Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

Financial Services and the Treasury Bureau

www.fstb.gov.hk

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FOREWORD

1. This paper is issued by the Financial Services and the Treasury Bureau ("FSTB") to consult the public on the proposed statutory codification of certain requirements to disclose price sensitive information ("PSI") by listed corporations.

2. FSTB welcomes written comments on or before **28 June 2010** through any of the following means:

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CONTENTS

ABBREVIATIONS

EU	European Union
FSTB	Financial Services and the Treasury Bureau
HKEx-EPS	Hong Kong Exchanges and Clearing Limited's Electronic Publication System
MMT	Market Misconduct Tribunal
MOU	Memorandum of Understanding Governing Listing Matters between the Securities and Futures Commission and the Stock Exchange of Hong Kong, signed on 28 January 2003
PSI	Price sensitive information
SEHK	Stock Exchange of Hong Kong
SFC	Securities and Futures Commission
SFO	Securities and Futures Ordinance (Cap. 571)

EXECUTIVE SUMMARY

1. The Administration supports the cultivation of a continuous disclosure culture among listed corporations. A way to achieve this is to oblige timely disclosure of price sensitive information ("PSI") under our statute, instead of relying on the existing non-statutory Listing Rules administered by the Stock Exchange of Hong Kong ("SEHK"). The proposed legislation will oblige listed corporations to make available necessary information for investors in making their investment decisions on listed corporations. Through continuous improvement of the regulatory regime in respect of listing, we are enhancing our market transparency and quality. This will also help sustain Hong Kong as a leading international financial centre and the premier capital formation centre in the region.

2. We propose codifying certain requirements for listed corporations to disclose PSI in the statute, by adopting the existing concept of "relevant information" as defined under the Securities and Futures Ordinance ("SFO") (Cap. 571) (to be referred to as "inside information" under our proposal) to define PSI. This concept has been used for two decades in the statutory "insider dealing" regime and the market is familiar with it. Under this approach, it will be the same set of information which is prohibited from being used for insider dealing and which is required to be disclosed to the public. The European Union ("EU") adopts the same approach.

3. We propose specifying in the law that a listed corporation be obliged to disclose to the public as soon as practicable any "inside information" that has come to the knowledge of the listed corporation. We also propose that directors and officers must take all reasonable measures from time to time to ensure that proper safeguards exist to prevent the corporation from breaching the statutory disclosure requirements. Should a listed corporation be found to have breached the statutory disclosure requirements, and that such a breach is a result of any intentional, reckless or negligent act or omission on the part of any individual director or officer, or that any individual director or officer has not taken all reasonable measures to prevent the breach, the director/officer would also be in breach of the statutory disclosure requirements.

4. We recognise the need to strike a reasonable balance between ensuring market transparency and fairness in the provision of information to all investors, and safeguarding the legitimate interests of listed corporations in preserving certain information in confidence to facilitate its operation and business developments. Hence, we propose that certain safe harbours be provided to cater for legitimate circumstances where non-disclosure or delay in disclosure would be permitted. These circumstances are -

   (a) when the disclosure would constitute a breach against an order made by a Hong Kong court or any provisions of other Hong Kong statutes;

   (b) when the information is related to impending negotiations or incomplete proposals the outcome of which may be prejudiced if the information is disclosed prematurely;

   (c) when the information is a trade secret; and

   (d) when the Government's Exchange Fund or a central bank provides liquidity support to the listed corporation. This safe harbour will allow a listed banking institution to recover from its liquidity difficulties to the benefit of its depositors, other creditors and shareholders and the overall stability of Hong Kong's financial markets.

5. To allow the statutory disclosure regime to evolve with future market development, we propose to empower the Securities and Futures Commission ("SFC") to create new safe harbours through subsidiary legislation to be made under the SFO.

6. Our proposal will not oblige listed corporations to respond to mere rumours. Otherwise, they may be under an undue burden of responding to rumours from time to time. However, where rumours indicate that the inside information intended to be kept confidential has been leaked, the listed corporation would need to disclose the inside information.

7. To facilitate compliance, we propose that the SFC should promulgate guidelines to provide guidance on what constitutes "inside information" and when the safe harbours would be applicable. We also propose that the SFC should provide an informal consultation service on the disclosure requirements.

8. We propose that the SFC be the enforcement authority. It will, upon receipt of a referral from the SEHK of possible breach or upon detection of a possible breach at its own initiative, carry out investigation and pursue follow-up proceedings of the case with investigatory powers under the SFO.

9. We propose that one or more than one of the following civil sanctions be imposed on those breaching the disclosure requirements-

(a) a regulatory fine up to $8 million on the listed corporation and/or the director;

(b) disqualification of the director or officer from being a director or otherwise involved in the management of a listed corporation for up to five years;

(c) a "cold shoulder" order on the director or officer (i.e. the person is deprived of access to market facilities) for up to five years;

(d) a "cease and desist" order on the listed corporation, director or officer (i.e. an order not to breach the statutory disclosure requirements again);

(e) an order that any body of which the director or officer is a member be recommended to take disciplinary action against him; and

(f) payment of costs of the civil inquiry and/or the SFC investigation by the listed corporation, director or officer.

10. Since the Market Misconduct Tribunal ("MMT") has experience in dealing with cases concerning "inside information" and in considering orders (b) to (f) above, we propose extending the jurisdiction of MMT to breaches of the statutory disclosure requirements. We further propose to empower the SFC to institute proceedings on breaches of the disclosure requirements direct before the MMT, without having first to report to the Financial Secretary for his decision to do so. This will help streamline the process in implementing the civil regime.

11. In addition, we propose that persons suffering pecuniary loss as a result of others breaching the disclosure requirements could rely on the MMT findings to take civil actions to seek compensation from those having breached the disclosure requirements.

12. The SFC may also, where appropriate, take action under existing provisions of the SFO to apply for injunctive and disqualification orders.

13. We aim to formulate a proposal that would promote effective compliance with, and allow effective enforcement of, the disclosure obligations, to be underpinned by adequate measures to protect the investing public against a breach of these statutory obligations. After carefully considering market comments, we propose adopting an evolutionary approach in developing a statutory disclosure regime, by focussing on inside information and civil sanctions. We would keep under review the effectiveness of the regime, and consider the need for introducing other disclosure requirements and additional sanctions, including criminal sanctions, in the light of local and international market experience.

14. To facilitate the public and market participants in making comments on our proposal, we have attached at **Annex 1** to this consultation paper indicative draft legislative provisions on the statutory disclosure requirements and safe harbours. The SFC has prepared draft guidelines on disclosure of inside information and is consulting the public separately. The SFC's consultation paper is attached at **Annex 2** for reference. The Government will carefully consider the comments received during this consultation exercise. Subject to public comments, our plan is to introduce a bill to the Legislative Council to codify such disclosure requirements in the SFO in the 2010/11 legislative session.

CHAPTER 1

INTRODUCTION

1.1 The sustainability of Hong Kong as the leading international financial centre and the premier capital formation centre in the region depends on our ability to maintain and improve the quality of the equity market. The Government's policy objective is clear – continuous improvement of the regulatory regime in respect of listing, with a view to enhancing market transparency and quality.

1.2 The lack of regulatory teeth in the Listing Rules administered by the SEHK has been an issue of concern to the market as well as the general public. We note that overseas jurisdictions such as the United Kingdom have provided statutory backing, in various forms, to their listing rules. We have previously proposed codifying certain major listing requirements[1] in the statute. Since the Listing Rules are not written in legal terms, market participants have reflected to us their concerns on whether the statutory requirements would be sufficiently clear for them to ensure compliance, when the requirements under the Listing Rules are transformed into law.

1.3 In its press release issued on 12 February 2009, the Listing Committee of SEHK strongly supported, as a minimum, the early implementation of a statutory obligation to disclose PSI. We agree that the requirements to disclose PSI are most important for cultivating a continuous disclosure culture among listed corporations and improving our market quality. We are prepared to adopt an evolutionary approach in providing statutory backing to listing requirements, both in terms of the requirements to be codified in statute and the sanctions to be introduced against breaches, in light of market needs. As a first step, we would take forward the legislative exercise to codify the requirements to disclose PSI by listed corporations. This would be an important

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[1] These major requirements are:
- financial reporting and other periodic disclosure obligations;
- disclosure of PSI; and
- shareholders' approval for certain notifiable transactions.

step in establishing a statutory regime to promote compliance with key listing requirements.

1.4 When formulating the consultation proposals, we have taken into account the latest development in major markets as well as feedback obtained from past consultation exercises. We have made extra efforts in preparing for this consultation exercise in an attempt to secure market consensus. We have therefore included in this consultation paper -

(a) indicative draft provisions on disclosure requirements and safe harbours, as a basis for comments and further development into proposed amendments to the SFO (see **Annex 1**); and

(b) SFC's Consultation Paper on The Draft Guidelines on Disclosure of Inside Information for reference (see **Annex 2**).[2]

1.5 We hope that such an approach would allow the market to gain experience in complying with the new statutory disclosure regime. We will keep in view developments both in the local and international markets as we go forward with the new regime.

[2] The SFC is separately conducting a consultation on its draft guidelines. Comments on the SFC's draft guidelines should be sent to the SFC direct.

CHAPTER 2

PROPOSED LEGISLATIVE FRAMEWORK

Establishing the Statutory Disclosure Obligation

Legislative Approach

2.1 In devising the legislative approach, we have taken into account public comments, including those we received during the previous consultation exercise. For example, market participants had raised concerns about replicating the detailed SEHK Listing Rules in the law on the ground that it might reduce flexibility and hence hinder expeditious administration of the rules in response to market needs. There were also concerns that the statutory listing rules would be unduly detailed and hence a minor breach of the detailed requirements in the rules might attract severe statutory sanctions.

2.2 Under our current proposal, in defining PSI, instead of replicating the detailed Listing Rules in the law, we now propose borrowing the concept of "relevant information" currently used in section 245 of the SFO in relation to prohibiting any person from dealing in securities using "inside information" under the "insider dealing" regime. "Relevant information", as set out in section 245 of SFO, in relation to a corporation, means specific information about –

(a) the corporation;
(b) a shareholder or officer of the corporation; or
(c) the listed securities of the corporation or their derivatives,

which is not generally known to the persons who are accustomed or would be likely to deal in the listed securities of the corporation, but which would, if it were generally known to them, be likely to materially affect the price of the listed securities.

2.3 Under the proposal, PSI will be the same set of information currently prohibited from being used for dealing in the securities of the listed corporation concerned. In other words, in addition to the existing prohibition from making use of PSI for insider dealing, listed corporations will be required to disclose PSI to the public in a timely manner.

2.4 The advantage of this approach is that the market is familiar with the concept of "relevant information" as it has been used for 20 years since the enactment of the now repealed Securities (Insider Dealing) Ordinance (Cap. 395)[3] in 1990. The familiarity with the concept should facilitate listed corporations in determining whether a particular piece of information is PSI and hence the need for disclosure. It would also enhance market confidence in the proposed regime which in turn would be conducive to market compliance.

