

APPENDIX 2

DRAFT AMENDMENTS TO SECURITIES AND FUTURES (LICENSING AND CONDUCT OF BUSINESS) REGULATIONS

**DISCLAIMER: This version of the Regulations is in draft form and is subject to change.
It is also subject to review by the Attorney-General's Chambers.**

Definitions

2. In these Regulations, unless the context otherwise requires —

[...]

“associated corporation”, in relation to a corporation, means —

- (a) any corporation in which the first-mentioned corporation or its subsidiary has, or the first-mentioned corporation and its subsidiary together have, an interest in shares entitling the beneficial owners thereof the right to cast, whether by proxy or in person, not less than 20% but not more than 50% of the total votes able to be cast at a general meeting of the second-mentioned corporation; or
- (b) any corporation, other than a subsidiary of the first-mentioned corporation or a corporation which is an associated corporation by virtue of paragraph (a), the policies of which the first-mentioned corporation or its subsidiary is, or the first-mentioned corporation together with its subsidiary are, able to control or influence materially;

“Board”, in relation to a holder of a capital markets services licence for real estate investment trust management, means the board of directors of the holder;

“executive director” means a director who is concurrently an executive officer;

“immediate family”, in relation to an individual, means the individual’s spouse, son, adopted son, step-son, daughter, adopted daughter, step-daughter, father, step-father, mother, step-mother, brother, step-brother, sister or step-sister;

“independent director”, in relation to a holder of a capital markets services licence for real estate investment trust management, means a director who —

- (a) is independent from any management and business relationship with the holder and the real estate investment trust;
- (b) is independent from any substantial shareholder of the holder and any substantial unitholder of the real estate investment trust; and
- (c) has not served on the Board for a continuous period of 9 years or longer;

“non-executive director” means a person who is not an executive director;

“real estate investment trust” means a collective investment scheme that is —

(a) authorised under section 286 or recognised under section 287 of the Act;
and

(b) a trust that invests primarily in real estate and real estate-related assets specified by the Authority in the Code on Collective Investment Schemes and all or any of the units which are listed for quotation on a securities exchange.

“substantial shareholder” means a person who has a substantial shareholding in a corporation in accordance with sections 2(4) and 2(5) of the Securities and Futures Act (Cap. 289)

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[...]

Criteria for determining if chief executive officer or director of holder of capital markets services licence for fund management has breached duties

13C. For the purposes of section 97(2) of the Act and without prejudice to regulation 13A and any other matter that the Authority may consider relevant, the Authority shall, in determining whether a chief executive officer or a director of the holder of a capital markets services licence for fund management has failed to discharge the duties or functions of his office, have regard to whether the chief executive officer or director has ensured compliance by the holder with each of the duties specified in regulation 13B.

Composition of the Board of a holder of capital markets services licence for real estate investment trust management

13D.—(1) The holder of a capital markets services licence for real estate investment trust management shall not appoint any of the following persons as the chairman of its Board:

- (a) any of its executive directors;
- (b) any person who is a member of the immediate family of the chief executive officer of the holder.

(2) Subject to paragraphs (3) and (6), the holder of a capital markets services licence for real estate investment trust management shall have a Board which satisfies the following requirements:

- (a) where the participants of a real estate investment trust do not have the right to vote on the appointment of directors to the Board, at least half of the Board shall comprise independent directors;
- (b) where the participants of a real estate investment trust have the right to vote on the appointment of directors to the Board, at least one third of the Board shall comprise independent directors.

(3) The requirements prescribed in paragraph (2) shall not apply —

- (a) where —
 - (i) there is a change in status of a director under regulation 13F or 13G during the period between the date immediately after the

date of the director's appointment and the date immediately before the next annual general meeting of the holder; and

(ii) the holder could not reasonably have known of that change on or before the date of the director's appointment; or

(b) where —

(i) there is a change in status of a director under regulation 13F or 13G during the period between the date immediately after an annual general meeting of the holder and the date immediately before the next annual general meeting of the holder (other than the period referred to in sub-paragraph (a)(i)); and

(ii) the holder could not reasonably have known of that change on or before the date of the first-mentioned annual general meeting.

(4) In the circumstances referred to in paragraph (3)(a)(i) or (b)(i), the holder shall notify the Authority of the change in status of a director within 14 days of becoming aware of the change.

(5) The Authority may, upon being notified under paragraph (4), direct the holder concerned to take such steps as may be necessary to rectify the composition of the Board in accordance with the requirements prescribed in paragraph (2) within such time, and subject to such conditions or requirements, as the Authority may specify.

(6) The Board may determine that a person —

(a) who is not a director of the holder; or

(b) who is a director of the holder being considered for reappointment to the Board.

and who is —

(i) not considered independent from management and business relationships with the holder and the real estate investment trust under regulation 13F; or

(ii) not considered independent from a substantial shareholder of the holder or a substantial unitholder of the real estate investment trust under regulation 13G.

shall nonetheless be considered independent from —

(A) management or business relationships with the holder and the real estate investment trust; or

(B) a substantial shareholder of the holder and a substantial unitholder of the real estate investment trust.

as the case may be, if the Board is satisfied that the director's independent judgment and ability to act in the interests of all the unitholders of the real estate investment trust as a whole will not be impeded.

Disclosure of director's independence in the annual reports of the real estate investment trust

13E.—(1) Prior to every annual general meeting of the real estate investment trust, or at least once in a calendar year, the Board shall review and determine:

(a) whether each existing director is independent from management and business relationships with the holder and the real estate investment trust; and

(b) whether each existing director is independent from every substantial shareholder of the holder and substantial unitholder of the real estate investment trust.

using the criteria set out in regulation 13F or 13G, as the case may be, and, where applicable, in accordance with regulation 13D(6).

