exit mechanism for REITs, not at present provided for. This would accordingly reduce the differences relating to companies and REITs listed on The Stock Exchange of Hong Kong Limited (the “HKSE”) in relation to the protection of the interests of unitholders, while ensuring consistency of treatment with the interests of shareholders of HKSE listed companies. The regulation of REITs would be brought more into line with the regulation applicable to HKSE listed companies in accordance with the overall approach of the Securities and Futures Commission (the “SFC”).</p>
	Some clarifications could be considered to clarify some practical issues in relation to the proposed mechanisms:
	(a) <b>REIT trustee’s duties.</b> – Paragraph 28(a) of the Consultation Paper (the “CP”) proposes that applications to the court may be made by, <i>inter alia</i> , the management company or the REIT trustee. It appears that either the manager or the REIT trustee can make this application for or on behalf of the REIT. Under Rule 4.1A of the Code on Real Estate Investment Trusts (the “REIT Code”), the REIT trustee has a fiduciary duty to oversee the management company for compliance with the regulatory requirements applicable to the REIT. Accordingly, the REIT trustee could be obliged to carry out other specified compliance

	<p>functions or duties in relation to the interests of REIT unitholders during a REIT scheme of arrangement.</p> <p>(b) <b>Liability for breach of the CO.</b> – S.671(5) of the CO states who are the relevant persons subject to liability for an offence in the event the relevant explanatory statement is not produced in accordance with the CO. The relevant persons are:</p> <p>(i) “<i>the company</i>”, paragraph 36(b) of the CP states that requirements applicable to a REIT will be deemed to be applicable to “<i>the trustee or management company (as appropriate)</i>”. A clarification as to whether either or both the management company or the REIT trustee will be liable in the same way as “the company” is subject to liability under s.671(5) and (6) of the CO would be helpful;</p> <p>(ii) “<i>every responsible person of the company</i>”, which includes a person who is an <i>officer</i> or shadow director of the company and authorises or permits, or participates in, the contravention or failure. “<i>Officer</i>” is defined under s.2 of the CO to include a director, manager or company secretary of a body corporate. Paragraph 36(f) of the CP states that “<i>responsible person</i>” in relation to a company under the CO will apply to “<i>officers</i>” of the management company of a REIT. We assume that the CO definition of “<i>officer</i>” referred to above would apply.</p> <p>(iii) “<i>a trustee of a deed for securing the issue of the company’s debentures</i>” (“<i>Debenture Trustee</i>”), the Debenture Trustee under the CO must disclose its material interests (where applicable) and the Debenture Trustee “<i>who authorises or permits, participates in, or fails to take all reasonable steps to prevent, the contravention</i>” is liable and commits an offence (in addition to the other persons specified) under s.671(5) of the CO. Paragraph 28(b) of the CP states that the REIT trustee and the trustee’s directors must disclose their material interests in the explanatory statement. If the position under the CO were to be followed, the trustee’s directors would not be required to declare their interests in the explanatory statement. It would be helpful to clarify whether a REIT trustee would have a defence along the lines of that available to a Debenture Trustee under the CO under the proposed amendments to the Securities and Futures Ordinance (Cap. 571 of the laws of Hong Kong)(the “<b>SFO</b>”).</p> <p>This is also relevant to the proposed offences along the lines of those under s.673 (8) and 677(2) of the CO, under which “the company” and “every responsible person of the company” is potentially liable for the relevant offences.</p> <p>(c) <b>Notification of material interests by the directors of the manager and the trustee.</b> – Under s.672 of the CO these interests must be notified to “<i>the company</i>”. It would be helpful to clarify to which entity this notification should be made in relation to a REIT, for example whether this notification in relation to a REIT should be made to the directors of the management company of the REIT (on behalf of the REIT).</p>
2.	<p>Do you agree with the proposal to introduce a statutory compulsory acquisition mechanism similar to that under the CO with the proposed features and modifications for REITs? Please explain your view.</p> <hr/> <p>We generally agree with the introduction of a statutory compulsory acquisition mechanism that mirrors the regime under the CO.</p>

	<p>To accommodate the characteristics of REITs, the following additions or clarifications may be considered:</p> <p>(a) <b><u>Clarification on protections offered to minority unitholders after the scheme of arrangement or compulsory acquisition and the application of existing rules</u></b> – As the Takeovers Code is exclusively applicable to public companies, companies with a primary listing on the HKSE and REITs with a primary listing on the HKSE, the Takeovers Code would not be applicable to REITs that have been delisted. Therefore, the protections offered to minority shareholders under the Takeovers Code would not be applicable. It may be helpful to clarify whether the Takeovers Code will apply to REITs in a similar way to the application of the Takeovers Code to companies, which have delisted but are public companies which remain subject to the Takeovers Code. Additional mechanisms could also be included to provide protective mechanisms to minority unitholders.</p> <p>(b) <b><u>Addition of notification requirements to overseas unitholders</u></b> – We note that in paragraph 34 of the CP, the SFC would be given the power to give directions on service of the notice in relation to the compulsory acquisition on unitholders whose address is not provided on the register. Given that it is common for REITs to have overseas unitholders, an explicit provision could be included under the SFO in relation to the method of service of notices on overseas unitholders, such as by post to the registered address or by email to the overseas unitholders.</p> <p>(c) <b><u>Amendments to the current document communication requirements to enhance minority unitholder protection</u></b> – Currently, under paragraph 5.2 of the REITs Code, documents in relation to the REITs including the trust deed and other constitutional documents are only required to be made available for inspection on the REITs’ website <i>or</i> at the place business of the management company and that of the approved person. Overseas unitholders of any REIT which adopts the latter document display method may not be able to have timely access to the relevant documentation as they are not available for inspection online. Copies of the documents must also be available upon request but the REIT can impose a reasonable fee for such service. Amendments to the relevant communication requirements to mirror the approach in relation to the constitutional documents of listed companies, making the trust deeds and other constitutional documents of REITs available for public inspection on the HKSE website and/or on the REITs’ websites, could be considered.</p>
3.	<p>Do you have any comments on the proposed interpretations and definitions to be used in the new Part of the SFO which are modified from the CO to cater for the nature and features of a REIT?</p> <p>Other than the abovementioned clarifications, the definition of “<i>associate</i>” tailored to REITs under the new Part of the SFO could be included. When determining the scope of an “<i>associate</i>” of a REIT in a buy-back situation, paragraph 36(c) of the CP proposes that the voting rights owned, controlled or held by trustees, or the management company and/or its directors will be deemed to be owned, controlled or held by the REIT. Similarly, under the Takeovers Code, an “<i>associate</i>” of the repurchasing REIT, that is the offeror, will include the trustee of the repurchasing REIT and the management company together with the person controlling, controlled by or under the same control as the management company. As the Takeovers Code does not have statutory effect, consideration could be given as to whether a definition along the lines of that applicable under the Takeovers Code could be included in the SFO.</p>

4.	Do you have any comments on the proposed deeming provisions to be introduced in the new Part of the SFO having regard to the REIT structure?
	We agree with the deeming provisions as a REIT does not have a board of directors to manage the REIT. The actions and powers of a REIT are currently exercised by the management company or the REIT trustee in accordance with the trust deed. Therefore, adding a deeming provision in the context of privatisation of a REIT would be in line with the existing management mechanism of REITs.
5.	Do you have any comments on the proposed amendments?
	We generally agree with the regulatory approach and would be pleased to comment on the detailed draft amendments when available.
6.	Do you have any comments on the proposed implementation timelines?
	We agree with the proposed general implementation timelines. It would be beneficial if the proposals in the CP can be implemented as soon as possible.