2.5 This is similar to the approach adopted by the EU, which has developed the insider dealing regime and the disclosure regime on the basis of the same concept of "inside information"[4]: prohibiting dealing in securities using "inside information" and requiring timely disclosure of "inside information" at the same time.[5]

2.6 In this regard and to make the term "relevant information" in the SFO more self-explanatory, we propose renaming the term "relevant information" as "inside information". We also propose specifying in the SFO that a listed corporation be obliged to disclose to the public as soon as practicable any "inside information" that has come to the knowledge of the listed corporation. Indicative draft legislative provisions are set out at **Annex 1,** as a basis for amendments to the SFO and to facilitate comments by the public.

2.7 We propose that a listed corporation will be regarded to have knowledge of the inside information if a director or an officer[6] has come into possession of that information in the course of the performance of his duties.

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[3] The Securities (Insider Dealing) Ordinance, together with nine other Ordinances, were consolidated into the SFO in 2003.

[4] "Inside information" is defined in Article 1.1 of "Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)", and elaborated by Article 1 of the "Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation". The Directives are available at http://europa.eu/legislation_summaries/internal_market/single_market_services/financial_services_transactions_in_securities/l24035_en.htm.

[5] For example, in the United Kingdom, "inside information" is defined in section 118C of the Financial Services and Markets Act, which is applicable to both its requirements on disclosure of PSI and prohibition against insider dealing.

[6] As specified under Part 1 of Schedule 1 to the SFO, an "officer" in relation to a corporation means a director, manager or secretary of, or any other person involved in the management of, the corporation. The statutory obligation does not cover directors or officers of subsidiaries of the listed corporation unless they are also directors and officers of the listed corporation.

2.8 We propose that the disclosure must be made in a manner that can provide for equal, timely and effective access by the public to the information disclosed. A listed corporation can comply with such a requirement in disclosure manner by disseminating the information via the electronic publication system operated by a recognized exchange company for disclosure to the public. Such system currently adopted by the Hong Kong Exchanges and Clearing Limited is the Electronic Publication System ("HKEx-EPS"). A listed corporation will have to ensure that any disclosure made by it to the public is not false or misleading as to a material fact, or false or misleading through the omission of a material fact.

Question 1

(a) Do you agree with the proposal to adopt the existing definition of "relevant information" from the insider dealing regime under the SFO to define PSI?

(b) Do you agree that a listed corporation should be obliged to disclose to the public as soon as practicable any "inside information" that has come to its knowledge, and that it should be regarded to have knowledge of the inside information if a director or an officer has come into possession of that information in the course of the performance of his duties?

(c) Do you agree with the proposal that the disclosure must be made in a manner that can provide for equal, timely and effective access by the public to the information disclosed?

Safe Harbours

2.9 In cultivating a continuous disclosure culture among listed corporations, our policy objective is to arrive at a proposal which can effectively enhance the quality and reputation of our equity market, without stifling market development. We are also mindful of the need to strike a reasonable balance between ensuring market transparency and fairness in the provision of information to all investors, and safeguarding the legitimate interests of listed corporations in preserving certain information in confidence to facilitate its operation and business development.

The statutory disclosure obligation would therefore only be reasonable if it also specifies safe harbours to cater for legitimate circumstances wherein disclosure of inside information may be delayed or withheld. In devising the proposed safe harbours, we have taken into account those applicable in overseas jurisdictions like the EU (including the United Kingdom). It should be noted that all safe harbours would only be applicable if the concerned listed corporation has taken reasonable precautions for preserving the confidentiality of the inside information, and that the inside information has not been leaked.

2.10 For the proposed statutory disclosure regime, we propose to provide safe harbours for the following circumstances -

Safe Harbour A
When the disclosure would constitute a breach against an order made by a Hong Kong court or any provisions of other Hong Kong statutes;

Safe Harbour B
When the information is related to impending negotiations or incomplete proposals the outcome of which may be prejudiced if the information is disclosed prematurely;

Safe Harbour C
When the information is a trade secret; and

Safe Harbour D
When the Government's Exchange Fund or a central bank provides liquidity support to the listed corporation.

2.11 The proposed Safe Harbour A would cover information prohibited to be disclosed by a Hong Kong court or under other Hong Kong statutes, e.g. section 30 of the Prevention of Bribery Ordinance (Cap. 201) which prohibits the disclosure of the fact of an investigation by the Independent Commission Against Corruption.

2.12 There may be certain circumstances that a disclosure of PSI under our proposed legislation would mean a contravention against a court order or legislation in other jurisdictions – especially if the concerned listed corporation is incorporated or has major business activities outside Hong Kong. We therefore propose to empower the SFC, as the regulator and enforcement authority of the statutory

disclosure requirements, to grant a waiver to listed corporations if they face disclosure prohibition arising from court orders or legislation of another jurisdiction. (The respective roles of the SFC and SEHK are set out in Chapter 3.) Such waiver may only be given if the listed corporation could show that the waiver should be granted on appropriate grounds. We further propose to empower the SFC to impose appropriate conditions on the waiver.

2.13 The SFC will deal with applications for a waiver in a reasonable, fair and expedient manner. They would be considered by an SFC internal committee that would make first instance decision after considering all relevant facts and circumstances of the case.

2.14 Where a waiver is rejected by the committee, the listed corporation may request the decision be reviewed by the Board of the SFC. A request for such review must be made to the Board of the SFC within 2 business days after the refusal of the waiver. Any member of the SFC who was involved in the first instance decision shall not participate in the deliberation and voting of the SFC Board in considering the review.

2.15 In line with the "user pays" principle, the SFC proposes that the listed corporation should be charged with a fee for SFC to process the waiver application. This would also help deter any abusive use of the waiver application process to delay disclosure of PSI.

2.16 With the proposed Safe Harbour B, listed corporations need not disclose negotiations or proposals for say, mergers and acquisitions, which have not yet been concluded, so that the outcome of which may not be prejudiced. This is however subject to the treatment of rumours as set out in paragraph 2.22 if there were leakage before the negotiations or proposals were concluded.

2.17 The proposed Safe Harbour C would enable keeping of trade secret confidential. In other words, listed corporations would not be compelled to disclose information used in a trade or business which if disclosed to a competitor would be liable to cause real or significant harm to the owner of the trade secret (which should be the concerned listed corporation) and that the owner must maintain strict confidentiality of that information.

2.18 There may also be very rare circumstances when the need to maintain and safeguard financial stability overrides the benefit of

making a given piece of information public. One example would be the provision to banking institutions of liquidity support by Government or central banks in times of financial crisis or heightened financial tension. In these circumstances, immediate disclosure of the receipt of liquidity support by a listed corporation which is a banking institution (or by a member of its corporate group which is a banking institution) could lead to a loss of confidence in the institution, resulting in the liquidity assistance having insufficient time to serve its intended purpose of helping the institution resolve its difficulties. Furthermore, a loss of confidence in one institution has the potential, either directly or through contagion, to adversely affect the banking system as a whole. Withholding disclosure of the liquidity support could allow the institution to recover from its liquidity difficulties to the benefit of its depositors, other creditors and shareholders and the overall stability of Hong Kong's financial markets.

2.19 To cater for such rare but critical circumstances, the proposed Safe Harbour D would specify that a listed corporation should not be required to disclose inside information concerning the provision of liquidity support by the Government's Exchange Fund or by a central bank (including overseas central banks) to it or to a member of its group. The United Kingdom has provided a similar safe harbour in the Financial Services Authority's Disclosure and Transparency Rules.

2.20 To allow for flexibility and to cater for unforeseen circumstances as a result of rapid market development in the financial services industry, we propose to empower the SFC to, after consulting the Financial Secretary, make rules under the SFO to prescribe further safe harbours if it considers that it is in the public interest to do so. This proposal draws reference from section 282(2) of the SFO.

2.21 Indicative draft legislative provisions on the proposed safe harbours are set out at **Annex 1** for reference.

Question 2

(a) Do you agree to the provision of the four proposed safe harbours?

(b) Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?

(c) Do you think that the legislation should provide for additional safe harbours? If so, what are these additional safe harbours?

(d) Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?

Rumours

2.22 Our proposal would not oblige listed corporations to respond to mere rumours. Otherwise, they may be under an undue burden of responding to rumours from time to time. However, where rumours indicate that the inside information intended to be kept confidential has been leaked, the listed corporation would need to disclose the inside information. The EU (including the United Kingdom) handles rumours in a similar manner.

Guidelines on the Disclosure Obligation

2.23 When imposing a statutory obligation on the listed corporations to disclose inside information, we believe that it is of utmost importance to ensure that listed corporations are clear about their obligations under the law. This is to ensure that they would not fall short of the obligation inadvertently and that they would not have to bear the unnecessary burden of making frequent disclosure even if that information is not price sensitive, which may in turn overwhelm the investing public with information irrelevant for their making of investment decisions.

2.24 Noting that the EU has promulgated detailed guidelines[7] on what constitutes inside information and when it is legitimate to delay the disclosure of inside information, we propose that the SFC also promulgates detailed guidelines to provide guidance on what constitutes inside information under the statutory disclosure requirements and when the statutory safe harbours would be applicable. The SFC has prepared draft guidelines on disclosure of inside information and is separately consulting the public. The SFC's consultation paper is attached at **Annex 2** for reference.[8]

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[7] Please refer to the directives issued by the Committee of European Securities Regulators (CESR) in 2007 and 2009 – i.e. the sets of CESR guidance and information on the common operation of the Market Abuse Directive to the market (Reference: CESR/06-562b and CESR/09-219).

[8] Consequent upon the establishment of the proposed legislative regime, the SFC will publish guidelines, under section 399 of the SFO, to assist listed corporations to comply with their obligations

Sanctions

2.25 We have been working on this legislative proposal on the premise that it should seek to effectively enhance the quality and hence the reputation of our equity market without stifling market development. This would require a piece of legislation that would promote effective compliance with, and allow effective enforcement of, the disclosure obligations to be underpinned by adequate deterrent against a breach of these statutory obligations.

2.26 In the previous consultation, we had contemplated criminal sanctions against deliberate breaches of the statutory disclosure obligations. The market had expressed serious concerns about when a non-disclosure would amount to a breach of the statutory obligations and the consequence of criminal prosecution.

2.27 In developing the proposed disclosure obligation, we have engaged market participants to have a better grasp of the key areas to which we should pay attention in order to ensure that the proposal is practical and conducive to compliance. Since a breach of the proposed disclosure obligation might not involve a clear deliberate act or behaviour, there are market concerns on how PSI should be determined. If the directors/officers choose to "play it safe" and make disclosure indiscriminately, the market could be inundated with too much information which may not help the investors in making an informed decision.

2.28 A listed corporation is in possession of a large amount of information every day and may be engaged in business negotiations on a frequent basis. There could also be cost implication for listed corporations to determine whether a piece of information is PSI and hence should be disclosed.

