

Submission on Consultation Paper to introduce a statutory scheme of arrangement and compulsory acquisition mechanism for REITs and enhance the SFO market conduct regime for listed CISs

We welcome and are generally in support of the proposals outlined in the SFC Consultation Paper (“**Consultation Paper**”) in March 2024 on (i) introducing a statutory scheme of arrangement and compulsory acquisition mechanism for real estate investment trusts (“**REITs**”) and (ii) enhancing the SFO market conduct regime for listed collective investment schemes (“**CIS**”).

We believe the proposals will be conducive to addressing a current gap in the regulatory framework for REITs listed in Hong Kong. The proposals will also more closely align the treatment of REITs with comparable international markets such as Australia and Singapore.

Our comments are set out in response below to the questions raised in the Consultation Paper.

Part I – Proposal to introduce a statutory scheme of arrangement and compulsory acquisition mechanism for REITs

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?
(“**REIT Scheme Proposal**”)

- 1.1 We agree with the proposal to introduce a REIT Scheme Proposal similar to that under the Companies Ordinance (Cap. 622 of the Laws of Hong Kong) (“**CO**”) to enhance the existing regulatory framework for REITs, as we believe that such introduction is appropriate and will offer additional protection to minority unitholders.
- 1.2 The REIT Scheme Proposal fills a significant gap in Hong Kong’s regulatory regime for REITs and is timely given the expected growth in privatization and corporate restructuring transactions in respect of REITs holding assets in the region. It would enhance the versatility and competitiveness of Hong Kong’s REITs.
- 1.3 We generally concur with the voting thresholds set out under paragraph 27 and the tailored provisions under paragraph 28 of the Consultation Paper (please see also our other comments below).
- 1.4 We note that it is provided in paragraph 54 of the Consultation Paper that “as the proposed legislative amendments to the SFO in Part I of this paper aim to provide more flexibility to REITs ... a transition period before implementation is not considered necessary.” We agree that it would be desirable to implement the amendments to the SFO as soon as practicable so as to give full play to their intended effects. While currently trust deeds for REITs are not publicly available, we would recommend the SFC to check or consult with trustees and/or managers in the industry as to whether the existing trust deeds of REITs would in any way be inconsistent with the proposed amendments to the SFO. For example, the facilitation of a privatization or scheme of arrangement and the pursuit of the objective of the REIT stated in relevant trust deed (which may include providing the unitholders with stable distributions, sustainable and long-term distribution growth and enhancement in the value of the REIT’s properties) might in some cases be regarded as contradictory. If considered necessary, the amendments to SFO may include provisions to deem the conduct of an REIT privatization or other restructuring transactions as compatible with the objectives of the REIT.

- 1.5 We would expect the SFC to consider the applicability of certain housekeeping provisions in the CO. For example, pursuant to section 677 of the CO, it is an offence if a company's articles issued after the making of a court order sanctioning an arrangement or compromise is not accompanied by a copy of the order, unless the effect of which has been incorporated into the articles by alteration to those articles. The SFC is recommended to consider the legislative intent of such provisions (in the CO) in a REIT context, so as to enhance the protection to not only the REIT unitholders but also third parties dealing with the REIT.
- 1.6 Overall, the REIT Scheme Proposal represents a positive development that will provide greater clarity and protection for REIT investors. While details of the REIT Scheme Proposal are yet to be ascertained, its principles appear to be in line with the SFC's stated policy to equalize regulations concerning REITs and other publicly listed companies in Hong Kong.

2. 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 ("**Statutory Compulsory Acquisition**").

- 2.1 We agree with the proposal to introduce Statutory Compulsory Acquisition similar to that under the CO to enhance the existing regulatory framework for REITs, as we believe that the introduction of a Statutory Compulsory Acquisition is appropriate to a takeover offer or a general offer for a unit buy-back as modified under the REIT Scheme Proposal.
- 2.2 Overall, Statutory Compulsory Acquisition represents a positive development that will provide greater clarity and protection for REIT investors. While details of such statutory compulsory acquisition are yet to be finalized, its principles appear to be in line with the SFC's stated policy to equalize regulations concerning REITs and other publicly listed companies in Hong Kong.

3. 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?

- 3.1 We agree with the proposed interpretations and definitions.

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?

- 4.1 We generally agree with the proposed deeming provisions to be introduced.
- 4.2 It is our observation that the proposed deeming provisions may, in some situations, possibly create certain circumstances in which potential conflicts of interest may arise:
- In the context of a financially distressed REIT, the trustee and/or the management company may at the same time be creditors of the REIT, and there may be a conflict between their hat as creditor as opposed to their other hat as a trustee and/or the management company of the REIT.

- An officer of the management company will be deemed a “responsible person” of a company provided under section 3 of the CO under the proposed deeming provisions. It should be noted that an officer (e.g. a director) of a management company owes a fiduciary duty to the management company under company law. In the circumstances where the interests of the management company and those of the REIT may not be aligned, the officers of a management company may then be facing a very difficult situation. Proposed amendments to the SFO may include statutory provisions to prioritize the interests of the unitholders of the REIT over those of the management company and its directors in the event of a conflict of interests.
- In a way, the management company and trustee may have an inherent conflict of interest in the context of the Statutory Compulsory Acquisition as they may be remunerated for managing or providing services to a public REIT. Again, proposed amendments to the SFO may include statutory provisions to prioritize the interests of the unitholders of the REIT over those of the management company and its directors in the event of a conflict of interests.

Part II – Proposal to enhance the SFO market conduct regime for listed CIS

5. Do you have any comments on the proposed amendments?

5.1 We agree with the proposed amendments.

6. Do you have any comments on the proposed implementation timelines?

6.1 We agree with the proposed implementation timelines.

Jeffrey Mak Law Firm

24 May 2024