(2) Upon the Board's review and determination under paragraph (1), the Board shall disclose in the annual reports of the real estate investment trust required under regulation 8(2)(a)(vii) of the Securities and Futures (Offers of Investments)(Collective Investment Schemes) Regulations 2005 for each director in respect of each of the following:

(a) whether he is independent from management and business relationships with the holder and the real estate investment trust; and

(b) whether he is independent from every substantial shareholder of the holder and substantial unitholder of the real estate investment trust.

and if he is not independent under any or all of the circumstances specified in sub-paragraphs (a) and (b), to describe and explain the relationship of such non-independence.

(3) Where the Board determines that a director is nonetheless independent under regulation 13D(6), the Board shall disclose in the annual reports of the real estate investment trust required under regulation 8(2)(a)(vii) of the Securities and Futures (Offers of Investments)(Collective Investment Schemes) Regulations 2005 —

(a) the nature of that director's relationship; and

(b) an explanation of the grounds for the determination of that director's independence by the Board.

(4) Where the Board has contravened paragraph (1), (2) or (3), any director who permits or authorises the contravention shall be guilty of an offence.

(5) For the purposes of this regulation, a reference to a director shall include a reference to a person proposed to be appointed as a director.

Independence from management and business relationships

13F.—(1) A director of a holder of a capital markets services licence for real estate investment trust management shall be considered to be independent from management and business relationships with the holder (whether or not the holder is acting for or on behalf of the real estate investment trust) and the real estate investment trust if —

(a) the director has no management relationships with —

(i) the holder or with any of its related corporations; and

(ii) the real estate investment trust; and

(b) the director has no business relationships with —

(i) the holder or with any of its related corporations, or with any officer of the holder or any of its related corporations; and

(ii) the real estate investment trust or with any of its related corporations, or with any officer of the real estate investment trust or any of its related corporations

that could interfere, or be reasonably regarded as interfering, with the exercise of the director's independent judgment with regard to the interests of all the unitholders of the real estate investment trust as a whole.

- (2) Without prejudice to the generality of paragraph (1)(a), a director shall be considered to have a management relationship with the holder, the real estate investment trust or with any of their related corporations if —
- (a) he is employed by the holder, or the real estate investment trust or with any of their related corporations, or has been so employed, at any time during the current financial year or any of the preceding 3 financial years of the holder, the real estate investment trust or any of their related corporations;
 - (b) any member of his immediate family —
 - (i) is employed by the holder, or the real estate investment trust or with any of their related corporations as an executive officer whose compensation is determined by the Board or the board of directors of the related corporation, as the case may be; or
 - (ii) has been so employed at any time during the current financial year or any of the preceding 3 financial years of the holder, the real estate investment trust or any of their related corporations; or
 - (c) he is accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the management of the holder, the real estate investment trust or any of their related corporations.
- (3) Without prejudice to the generality of paragraph (1)(b), a director shall be considered to have a business relationship with the holder, the real estate investment trust, any of their related corporations, or with any officer of the holder, the real estate investment trust or any of their related corporations, if —
- (a) he is a substantial shareholder, a director or an executive officer of any corporation, or a sole proprietor or partner of any firm, where —
 - (i) such corporation, sole proprietorship or firm carries on business for purposes of profit; and
 - (ii) the holder, the real estate investment trust or any of their related corporations, has in the current or immediately preceding financial year, made or received payments to or from the corporation, sole proprietorship or firm; or
 - (b) he is receiving or has received compensation from the holder, the real estate investment trust or any of their related corporations, other than compensation received for his service as a director or as an employee, at any time during the current or immediately preceding financial year of the holder.

Independence from substantial shareholder and substantial unitholder

13G.—(1) A director of a holder of a capital markets services licence for real estate investment trust management shall be considered to be independent from a substantial shareholder of the holder or substantial unitholder of the real estate investment trust if he is not that substantial shareholder or substantial unitholder from whom the independence of the director is being ascertained and is not connected to that substantial shareholder or substantial unitholder.

(2) For the purposes of paragraph (1), a person is connected to a substantial shareholder of the holder or a substantial unitholder of the real estate investment trust if —

(a) in the case where the substantial shareholder or substantial unitholder is an individual, he is —

- (i) a member of the immediate family of the substantial shareholder or substantial unitholder;
- (ii) employed by the substantial shareholder or substantial unitholder;
- (iii) employed by a related corporation or associated corporation of the substantial shareholder or substantial unitholder;
- (iv) an executive director of a related corporation or associated corporation of the substantial shareholder or substantial unitholder;
- (v) a non-executive director of a related corporation or associated corporation of the substantial shareholder or substantial unitholder;
- (vi) a partner of a firm or a limited liability partnership of which the substantial shareholder or substantial unitholder is also a partner; or
- (vii) accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the substantial shareholder or substantial unitholder; or

(b) in the case where the substantial shareholder or substantial unitholder is a corporation, he is —

- (i) employed by the substantial shareholder or substantial unitholder;
- (ii) employed by a related corporation or associated corporation of the substantial shareholder or substantial unitholder;
- (iii) a director of the substantial shareholder or substantial unitholder;

- (iv) an executive director of a related corporation or associated corporation of the substantial shareholder or substantial unitholder;
- (v) a non-executive director of a related corporation or associated corporation of the substantial shareholder or substantial unitholder;
- (vi) a partner of a firm or a limited liability partnership of which the substantial shareholder or substantial unitholder is also a partner; or
- (vii) accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the substantial shareholder or substantial unitholder.

Exemptions

14. —(1) Each person specified in the Second Schedule is exempted from section 82(1) or section 99B(1) (as the case may be) of the Act, in the circumstances specified in that Schedule.

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