2.29 We have carefully considered these market concerns. While the concept of "relevant information" has been used in the "insider dealing" regime for two decades, we acknowledge that it would take time for the market to accumulate experience in complying with the proposed disclosure obligation. We would therefore propose focussing on civil sanctions against non-disclosure of PSI by listed corporations. We would keep under review the

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to disclose inside information under the SFO. Comments on the SFC's draft guidelines should be sent to the SFC direct.

effectiveness of the regime, and consider the need for creating additional sanctions, including criminal sanctions, in the light of local and international market experience. From our research, the EU does not require its member states to impose criminal sanctions on breaches of statutory requirements to disclose PSI. In the United Kingdom, the Financial Services and Markets Act stipulates that civil fines may be imposed on such breaches.

2.30 We propose that directors and officers be obliged to take all reasonable measures from time to time to ensure that proper safeguards exist to prevent the corporation from breaching the statutory disclosure requirements. Should a listed corporation be found to have breached the statutory disclosure requirements, and that such a breach is a result of any intentional, reckless or negligent act or omission on the part of any individual director or officer, or that any individual director or officer has not taken all reasonable measures to prevent the listed corporation from breaching the statutory disclosure requirements, the director or officer would also be regarded as having breached the statutory disclosure requirements. Indicative draft legislative provisions are set out at **Annex 1** for reference.

2.31 We propose that one or more than one of the following civil sanctions be imposed on the listed corporations and individual directors or officers breaching the statutory disclosure requirements -

(a) a regulatory fine up to $8 million on the listed corporation and/or the director;

(b) disqualification of the director or officer from being a director or otherwise involved in the management of a listed corporation for up to five years;

(c) a "cold shoulder" order on the director or an officer (i.e. the person is deprived of access to market facilities) for up to five years;

(d) a "cease and desist" order on the listed corporation, director or officer (i.e. an order not to breach the statutory disclosure requirements again);

(e) an order that any body of which the director or officer is a member be recommended to take disciplinary action against

him; and

(f) payment of costs of the civil inquiry and/or the SFC investigation by the listed corporation, director or officer.

2.32 The MMT[9] has already had experience in dealing with cases concerning "inside information" and in considering the above orders (b) to (f). We propose extending the jurisdiction of MMT to cover cases regarding breaches of the statutory disclosure requirements. The proposed spectrum of sanctions would provide the MMT with sufficient flexibility to calibrate sanctions against breaches of the disclosure requirements for different degrees of severity.

2.33 The fines mentioned in paragraph 2.31(a) above are intended to be regulatory in nature, and the MMT will be required to comply with the principle of proportionality when determining the amount of regulatory fines to be imposed by reference to the facts and circumstances in a particular case. We propose to require the MMT to only order the payment of a fine which is, in the circumstances of the case, proportionate and reasonable in relation to the conduct of the listed corporations and/or director breaching the disclosure requirements. The factors that MMT may take into consideration include-

(a) the seriousness of the conduct of the one breaching the disclosure requirements;

(b) whether the conduct was intentional, reckless or negligent;

(c) whether the conduct may have damaged the integrity of the securities and futures market;

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[9] The MMT was established on 1 April 2003 under section 251 of the SFO to hear and determine market misconduct in accordance with Part XIII and Schedule 9 of the SFO. The Chairman of the MMT (who must be a judge or deputy judge of the Court of First Instance; a former Justice of Appeal of the Court of Appeal; or a former judge or former deputy judge of the Court of First Instance) is appointed by the Chief Executive on the recommendation of the Chief Justice. The Chairman sits with two members from the business and professional community. The MMT makes its findings to the civil standard of proof, i.e. on balance of probabilities. Every sitting of the Tribunal must be held in public unless the Tribunal considers, in the interests of justice, that a sitting (or any part of it) should be held in private. The MMT proceedings are civil and inquisitorial in nature. The MMT has powers to compel the giving of evidence including testimony on oath or affirmation. It has power to stay its own proceedings. The MMT may direct the SFC to investigate further and it can receive any further evidence so obtained.

(d) whether the conduct may have damaged the interest of the investing public;

(e) whether the conduct has resulted in a benefit to the person or any other person;

(f) the financial resources of the one breaching the disclosure requirements;

(g) whether the breach has resulted in any gain or loss avoided to the person in breach; and

(h) any conduct by the one breaching the disclosure requirements which-

i. previously resulted in it/him being convicted of an offence in Hong Kong;
ii. previously resulted in it/him being identified by the MMT as having engaged in any market misconduct;
iii. previously resulted in it/him being identified as an insider dealer.

2.34 To allow for a streamlined process to enforce the statutory disclosure requirement, we propose to empower the SFC to institute proceedings on such breaches before the MMT, without having to first submit the case to the Financial Secretary for his decision to do so[10]. In line with international practice, we propose applying this streamlined arrangement to other proceedings before the MMT.[11]

2.35 We propose that persons suffering pecuniary loss as a result of others breaching the disclosure requirements could rely on the MMT findings to take civil actions to seek compensation from those having breached the disclosure requirements. As a safeguard, no person is to be liable to pay such compensation unless it is fair, just and reasonable in the circumstances of the case that he should be so liable. This proposal draws reference from

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[10] Currently under sections 252(2) of SFO, it is the Financial Secretary who institutes proceedings before the MMT. Upon receipt of reports from the SFC, the Financial Secretary would seek legal advice from Department of Justice to assist him in deciding whether proceedings should be instituted.

[11] Other MMT proceedings cover six types of market misconduct, namely insider dealing, false trading, price rigging, disclosure of information about prohibited transactions, disclosure of false or misleading information inducing transactions and stock market manipulation.

section 281 of the SFO to enhance deterrence against non-compliance.

2.36 In addition, the SFC may, where appropriate, take action under the existing sections 213 and 214 of the SFO in respect of non-compliance with the statutory disclosure obligation, to apply for injunctive and disqualification orders.[12] These additional civil remedies would enhance the enforcement effectiveness of the statutory disclosure regime.

Question 3

(a) Do you agree to extend the jurisdiction of the MMT to handle breaches of the statutory disclosure requirements?

(b) Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

(c) Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

[12] Section 213 specifies that the SFC may apply to the Court of First Instance for an injunction against persons who have contravened provisions of the SFO. These court orders may, for example, restrain or prohibit the occurrence or the continued occurrence of breaches of the disclosure requirements, or direct the persons to take steps to restore the parties to any transaction to the position in which they were before the transaction was entered into. Where the business or affairs of a listed corporation have been conducted in a manner which generally is prejudicial to the interests of its members, the SFC may, under section 214 apply to the Court of First Instance to disqualify a person from being involved in the management of any corporation.

CHAPTER 3

REGULATORY STRUCTURE AND ENFORCEMENT

SFC as the Enforcement Authority

3.1 The SFC, under the SFO, has the statutory functions to, among other things, maintain and promote the fairness, efficiency, competitiveness, transparency and orderliness of the securities and futures industry; and to suppress illegal, dishonourable and improper practices in the securities and futures industry. It is responsible for taking steps to ensure that provisions in the SFO are complied with and to investigate breaches of such provisions. SEHK is the frontline regulator of all listing-related matters and of corporations listed on its markets. It carries out such functions by administering the Listing Rules. Such division of duties has been reflected in the Memorandum of Understanding Governing Listing Matters between the SFC and SEHK, signed on 28 January 2003 ("MOU"). We propose that the statutory disclosure requirements be enforced by the SFC. This will keep the spirit of the division of duties in the MOU intact.

3.2 We note that, during the previous consultation, the market had raised concerns about the division of responsibilities between the SFC and SEHK under the statutory regime. The market then pointed out that the statutory regime should -

(a) avoid dual regulation to minimize the possibility of conflicting decisions between two regulators and compliance costs;

(b) ensure certainty and clarity so that listed corporations would know whether they should deal with the SFC or SEHK; and

(c) ensure that SEHK's existing practice of interpreting the listing requirements will continue into the new regime to provide a smooth transition.

3.3 We agree that these general principles should be observed when the SFC and SEHK perform their respective functions under the statutory regime.

Requirements in the SEHK Listing Rules

3.4 Under the current approach, we are essentially turning the core part of the general obligation of disclosure currently under Rule 13.09(1) of the Rules Governing the Listing of Securities on SEHK and Rule 17.10(3) of the Rules Governing the Listing of Securities on the Growth Enterprise Market of SEHK into law. SEHK will, after conducting its public consultation and with the SFC's approval in accordance with established procedures, modify these general obligations of disclosure in the Listing Rules to dovetail them with the statutory provisions. SEHK will continue administering its Listing Rules.

Filing of Materials

3.5 SEHK will remain as the frontline regulator. Listed corporations would not need to file disclosure materials with the SFC directly. SEHK will remain as the point of contact at the frontline and listed corporations would continue to file materials with SEHK. Indeed, as proposed in paragraph 2.8, a listed corporation can comply with the requirement in disclosure manner by disseminating the inside information via HKEx-EPS.

Informal Consultation with the SFC

3.6 Under the current practice, listed corporations may approach SEHK for informal consultation with regard to the disclosure requirements under the Listing Rules. As the SFC will enforce the statutory regime under our proposal, the SFC (instead of SEHK) will provide such consultation service on the statutory PSI disclosure requirements after the commencement of the regime. The SFC expects that the questions for consultation will generally relate to the application of safe harbours, rather than deciding for a listed corporation whether certain information has to be disclosed. The SFC proposes providing such service for an initial period of 12 months, starting one month before the commencement of the statutory regime, and will review whether it is necessary to continue the service for an additional period.

3.7 SEHK will continue its informal consultation service with regard to the other disclosure requirements under the Listing Rules.

Question 4

Do you agree that the SFC should provide informal consultation for the listed corporations with regard to the statutory disclosure requirements, initially for a 12-month period?

Monitoring of Price and Volume Movements

3.8 Currently both the SFC and SEHK are monitoring price and volume movements of listed securities for their respective purposes. For SEHK, the monitoring primarily is to discharge its statutory duty under section 21 of SFO to ensure, as far as reasonably practicable, an orderly, informed and fair market. For the SFC, the monitoring facilitates the detection of possible market misconduct and breaches against the statutory provisions under the SFO. Under the proposed disclosure regime, both entities will continue with their monitoring. If SEHK detects a possible breach of the statutory disclosure obligation, it would inform the SFC for follow-up action.

Enforcement of the Statutory Disclosure Obligation

3.9 With the coming into force of the statutory regime, the SFC will assume the responsibility for handling all alleged breaches of the statutory disclosure obligation. We propose enabling the SFC to conduct investigation where it has reasonable cause to believe that a breach of the disclosure requirement may have taken place. This would be specified under section 182(1) of the SFO. The SFC will, upon receipt of a referral from the SEHK of a possible breach or upon detection of a possible breach at its own initiative, carry out investigation, under Divisions 3 and 4 of Part VIII (Supervision and Investigations) of the SFO, and pursue follow-up proceedings of the case. As at present, the SFC and SEHK would continue to liaise closely as to the processing of the relevant cases. While SEHK's intention is to modify the existing general obligations of disclosure in the Listing Rules to dovetail them with the statutory provisions (as mentioned in paragraph 3.4 above), possible breaches of the statutory PSI disclosure requirements will take precedence for investigation and enforcement by the SFC. If, however, the facts also demonstrate a possible breach of other requirements under the Listing Rules, SEHK may bring disciplinary action based on those infringements.

3.10 The SFC and SEHK will consider the need for amending the MOU to set out their respective duties under the proposed disclosure regime and to minimize possible duplication of regulatory effort.

Question 5

Do you think the administration and enforcement arrangements proposed by the SFC and SEHK in paragraphs 3.8 – 3.9 are appropriate? Do you have any comments on the respective roles of the SFC and SEHK to further enhance clarity?

CHAPTER 4

CONCLUSIONS

4.1 The proposed statutory disclosure regime represents an important step forward in enhancing the disclosure culture among listed corporations. Compared with the existing regime under the SEHK Listing Rules, the proposed statutory regime has the advantages of -

(a) creating a formal statutory obligation for compliance with certain PSI disclosure requirements;

(b) providing a clearer set of PSI disclosure requirements with obligations and safe harbours explicitly set out in the law and the SFC's guidelines to facilitate listed corporations in ensuring compliance;

(c) allowing the SFC to resort to its powers under the SFO to conduct more effective investigation into a suspected breach of these statutory requirements;

(d) enabling all alleged breaches to be heard by an independent statutory body (the MMT);

(e) granting direct access for the SFC to institute proceedings before the MMT without having first to report to the Financial Secretary for his decision to do so, therefore allowing a streamlined process for hearings of alleged breaches of PSI disclosure requirements;

(f) imposing a wide range of statutory civil sanctions in respect of any proven breach of these PSI disclosure requirements;

(g) enabling persons suffering pecuniary loss as a result of others breaching the statutory disclosure requirements to rely on the results of the MMT proceedings to take civil actions against those breaching the requirements for compensation; and

(h) bringing our regime more in line with overseas jurisdictions, such as the EU (including the United Kingdom), in the

approach of defining PSI in the statute and giving statutory status to the requirements to disclose PSI.

These together would help demonstrate to the market our commitment to enhancing market transparency and quality, and would be an important step in enhancing Hong Kong's position as a leading international financial centre and the premier capital formation centre in the region.

LIST OF QUESTIONS FOR CONSULTATION

Chapter 2 Question 1 (a) Do you agree with the proposal to adopt the existing definition of "relevant information" from the insider dealing regime under the SFO to define PSI?

(b) Do you agree that a listed corporation should be obliged to disclose to the public as soon as practicable any "inside information" that has come to its knowledge, and that it should be regarded to have knowledge of the inside information if a director or an officer has come into possession of that information in the course of the performance of his duties?

(c) Do you agree with the proposal that the disclosure must be made in a manner that can provide for equal, timely and effective access by the public to the information disclosed?

Question 2 (a) Do you agree to the provision of the four proposed safe harbours?

(b) Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?

(c) Do you think that the legislation should provide for additional safe harbours? If so, what are these additional safe harbours?

(d) Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?

Question 3 (a) Do you agree to extend the jurisdiction of the MMT to handle breaches of the statutory disclosure requirements?

(b) Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

(c) Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

Chapter 3 Question 4 Do you agree that the SFC should provide informal consultation for the listed corporations with regard to the statutory disclosure requirements, initially for a 12-month period?

Question 5 Do you think the administration and enforcement arrangements proposed by the SFC and SEHK in paragraphs 3.8 – 3.9 are appropriate? Do you have any comments on the respective roles of the SFC and SEHK to further enhance clarity?

Indicative Draft Legislative Provisions on Disclosure Obligations and Safe Harbours

The Securities and Futures Ordinance (Cap. 571) is proposed to be amended by adding –

"PART IIIA

DISCLOSURE REQUIREMENTS RELATING TO LISTED CORPORATIONS

Division 1 – Interpretation

101A. Interpretation of Part IIIA

(1) In this Part –

"breach of a disclosure requirement" (違反披露規定) – see subsection (2);

"derivatives" (衍生工具), in relation to listed securities, means any of the following (whether or not they are listed and regardless of who issued or made them) –

(*a*) rights, options or interests (whether described as units or otherwise) in, or in respect of, the listed securities;

(*b*) contracts, the purpose or pretended purpose of which is to secure or increase a profit or avoid or reduce a loss, wholly or partly by reference to the price or value, or a change in the price or value, of –

(i) the listed securities; or

(ii) any rights, options or interests referred to in paragraph (*a*);

(*c*) rights, options or interests (whether described as units or otherwise) in, or in respect of –

(i) any rights, options or interests referred to in paragraph (*a*); or

(ii) any contracts referred to in paragraph (*b*);

(*d*) instruments or other documents creating, acknowledging or evidencing any rights, options or interests or any contracts referred to in paragraph (*a*), (*b*) or (*c*), including certificates of interest or participation in, temporary or interim certificates for, receipts (including depositary receipts) in respect of, or warrants to subscribe for or purchase –

(i) the listed securities; or

(ii) the rights, options or interests or the contracts;

"inside information" (內幕消息), in relation to a listed corporation, means specific information that –

(*a*) is about –

(i) the corporation;

(ii) a shareholder or officer of the corporation; or

(iii) the listed securities of the corporation or their derivatives; and

(*b*) is not generally known to the persons who are accustomed or would be likely to deal in the listed securities of the corporation but would if generally known to them be likely to materially affect the price of the listed securities;

"listed" (上市) means listed on a recognized stock market – see also subsection (3);

"listed corporation" (上市法團) means a corporation which has issued securities that are, at the time of the breach of a disclosure requirement in relation to the corporation, listed;

"listed securities" (上市證券) means –

(*a*) securities which, at the time of the breach of a disclosure requirement in relation to a corporation, have been issued by the corporation and are listed;

(*b*) securities which, at the time of the breach of a disclosure requirement in relation to a corporation, have been issued by the corporation and are not listed, but which, at that time, it is reasonably foreseeable will be and which, in fact, are subsequently listed; or

(*c*) securities which, at the time of the breach of a disclosure requirement in relation to a corporation, have not been issued by the corporation and are not listed, but which, at that time, it is reasonably foreseeable will be and which, in fact, are subsequently so issued and listed;

"securities" (證券) means –

(*a*) shares, stocks, debentures, loan stocks, funds, bonds or notes of, or issued by, or which it is reasonably foreseeable will be issued by, a body, whether incorporated or unincorporated, or a government or municipal government authority;

(*b*) rights, options or interests (whether described as units or otherwise) in, or in respect of, such shares,

stocks, debentures, loan stocks, funds, bonds or notes;

(*c*) certificates of interest or participation in, temporary or interim certificates for, receipts for, or warrants to subscribe for or purchase, such shares, stocks, debentures, loan stocks, funds, bonds or notes;

(*d*) interests, rights or property, whether in the form of an instrument or otherwise, commonly known as securities; or

(*e*) interests, rights or property, whether in the form of an instrument or otherwise, prescribed by notice under section 392 as being regarded as securities in accordance with the terms of the notice.

(2) For the purposes of this Part, a listed corporation is in breach of a disclosure requirement if any of the requirements in section 101B or 101C is contravened in relation to the corporation.

(3) For the purposes of this Part, securities listed on a recognized stock market are to continue to be regarded as listed during any period of suspension of dealings in those securities on that market.

Division 2 – Disclosure of inside information

101B. Requirement for listed corporations to disclose inside information

(1) A listed corporation must, as soon as practicable after any inside information has come to its knowledge, disclose the information to the public.

(2) For the purposes of subsection (1), inside information has come to the knowledge of a listed corporation if an officer of the

corporation has, or ought reasonably to have, come into possession of the information in the course of performing functions as an officer of the corporation.

(3) A listed corporation fails to disclose the inside information required under subsection (1) if –

(*a*) the information disclosed is false or misleading as to a material fact, or is false or misleading through the omission of a material fact; and

(*b*) an officer of the corporation knows or ought reasonably to have known that, or is reckless or negligent as to whether, the information disclosed is false or misleading as to a material fact, or is false or misleading through the omission of a material fact.

(4) For the avoidance of doubt, subsection (3) does not limit the circumstances in which a listed corporation may fail to disclose the inside information required under subsection (1).

(5) This section is subject to sections 101C, 101D, 101E and 101F.

101C. Manner of disclosure

(1) A disclosure under section 101B must be made in a manner that can provide for equal, timely and effective access by the public to the inside information disclosed.

(2) Without limiting the manner of disclosure permitted under subsection (1), a listed corporation complies with that subsection if it has disseminated the inside information required to be disclosed under section 101B through an electronic publication system operated by a recognized exchange company for disseminating information to the public.

101D. Exceptions to section 101B

(1) A listed corporation is not required to disclose any inside information under section 101B if and so long as –

(*a*) the corporation takes reasonable precautions for preserving the confidentiality of the information;

(*b*) the confidentiality of the information is preserved; and

(*c*) one or more of the following applies –

(i) the disclosure is prohibited under, or constitutes a contravention of a restriction imposed by, an enactment or an order of a court;

(ii) the information concerns an incomplete proposal or negotiation the outcome of which may be prejudiced if the information is disclosed prematurely;

(iii) the information is a trade secret;

(iv) the information concerns the provision of liquidity support by the Exchange Fund established by the Exchange Fund Ordinance (Cap. 66) or by a central bank (including a central bank of a place outside Hong Kong) to the corporation or, if the corporation is a member of a group of companies, to any other member of the group;

(v) the disclosure is waived by the Commission under section 101E(1), and any condition imposed under section

101E(2) in relation to the waiver is complied with.

(2) For the purposes of subsection (1)(*a*), a listed corporation has not failed to take reasonable precautions for preserving the confidentiality of any inside information merely because the corporation has, in the ordinary course of business, disclosed the information to any person who –

(*a*) requires the information to perform the person's functions in relation to the corporation; and

(*b*) by virtue of any enactment, rule of law, contract, or the articles of association of the corporation, is under a duty to the corporation not to disclose the information to any other person.

101E. Waiver

(1) The Commission may, on an application by a listed corporation, grant a waiver in relation to the disclosure of any inside information required to be disclosed under section 101B if the Commission is satisfied that the disclosure is prohibited under, or constitutes a contravention of a restriction imposed by, the legislation of a place outside Hong Kong or an order of a court exercising jurisdiction under the law of a place outside Hong Kong.

(2) The Commission may grant a waiver under subsection (1) subject to any condition that it considers appropriate to impose.

101F. Commission may make rules to prescribe circumstances in which section 101B does not apply

(1) The Commission, after consultation with the Financial Secretary, may, if it considers it is in the public interest to do so, make

rules to prescribe the circumstances in which a listed corporation is not required to disclose any inside information under section 101B.

(2) Section 101B does not apply in the circumstances prescribed by rules made under subsection (1).

101G. Duty of officers of listed corporations

(1) Every officer of a listed corporation must take all reasonable measures from time to time to ensure that proper safeguards exist to prevent the breach of a disclosure requirement in relation to the corporation.

(2) If a listed corporation is in breach of a disclosure requirement, an officer of the corporation –

(*a*) whose intentional, reckless or negligent act or omission has resulted in the breach; or

(*b*) who has not taken all reasonable measures to prevent the breach,

is also in breach of that requirement.".

Annex 2

The Securities and Futures Commission's Consultation Paper on the Draft Guidelines on Disclosure of Inside Information

SECURITIES AND FUTURES COMMISSION
證券及期貨事務監察委員會

SFC
證監會

Consultation Paper on the Draft Guidelines on Disclosure of Inside Information

March 2010

Consultation

This consultation document invites public comments on the draft **Guidelines on Disclosure of Inside Information** ("**Guidelines**") which the Securities and Futures Commission ("**SFC**") proposes to issue under section 399 of the Securities and Futures Ordinance (Cap. 571) ("**SFO**").

Introduction

1. The SFC's proposed issue of the Guidelines is related to the Government's proposals to give statutory backing to the obligation on listed corporations to disclose price sensitive information.

2. To help market participants better understand the Government's proposals, the SFC proposes to issue the Guidelines to illustrate how the statutory disclosure requirements would operate in practice and what the compliance issues are. A copy of the draft Guidelines, attached as **Appendix** to this document, is now released for public consultation.

3. This document should be read in conjunction with the "Consultation Paper on The Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations" published by the Financial Services and Treasury Bureau concurrently.

4. The SFC invites interested parties to submit written comments on the draft Guidelines no later than 28 June 2010. Any person wishing to comment should provide details of any organisation whose views they represent. In addition, persons suggesting alternating approaches are encouraged to submit proposed text to be incorporated into the draft Guidelines.

Background to the Guidelines

5. The Guidelines seek to provide guidance to assist listed corporations to comply with their obligations to disclose price sensitive information under the statutory disclosure requirements.

6. Under the Government's proposals, a listed corporation is obliged to disclose to the public as soon as practicable any "price sensitive information" that has come to the knowledge of the listed corporation. In defining "price sensitive information", it is proposed that the definition of "price sensitive information" will replicate the definition of "relevant information" in section 245 of the SFO that specifies the information that the insider dealing regime in the SFO prohibits a person from using when dealing in the securities of a listed corporation. It is proposed that the SFO will use the term "**inside information**" to refer to "price sensitive information" that a listed corporation needs to disclose.

7. As the definition of the new term "inside information" is the same as that of "relevant information" used in section 245 of the SFO in connection with insider dealing, the Guidelines quote the decisions of the tribunals in Hong Kong with regard to the meaning of "relevant information". The decisions of the tribunals in relation to insider dealing, and "relevant information" are relevant for the purposes of determining what constitutes "inside information" and may assist in determining when an obligation to disclose information arises under the statutory disclosure regime.

8. Although the Guidelines summarise the key aspects of what has been viewed by the tribunals in Hong Kong as constituting "relevant information", it is important to recognise that the set of circumstances or events will not be the same in each case and every case turns on its own facts. Understanding the principles underlining the obligations will help listed corporations and their officers to comply with the disclosure requirements. The summary of guidance is not intended to be exhaustive and may not represent the latest legal authority.

9. The Guidelines explain the circumstances under which a listed corporation may delay the disclosure of inside information and how the safe harbours would operate in different circumstances. To clarify issues that may be raised by market participants, the Guidelines provide illustrative examples and discuss issues on particular situations and circumstances.

10. In preparing the Guidelines, we have made reference to the guidance issued in the European Union, the United Kingdom and Australia as to the operation of the disclosure regime in the respective markets to ensure that the proposed Guidelines are in line with international practices.

Other matters

11. Please note that the names of the commentators and the contents of their submissions may be published, in whole or in part, on the SFC's website and in other documents to be published by the SFC. In this connection, please read the Personal Information Collection Statement attached to this consultation document.

12. You may not wish your name and/or submission to be published by the SFC. If this is the case, please state that you wish your name and/or submission to be withheld from publication when you make your submission.

13. Written comments may be submitted as follows:

By mail:	The Securities and Futures Commission 8/F Chater House 8 Connaught Road Central Hong Kong Attention: Corporate Finance Division
By fax to:	(852) 2810-5385
By online submission at:	http://www.sfc.hk
By e-mail to:	cfdconsult@sfc.hk

Personal information collection statement

1. This Personal Information Collection Statement ("**PICS**") is made in accordance with the guidelines issued by the Privacy Commissioner for Personal Data. The PICS sets out the purposes for which your Personal Data[1] will be used following collection, what you are agreeing to with respect to the Commission's use of your Personal Data and your rights under the Personal Data (Privacy) Ordinance (Cap. 486) ("**PDPO**").

Purpose of collection

2. The Personal Data provided in your submission to the Commission in response to this consultation paper may be used by the Commission for one or more of the following purposes:

   (a) to administer the relevant provisions[2] and codes and guidelines published pursuant to the powers vested in the Commission;

   (b) in performing the Commission's statutory functions under the relevant provisions;

   (c) for research and statistical purposes; or

   (d) for other purposes permitted by law.

Transfer of personal data

3. Personal Data may be disclosed by the Commission to members of the public in Hong Kong and elsewhere as part of the public consultation on this consultation paper. The names of persons who submit comments on this consultation paper, together with the whole or any part of their submissions, may be disclosed to members of the public. This will be done by publishing this information on the Commission website and in documents to be published by the Commission during the consultation period or at its conclusion.

Access to data

4. You have the right to request access to and correction of your Personal Data in accordance with the provisions of the PDPO. Your right of access includes the right to obtain a copy of your Personal Data provided in your submission on this consultation paper. The Commission has the right to charge a reasonable fee for processing any data access request.

Retention

5. Personal Data provided to the Commission in response to this consultation paper will be retained for such period as may be necessary for the proper discharge of the Commission's functions.

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[1] Personal Data means personal data as defined in the Personal Data (Privacy) Ordinance (Cap. 486).

[2] Defined in Schedule 1 of the SFO to mean provisions of the SFO and subsidiary legislation made under it; and provisions of Parts II and XII of the Companies Ordinance (Cap. 32) so far as those Parts relate directly or indirectly, to the performance of functions relating to prospectuses; the purchase by a corporation of its own shares; a corporation giving financial assistance for the acquisition of its own shares etc.

Enquiries

6. Any enquiries regarding the Personal Data provided in your submission on this consultation paper, or requests for access to Personal Data or correction of Personal Data, should be addressed in writing to:

The Data Privacy Officer
The Securities and Futures Commission
8/F Chater House
8 Connaught Road Central
Hong Kong

A copy of the Privacy Policy Statement adopted by the Commission is available upon request.

Appendix

Guidelines on Disclosure of Inside Information

Draft

[ ] 2010

Table of Contents

Introduction

1. On [ ] ("**Commencement Date**"), amendments to the Securities and Futures Ordinance ("**SFO**") came into effect to provide for a new Part IIIA under the SFO giving statutory backing to one of the most important principles in the Rules Governing the Listing of Securities ("**Listing Rules**") on the Stock Exchange of Hong Kong Limited ("**Stock Exchange**"). The provisions under Part IIIA impose a general obligation of disclosure of price sensitive, or "inside" information by listed corporations ("**corporations**")[1].

2. These Guidelines are published by the Securities and Futures Commission ("**SFC"**) under section 399 of the SFO to assist corporations to comply with their obligations to disclose inside information under Part IIIA of the SFO. However, they are not an exhaustive examination of the disclosure obligations as set out in the SFO nor can they be relied upon as an authoritative legal opinion. The obligations to disclose inside information depend upon the facts of each case and you should seek independent legal advice if you are in doubt.

3. These Guidelines provide examples and discuss issues on particular situations to illustrate the SFC's views on the operation of the provisions as set out in the SFO. They do not have the force of law.

4. As the definition of the new term "inside information" in Part IIIA of the SFO is the same as that of "relevant information" used in section 245 of the SFO in connection with insider dealing, the Guidelines have quoted the decisions of the tribunals in Hong Kong with regard to the meaning of "relevant information". The decisions of the tribunals in relation to insider dealing, and "relevant information" are relevant for the purposes of determining what constitutes "inside information" and may assist in determining when an obligation to disclose information arises under the SFO.

5. Although the Guidelines summarise the key aspects of what has been viewed by the tribunals in Hong Kong as constituting "relevant information", it is important to recognise that the set of circumstances or events will not be the same in each case and every case turns on its own facts. Understanding the principles underlining the obligations will help listed corporations and their officers to comply with the disclosure requirements. This summary is not intended to be exhaustive, is included for guidance only, and may not represent the latest legal authority.

6. The term "inside information" is used in the legislation because the provisions are concerned with information that is known to an officer, or "insider", of a corporation but not generally known to the market. The term "inside information" is also used in a similar context in the securities regulations of the European Union.

Background

7. The statutory requirements to disclose inside information are central to the orderly operation and integrity of the market and underpin the maintenance of a fair and informed market.

[1] Where depositary receipts are issued, the corporation whose shares in respect of which the depositary receipts are issued is the listed corporation for the purposes of the SFO.

8. The SFO sets out the minimum standards with which corporations are required to comply. To comply with the obligations, corporations should consider their own circumstances when deciding whether any inside information arises and how it should be disclosed properly to the public. Disclosure should be made in a manner that provides for equal, timely and effective access by the public to the information disclosed. For good corporate governance, corporations should aim at disclosing appropriate and quality information to the public on a timely and equal basis, and not at merely meeting the minimum regulatory requirements. This also makes good business sense as it has been repeatedly shown that investors give a premium rating to transparent companies.

9. The SFC acknowledges that it is important to strike an appropriate balance between encouraging timely disclosure of inside information and preventing premature disclosure of impending negotiations or incomplete proposals which might unduly prejudice a corporation's legitimate interests. In this regard, the SFO provides for appropriate safe harbours to permit a corporation to withhold the disclosure of inside information in specified circumstances.

10. From one month before the Commencement Date, the SFC will provide a consultation service to assist corporations understand how to apply the disclosure provisions. We will provide the consultation service initially for a period of 12 months and will then review whether it is necessary to continue the service for an additional period. We envisage that most questions will relate to the application of the Safe Harbours. The SFC is not in a position to judge whether in the circumstances of a particular corporation certain information is likely to materially affect the price of a corporation's listed securities, and accordingly, is not able to offer advice to a corporation on whether a particular piece of information is inside information.

What may constitute inside information?

11. Section 101B(1) of the SFO states that –

"*A listed corporation must, as soon as practicable after any inside information has come to its knowledge, disclose the information to the public*."

12. Section 101A(1) of the SFO states that " 'inside information', in relation to a listed corporation, means specific information that –

(a) is about –

(i) the corporation;

(ii) a shareholder or officer of the corporation; or

(iii) the listed securities of the corporation or their derivatives; and

(b) is not generally known to the persons who are accustomed or would be likely to deal in the listed securities of the corporation but would if generally known to them be likely to materially affect the price of the listed securities."

13. The definition of **inside information** is the same as that of "relevant information" used in section 245 of the SFO which applies to insider dealing. The term "relevant information" has been the subject of consistent and definitive interpretation by the

tribunals in Hong Kong over many years and those decisions will continue to offer guidance as to the meaning of the new term **inside information**.

14. Paragraphs 15 to 28 below summarise the key aspects of what has been viewed by the tribunals as constituting "relevant information". A list of cases handled by the Insider Dealing Tribunal and the Market Misconduct Tribunal relevant to the interpretation of "relevant information" is set out in **Appendix A**. It is important to recognise that the set of factual circumstances or events will not be the same in each case. In particular, the circumstances in which insider dealings are regarded to have taken place would be different from the context in which the obligation to disclose may arise and thus the interpretative guidance available from these decisions may not apply. Understanding the principles underlining the obligations will help listed corporations and their officers to comply with the disclosure requirements. This summary is not intended to be exhaustive.

15. There are three key elements comprised in the concept of **inside information**. They are –

    (a) the information about the particular corporation must be **specific**;

    (b) the **information must not be generally known** to that segment of the market which deals or which would likely deal in the corporation's securities; and

    (c) the information would, if so known be **likely to have a material effect on the price of the corporation's securities**[2].

Inside information must be specific information

16. Inside information must be specific information. Specific information is information which has the following characteristics –

    (a) The information is capable of being identified, defined and unequivocally expressed.

    Information concerning a company's affairs is sufficiently specific if it carries with it such particulars as to a transaction, event or matter, or proposed transaction, event or matter, so as to allow that transaction, event or matter to be identified and its nature to be coherently described and understood.[3]

    (b) The information may not be precise.

    It is not necessary that all particulars or details of the transaction, event or matter be precisely known. Information may still be specific even though it has a vague quality and may be broad which allows room, even substantial room, for further particulars[4]. For instance, information that a company is having a financial crisis would be regarded to be specific, as would contemplation of a forthcoming share placing even if the details are not known. However specific information is to be

[2] See p.34 of the IDT report dated 6 August 2009 on Harbour Ring International Holdings Limited

[3] See p.58-59 of the IDT report dated 2 April 2004 and 8 July 2004 on Firstone International Holdings Limited

[4] See p.235-236 of the IDT report dated 5 August 1995 on Public International Investments Ltd

contrasted with mere rumour, vague hopes and worries, and with unsubstantiated conjecture.[5]

(c) Information on a transaction contemplated or at a preliminary state of negotiation can be specific information but vague hopes and wishful thinking may not be specific information.

The fact that a transaction is only contemplated or under negotiation and has not yet been subjected to any formal or informal final agreement does not necessarily cause the information concerning that contemplated course of action or negotiation to be non-specific. However, vague hope or wishful thinking that a transaction will occur or come to fruition does not amount to sufficient contemplation or preliminary negotiation of that transaction.

To constitute specific information, a proposal, whether described as under contemplation or at a preliminary stage of negotiation, should have more substance than merely being at the stage of a vague exchange of ideas or a "fishing expedition". Where negotiations or contacts have occurred, there should be a substantial commercial reality to such negotiations which goes beyond a merely exploratory testing of the waters and which is at a more concrete stage where the parties intend to negotiate with a realistic view to achieving an identifiable goal.[6]

Inside information must be information that is not generally known

17. By its very nature, inside information is information which is known only to a few and not generally known to the market, the market being defined as those persons who are accustomed or would be likely to deal in the listed securities of that corporation.[7] In some instances, the investor group or class who are accustomed or would be likely to deal in the listed securities of that corporation may be a large one, comprising not only professional dealers and investors with elaborate networks for obtaining information, but also those of the investing public including small investors who deal in the particular category of stocks to which the corporation belongs.[8]

18. Even though there might be rumours, media speculation or market expectation as to an event or a set of circumstances of a corporation, these cannot be equated with information which is generally known to the market. There is a clear distinction between actual knowledge of the market about a hard fact which is properly disclosed by the corporation and speculation or expectation of what might have happened about a corporation which obviously requires proof.[9]

19. It is not uncommon that information relating to a corporation is found in press articles, analyst research reports or electronic subscription database, which may consist of published historical information, market commentary, speculation, rumour or even information leaked from various sources. However, press speculation, reports and

[5] See p.20-21 of the IDT report dated 8 September 2006 and 14 December 2006 on Asia Orient Holdings Limited

[6] See p.60-61 of the IDT report dated 2 April 2004 and 8 July 2004 on Firstone International Holdings Limited

[7] See p.70 of the IDT report dated 10 April 2000 and 15 June 2000 on Hanny Holdings Limited

[8] See p.237-238 of the IDT report dated 5 August 1995 on Public International Investments Ltd

[9] See p.258 of the IDT report dated 5 August 1995 on Public International Investments Ltd

rumours in the market cannot be contended to be information generally known to the market, even though in some cases the press reports might have a wide circulation.[10]

20. Notwithstanding the above, a piece of information is regarded as generally known if it consists of readily observable matter such as general external developments e.g. changes in commodity prices, foreign exchange rates and interest rates, outbreak of pandemic diseases and occurrence of natural disasters or general public information e.g. disclosure of interests by directors and shareholders pursuant to Part XV of the SFO.

Inside information is information that is likely to have a material effect on the price of the listed securities

21. Corporations with potential inside information need to assess promptly whether or not the information is likely to have a material price effect. It would not be sufficient to meet the test of "likely to have a material price effect" if the information is likely to cause a mere fluctuation or slight change in price. For information to constitute inside information, there must be likelihood that the information would cause a change in the price of sufficient degree to amount to a material change.[11]

22. Generally information that is likely to have a material effect on the price of the listed securities is important information concerning a corporation. But the converse is not necessarily true. Some important information or information of great interest concerning a corporation may excite comment but may not be information that would be likely to have a material effect. Similarly, some important information may be of a neutral or mixed nature that may influence some investors to buy and others to sell, but which would not be likely to affect the price either up or down to a material degree.[12]

23. The test of whether the information is likely to materially affect the price is a hypothetical one in that it has to be applied at the time the information becomes available. The exercise in determining how the general investor would behave if he is in possession of that piece of information has necessarily to be an assessment.[13]

24. It is clear that fixed thresholds of price movements or quantitative criteria alone are not a suitable means of determining the materiality of a price movement. For example, the volatility of "blue-chip" securities is typically less than that of small, less liquid stocks and "blue-chip" securities usually move within ranges narrower than those of small stocks. While a certain percentage movement for a small company stock might be seen immaterial, the same (or even lower) percentage movement if applied to a large company stock might be considered material by virtue of the stock's nature and size. In determining whether a material effect is likely to occur, the following factors should be taken into consideration –

    (a) the anticipated magnitude of the event or the set of circumstances in question in the context of the totality of the corporation's activity;

    (b) the relevance of the information as regards the main determinants of the price of the listed securities;

[10] See p.57-58 of the IDT report dated 22 February 1990 on Lafe Holdings Limited

[11] See p.58-59 of the IDT report dated 22 February 1990 on Lafe Holdings Limited

[12] See p.20 of the IDT report dated 10 March 2005 on HKCB Holding Company Ltd & Hong Kong China Ltd

[13] See p.19-20 of the IDT report dated 10 March 2005 on HKCB Holding Company Ltd & Hong Kong China Ltd

(c) the reliability of the source;

(d) market variables that affect the price of the listed securities in question (These variables could include prices, returns, volatilities, liquidity, price relationships among securities, volume, supply, demand, etc.).

25. Whilst the actual magnitude of the share movement once the information becomes publicly known indicates the extent of probable change the information might have brought about was it known to the market at the time, this evaluation is by no means conclusive. It is possible that the actual price change on the day the information is released is moderate because of the mixed impact arising from the information released and other extraneous factors or considerations. It is possible that a material price movement may have been pre-empted by the fact that the share price has already declined substantially in the period leading up to the release of the information. Care must be taken to ascertain whether and how the investors' response once the information is stripped of its confidentiality and becomes public knowledge is attributable to the information released and / or affected by other events or considerations.[14]

Management accounts

26. In the ordinary course of running the business, directors and officers are likely to possess information concerning the corporation not generally known to the market. It is therefore necessary to distinguish between information about the day-to-day activities, and on the other hand, significant events and matters which are likely to change a corporation's course or indicate that there has been a change in its course.[15]

27. Generally the mere knowledge of the likely annual or interim accounts prior to their publication or internal management accounts would not be specific information. However knowledge of substantial losses or profits made by a corporation even through the precise magnitude is not yet clear would be specific information and accordingly may be inside information. The facts and figures in every case will be different and every case turns on its own facts. To constitute inside information the difference between the results which the market might predict and the results the directors or officers know must be significant.[16]

28. In assessing what results the market might predict for a corporation, account must be taken of information previously disclosed by the corporation including past results, statements and any forecasts issued by the corporation. Reference should also be made to profit projections by analysts and the availability of data and information about the corporation in financial journals and publications from which a sophisticated investor may logically deduce the corporation's results. However, it would be inadvisable to consider these research reports or financial publications to be information generally known to the market because the market means "the persons who are accustomed or would be likely to deal in the listed securities of the corporation" which might include smaller investors who are unable to perform or follow professional analyses.[17]

[14] See p.59-60 of the IDT report dated 22 February 1990 on Lafe Holdings Limited

[15] See p.72-73 of the IDT report dated 10 April 2000 and 15 June 2000 on Hanny Holdings Limited

[16] See p.35-36 of the IDT report dated 23 July 1998 of Ngai Hing Hong Company Limited

[17] See p.62-70 of the IDT report dated 10 July 1997 on Chevalier (OA) International Limited

Examples of possible inside information concerning the corporation

29. There are many events and circumstances which may affect the price of the listed securities of a corporation. It is vital for the corporation to make a prompt assessment of the likely impact of these events and circumstances on its share price and decide consciously whether the event or the set of circumstances constitutes inside information that needs to be disclosed. The following are common examples of such events or circumstances where a corporation should consider whether a disclosure obligation arises.

- Changes in performance, or the expectation of the performance, of the business;
- Changes in financial condition, e.g. cashflow crisis, credit crunch;
- Changes in control and control agreements;
- Changes in directors and (if applicable) supervisors;
- Changes in directors' service contracts;
- Changes in auditors or any other information related to the auditors' activity;
- Changes in the share capital, e.g. new share placing, bonus issue, rights issue, share split, share consolidation and capital reduction;
- Issue of debt securities, convertible instruments, options or warrants to acquire or subscribe for securities;
- Takeovers and mergers (corporations will also need to comply with the Codes on Takeovers and Mergers and Share Repurchases that include specific disclosure obligations);
- Purchase or disposal of equity interests or other major assets or business operations;
- Formation of a joint venture;
- Restructurings, reorganizations and spin-offs that have an effect on the corporation's assets, liabilities, financial position or profits and losses;
- Decisions concerning buy-back programmes or transactions in other listed financial instruments;
- Changes to the memorandum and articles (or equivalent constitutional documents);
- Filing of winding up petitions, the issuing of winding up orders or the appointment of provisional receivers or liquidators;
- Legal disputes and proceedings;
- Revocation or cancellation of credit lines by one or more banks;

- Changes in value of assets (including advances, loans, debts or other forms of financial assistance);
- Insolvency of relevant debtors;
- Reduction of real properties' values;
- Physical destruction of uninsured goods;
- New licenses, patents, registered trademarks;
- Decrease or increase in value of financial instruments in portfolio which include financial assets or liabilities arising from futures contracts, derivatives, warrants, swaps protective hedges, credit default swaps;
- Decrease in value of patents or rights or intangible assets due to market innovation;
- Receiving acquisition bids for relevant assets;
- Innovative products or processes;
- Changes in expected earnings or losses;
- Orders received from customers, their cancellation or important changes;
- Withdrawal from or entry into new core business areas;
- Changes in the investment policy;
- Changes in the accounting policy;
- Ex-dividend date, changes in dividend payment date and amount of dividend; changes in dividend policy;
- Pledge of the corporation's shares by controlling shareholders; or
- Changes in a matter which was the subject of a previous announcement.

30. However, the above list of events or circumstances should not be treated as definitive in terms of meaning that the information in question, if disclosed, will have a material price effect. It is a **non-exhaustive and purely indicative** list of the type of events or circumstances which might constitute inside information. The fact that an event or a set of circumstances does not appear on the list does not mean it cannot be inside information. Nor does inclusion in the list mean that it automatically is inside information. It is the materiality of the information in question that needs to be considered. Information which is likely to materially affect the price of the securities should be disclosed.

31. Moreover, corporations should take into account that the materiality of the information in question will vary widely from entity to entity, depending on a variety of factors such as the entity's size, its course of business and recent developments, the market sentiment about the entity and the sector in which it operates. What may constitute material information to one party to a contract may be immaterial to another party. A cancellation

of credit line by a bank which is material to an entity facing liquidity problems may be immaterial to another entity which is highly liquid.

When and how should inside information be disclosed?

32. A corporation must disclose any inside information to the public *"as soon as practicable"* unless the information falls within any of the Safe Harbours as provided in the SFO. For this purpose, "as soon as practicable" means that the corporation should immediately take all necessary steps that are reasonable in the circumstances to disclose the information to the public.

33. Before the information is fully disclosed to the public, the corporation should ensure that the information is kept strictly confidential. Where the corporation believes that the necessary degree of confidentiality cannot be maintained or that confidentiality may have been breached, it should immediately disclose the information to the public.

34. If a corporation needs time to clarify the details of, and the impact arising from, an event or a set of circumstances before it is in a position to issue a full announcement to properly inform the public, the corporation should consider issuing a "holding announcement" which –

    (a) details as much of the subject matter as possible; and

    (b) sets out reasons why a fuller announcement cannot be made.

    The corporation should make a full announcement as soon as possible.

35. There are circumstances where confidentiality has not been maintained and the corporation is not able to make an announcement, be it a full announcement or a holding announcement. In such cases, the corporation should consider applying for a suspension of trading in its securities until disclosure can be made. The fact that trading in the securities of the corporation is suspended in no way lessens the obligations of a corporation to disclose inside information to the public as soon as practicable.

36. Section 101C(1) of the SFO states that –

    "*A disclosure under section 101B must be made in a manner that can provide for equal, timely and effective access by the public to the inside information disclosed*."

37. Section 101C(2) of the SFO states that –

    "Without limiting the manner of disclosure permitted under subsection (1), a listed corporation complies with that subsection if it has disseminated the inside information required to be disclosed under section 101B through an electronic publication system operated by a recognized exchange company for disseminating information to the public."

38. To fulfil the obligation to disclose to the public, the corporation should disclose inside information to the market as a whole so that all users of the market have equal and simultaneous access to the same information.

39. The SFC considers the disclosure obligation to ensure that the public has equal, timely and effective access to the information is only likely to be satisfied if the corporation

disseminates the information via the electronic publication system operated by the Stock Exchange in a manner specified by the Stock Exchange.

40. Dissemination of the information via other means such as issuing a press release through news or wire services, holding a press conference in Hong Kong and / or posting an announcement on its own website, is not regarded to be sufficient to satisfy the obligation to ensure equal, timely and effective access by the public to the information.

Responsibility for compliance and management controls

41. Section 101B(2) of the SFO states that –

"*For the purposes of subsection (1), inside information has come to the knowledge of a listed corporation if an officer of the corporation has, or ought reasonably to have, come into possession of the information in the course of performing functions as an officer of the corporation*."

42. Section 101G(1) of the SFO states that –

"*Every officer of a listed corporation must take all reasonable measures from time to time to ensure that proper safeguards exist to prevent the breach of a disclosure requirement in relation to the corporation."*

43. Although the disclosure obligation rests with the corporation, the corporation is a legal entity which cannot act on its own. The corporation can only act through its "controlling mind", which encompasses its officers. An "officer" means a director, manager or secretary of, or any other person involved in the management of, the corporation. Therefore the corporation is considered to have knowledge of the inside information when one or more of its officers come into possession of that information in the course of performing functions as officers of the corporation.

44. The corporation should establish and maintain appropriate and effective systems and procedures to ensure any material information which comes to the knowledge of one or more of its officers be promptly identified, assessed and escalated for the attention of the Board of directors to decide about the need for disclosure. This would require a timely and structured flow to the Board of information arising from the development or occurrence of events and circumstances so that the Board can decide whether disclosure is necessary.

45. In the context of ensuring compliance with the obligation to disclose inside information in relation to any material changes in the corporation's financial condition, in the performance of its business or in its expectation as to its performance, the Board should establish and maintain appropriate and effective reporting procedures which ensure a structured flow of financial and operational data necessary for such an appraisal.

46. It is ultimately the responsibility of the officers to ensure that the corporation complies with the disclosure obligation. Officers are obliged to take all reasonable measures to prevent the corporation from breaching the statutory disclosure requirement, which would include the creation and maintenance of appropriate internal control and reporting systems. If a breach commissioned by the corporation is attributable to the failure to take all reasonable measures by, or to any recklessness or negligence of, any officers, the officers concerned would also be liable.

Safe Harbours that allow non-disclosure of inside information

47. To strike an appropriate balance between requiring timely disclosure of inside information and preventing premature disclosure, the SFO provides for Safe Harbours which permit a corporation to withhold disclosure of inside information under specified circumstances. Section 101D(1) of the SFO sets out the Safe Harbours –

"*A listed corporation is not required to disclose any inside information under section 101B if and so long as –*

(a) the corporation takes reasonable precautions for preserving the confidentiality of the information;

(b) the confidentiality of the information is preserved; and

(c) one or more of the following applies –

(i) the disclosure is prohibited under, or constitutes a contravention of a restriction imposed by, an enactment or an order of a court;

(ii) the information concerns an incomplete proposal or negotiation the outcome of which may be prejudiced if the information is disclosed prematurely;

(iii) the information is a trade secret;

(iv) the information concerns the provision of liquidity support by the Exchange Fund established by the Exchange Fund Ordinance (Cap.66) or by a central bank (including a central bank of a place outside Hong Kong) to the corporation or, if the corporation is a member of a group of companies, to any other member of the group;

(v) the disclosure is waived by the Commission under section 101E(1), and any condition imposed under section101E(2) in relation to the waiver is complied with."

48. The first and second requirements of the Safe Harbours are that the corporation must take reasonable measures to preserve the confidentiality of the information and that the confidentiality of the information is preserved. In this regard, the corporation needs to ensure that knowledge of information is restricted to those who need to have access to it and that recipients of the information are aware that the information is confidential and recognise their resulting obligations. If the corporation subsequently becomes aware that the information has not been kept confidential or there has been a leak, whether intentionally or inadvertently, any of these conditions will not be fulfilled and any Safe Harbour will no longer apply.

49. If there are unexplained changes to the share price of the corporation's securities or if there are comments about the corporation in the media or analysts' reports, this may indicate that confidentiality has been lost. It would be more likely to indicate that confidentiality has been lost where comments about the corporation or its proposals or events are significant and credible and the details are reasonably specific or the market moves in a way that appears to be referrable to such comments.

50. Confidentiality is not regarded to be lost because information is given to the corporation's advisers or a person with whom the corporation is negotiating if it is given on the basis that restricts its use to the stated purpose and the recipient owes the corporation a duty of confidentiality. However, any release of the information from any source, however inadvertent, will mean that confidentiality is lost and the Safe Harbour no longer applies.

51. If a corporation has availed itself of any of the Safe Harbours, it should keep under review whether confidentiality of the information has been maintained. If confidentiality has been lost, the Safe Harbour no longer applies and the corporation must disclose the inside information immediately. The corporation should normally prepare a draft announcement (albeit a holding announcement) to be kept updated ready for publication immediately if it becomes apparent that confidentiality is no longer maintained. In addition, the corporation should consider recording the reasons for, and the steps taken in, applying the Safe Harbour which may be to the advantage of the corporation if subsequently any such information is required to be provided.

52. The third requirement of the Safe Harbours is that the information is of the type in one or more of the following categories. If the information is not, or if it loses that character, then the requirement is not satisfied.

53. ***Where disclosure is prohibited by law***. No statutory disclosure is required for information which it would be a breach against an order made by a Hong Kong court or any provisions of other Hong Kong statutes to disclose. For example, under section 30 of the Prevention of Bribery Ordinance, it is unlawful for a person to disclose details of an investigation of the Independent Commission Against Corruption, except for disclosure matters which are carved out from that prohibition. If a corporation or any of its officers is subject to an investigation by the ICAC and such investigation constitutes inside information, disclosure would not be required to the extent that it is prohibited statutorily. Nonetheless, disclosure of other details of the investigation which would not contravene the statute is still required.

54. The Safe Harbour does not apply to information the disclosure of which is prevented by a contractual duty. A corporation cannot justify not making the disclosure by virtue of the terms of an agreement which require the parties entering into the agreement not to disclose information about the agreement or the transaction that is the subject of the agreement. The terms and conditions of a contract do not override the requirements of the statutes.

55. ***Where information concerns incomplete proposal or negotiation****.* No statutory disclosure is required for information concerning impending negotiations or incomplete proposals where the outcome or normal pattern of these negotiations or developments may be prejudiced if the information is disclosed prematurely. The following are certain examples: -

- when a contract is being negotiated but has not been finalised where a premature disclosure may threaten the loss of the contact to another party;

- when a corporation decides to sell a major holding in another corporation and the deal may fail with premature disclosure;

- when a corporation is negotiating a share placing with a financial institution and the deal will be jeopardised if disclosed prematurely; or

- when a corporation is negotiating the provision of financing with a creditor where a public disclosure may undermine the conclusion of such negotiation.

56. Where a corporation in financial difficulty or with worsening financial condition is in the course of negotiations with potential interested parties for funding, the Safe Harbour provides relief for disclosure in respect of the subject negotiations and the status of progress of those negotiations. However the Safe Harbour does not allow the corporation to withhold disclosure of any material change in its financial position or performance merely on the basis that its position in negotiations or subsequent negotiations may be jeopardised by the disclosure of its financial condition.

57. ***Where information concerns a trade secret***. No statutory disclosure is required for information that is a trade secret where the corporation needs to protect its confidential information used in a trade or business which if disclosed to a competitor would be liable to cause real or significant harm to the corporation's business interests. Trade secrets may concern inventions, manufacturing processes or customer lists. For example, a corporation with a new pharmaceutical product may withhold disclosure until after completing the registration of the patent for the product.

58. ***Where information concerns the provision of liquidity support***. No statutory disclosure is required for information concerning the provision of liquidity support from the Exchange Fund of the Government or from a central bank, including an overseas central bank. The liquidity support may be provided to the corporation or, if the corporation is a member of a group of companies, to any other member of the group. The entity receiving the liquidity support is a banking institution which may be registered in or outside Hong Kong.

59. ***Where disclosure is waived by the SFC***. There are circumstances that disclosure of the information is prohibited under the legislation, or orders imposed by a court, of an overseas jurisdiction especially where the corporation or certain of its subsidiaries are incorporated or operate outside Hong Kong. In these cases, the SFC may, on application by a corporation, grant an exemption to waive disclosure of the information if it considers appropriate to do so. An exemption granted may be unconditional or subject to specified conditions. No statutory disclosure is required for information for which an exemption has been granted and any conditions imposed in relation to the exemption have been complied with.

60. An application to the SFC to exempt disclosure of the information must be made in writing. The application should contain a clear explanation of why the exemption is requested in the circumstances and include all relevant details and information necessary for the SFC to consider the matter. Where applicable, the application should include an appropriate legal opinion to set out all relevant issues. The application should be accompanied by a fee which is payable pursuant to the Securities and Futures (Fees) Rules.

Guidance on particular situations and issues

Dealing with rumours

61. Corporations are under no obligation to respond to press speculation or market rumours. This notwithstanding, the existence of speculation or rumours about a corporation might indicate that matters intended to be kept confidential have leaked. In particular, where press speculation or market rumours are largely accurate and the information underlying the speculation or rumours constitutes inside information, the corporation should disclose the information as soon as practicable. Accurate and extensive rumours and media speculation are unlikely to represent information that is generally known and accordingly disclosure by the corporation is necessary.

62. Although a corporation is generally not obliged to respond to speculation or market rumours, the Stock Exchange may require a corporation to provide disclosure or clarification beyond that required by the SFO under the Listing Rules, for example the issue of a negative announcement to confirm that the rumour is false. The fact that the corporation issues an announcement as requested by the Stock Exchange would not in itself imply that the corporation has failed to meet the disclosure obligation for inside information. If a corporation wishes to respond to rumours, the corporation should do so by making a formal announcement, rather than making a remark to a single publication or by way of a press release. This will ensure that the whole market is equally and properly informed.

Internal matters

63. A corporation may consider internal issues in its day-to-day running which may involve matters of supposition or indefinite nature and where premature disclosure of the information may be more misleading than informative. Such information is not specific information. These might include, for example, the development of a new technology, the planning of a major redundancy program or the possibility for a substantial price cut in its products. The consideration of these matters with hypotheses or scenarios would not immediately trigger the disclosure duty. However, once these matters become specific or definite and are not within any of the Safe Harbours, the corporation should make an announcement as soon as practicable.

64. Similarly, a corporation may from time to time generate internal reports for management purposes. For example, an internal marketing research report may indicate that a new product to be launched by a competitor may pose a significant challenge that needs to be addressed as one possible outcome would be a significant loss of sales. The mere possibility that without a successful response the corporation would face a serious decline in profits does not automatically trigger an obligation to disclose. However, if after time the competitor's new product has significantly reduced sales, then the fact of the change in trading performance, shown by regular performance monitoring, may constitute inside information.

Corporation listed on more than one exchange

65. If the securities of a corporation are listed on more than one stock exchange, the corporation should synchronise the disclosure of inside information as closely as possible in all markets in which the securities are listed. In general, the corporation should ensure that inside information is released to the public in Hong Kong at the

same time it is given to the overseas markets. If inside information is released to another market when the market in Hong Kong is closed, the corporation should issue an announcement in Hong Kong before the Hong Kong market opens for trading.

66. If necessary, the corporation may request a suspension of trading in its securities pending the issue of the announcement in Hong Kong.

Analysts' reports

67. A corporation should ensure that only public information is given when answering an analyst's questions or reviewing an analyst's draft report. It is inappropriate for a question to be answered, or draft report corrected, if doing so involves providing inside information. When analysts visit the corporation, care should be taken to ensure they do not obtain inside information.

68. In some circumstances, for example where a corporation's business is complex and / or comprised of many different divisions, it is possible that analysts may draw on out of date data, or misread or misinterpret historical information. In such cases it is appropriate for a corporation to clarify historical information and correct any factual errors in analysts' assumptions which are significant to the extent that they may mislead the market, provided any clarification is confined to drawing the analyst's attention to information that has already been made available to the market. If the corporation is aware of inside information that would correct a fundamental misconception in the report, it should consider making public disclosure of such information and at the same time correcting the report.

69. It is important that no analyst, investor or journalist should receive a selective release of inside information.

Publications by third parties

70. Publications by industry regulators, government departments, rating agencies or other bodies may affect the price of, or market activity in, the securities of the corporation. If such events when they become public knowledge are expected to have significant consequences directly affecting the corporation this may be inside information that should be disclosed by the corporation with an assessment of the likely impact of those events.

External developments

71. Corporations are not expected to disclose general external developments, such as foreign currency rates, the market price of commodities or changes in a taxation regime. However, if the information has a particular impact on the corporation this may be inside information that should be disclosed by the corporation with an assessment of the likely impact of those events.

In the course of preparing periodic and other structured disclosures

72. A corporation may be required in a number of circumstances to prepare disclosure in certain prescribed structured formats pursuant to the relevant laws and listing rules, for example, regular periodic financial reports, circulars and listing documents. In the course of preparing these prescribed disclosure documents, a corporation may become aware of inside information previously unknown to the directors and officers, or

information in respect of a matter or financial trend which may have crystallised into inside information.

73. A corporation should be aware that inside information which requires disclosure may emerge during the preparation of these disclosures, in particular periodic financial information, and that the corporation cannot defer releasing inside information until the prescribed structured document is issued. Separate immediate disclosure of the information is necessary.

Appendix A

List of cases handled by the Insider Dealing Tribunal and the Market Misconduct Tribunal

The following is a list of cases handled by the Insider Dealing Tribunal and the Market Misconduct Tribunal. Details of these cases can be found on the Insider Dealing Tribunal website at http://www.idt.gov.hk/ and the Market Misconduct Tribunal website at http://www.mmt.gov.hk/

1) Harbour Ring International Holdings Limited (currently known as Hutchison Harbour Ring Limited) – Report of the IDT dated 6 Aug 2009

2) Vanda Systems and Communications Holdings Limited – Report of the IDT dated 26 Mar 2007

3) Dransfield Holdings Limited (later renamed China Merchants DiChan (Asia) Limited; now known as Pearl Orient Innovation Limited) – Report of the IDT dated 22 Dec 2006

4) Siu Fung Ceramics Holdings Limited – Report dated 18 Mar 2004 (1st Report), 25 Oct 2004 (2nd Report), 14 Mar 2006 (3rd Report) & 2 Nov 2006 (4th Report)

5) Asia Orient Holdings Limited – Report of the IDT dated 8 Sep 2006 & 14 Dec 2006

6) Cheong Ming Investments Limited (formerly Cheong Ming holdings Limited) – Report of the IDT dated 3 Aug 2006 & 14 Sep 2006

7) Easy Concepts International Holdings Limited (subsequently renamed as 21CN CyberNet Corporation Limited and known as CITIC 21CN Company Limited) and Easyknit International Holdings Limited – Report of the IDT dated 19 Jan 2006

8) Gilbert Holdings Limited – Report of the IDT dated 11 May 2005 & 15 Dec 2005

9) HKCB Holding Company Ltd & Hong Kong China Ltd (now renamed Lippo China Resources Ltd) – Report of the IDT dated 10 Mar 2005 (1st part)

10) Chinney Alliance Group Limited – Report of the IDT dated 24 Dec 2004

11) Firstone International Holdings Limited – Report of the IDT dated 2 Apr 2004 & 8 Jul 2004

12) Stime Watch International Holding Limited – Report of the IDT dated 6 Dec 2003 & 14 Feb 2003

13) China Apollo Holdings Limited – Report of the IDT dated 31 Jan 2002 & 6 Jun 2002

14) Indesen Industries Company Limited (now known as Central China Enterprises Limited) – Report of the IDT dated 2 Nov 2001

15) Hanny Holdings Limited (formerly known as Hanny Magnetics (Holdings) Limited) – Report of the IDT dated 10 Apr 2000 & 15 Jun 2000

16) Ngai Hing Hong Company Limited – Report of the IDT dated 23 Jul 1998

17) Chee Shing Holdings Limited – Report of the IDT dated 30 Mar 1998 & 21 Jun 2001

18) Emperor (China Concept) Investments Limited – Report of the IDT dated 8 Jun 1998

19) Hong Kong Worsted Mills Limited (now renamed as Beijing Development (H.K.) Limited) – Report of the IDT dated 18 Nov 1997 & 21 Jan 1998

20) Chevalier (OA) International Limited – Report of the IDT dated 10 Jul 1997

21) Hong Kong Parkview Group Limited – Report of the IDT dated 5 Mar 1997

22) Yanion International Holdings Limited – Report of the IDT dated 29 Oct 1996

23) Public International Investments Ltd – Report of the IDT dated 5 Aug 1995

24) Success Holdings Limited – Report of the IDT dated 24 Jun 1994

25) Lafe Holdings Limited – Report of the IDT dated 22 Feb 1990

26) International City Holdings Limited – Report of the IDT dated 27 Mar 1986 (Vols. I & II)

27) China Overseas Land and Investment Limited – Report of the MMT dated 8 Jul 2009

28) Sunny Global Holdings Limited – Report of the MMT dated 21 Jul 2008