

Securities and Futures (Amendment) Bill 2011

Financial Services and the Treasury Bureau
10.2011

Content of the Bill

- (A) Oblige listed corporations to disclose price sensitive information (“PSI”) in a timely manner
- (B) Enable the Securities and Futures Commission (“SFC”) to institute proceedings before the Market Misconduct Tribunal (“MMT”) direct
- (C) Enable SFC to establish a cross-sectoral Investor Education Council
- (D) Make miscellaneous amendments to the Securities and Futures Ordinance (“SFO”)

(A) PSI Disclosure - Objectives

- Cultivate a continuous disclosure culture among listed corporations
- Enhance market transparency and quality
- Sustain Hong Kong's position as China's global financial centre and a premier capital formation centre

(A) PSI Disclosure - Definition

- “Inside information” - borrowed from the concept of “relevant information” in the insider dealing regime (used since 1990)
- Same as approach adopted by UK and other EU countries
- Three major components
 - (a) specific information
 - (b) not generally known
 - (c) likely to materially affect the price of listed securities

(A) PSI Disclosure - When to Disclose?

- A listed corporation must, as soon as reasonably practicable after any inside information has come to its knowledge, disclose the information to the public
- Enable listed corporations to verify the facts, conduct assessment of the matter and its likely impact and seek professional advice as appropriate and reasonable

(A) PSI Disclosure - What is “Come to Knowledge”?

- Information has, or ought reasonably to have, come to the knowledge of an “officer” of the corporation in the course of performing functions as an “officer” of the corporation
- A reasonable person, acting as an “officer” of the corporation, would consider that the information is inside information in relation to the corporation
- Adopt an “objective test”, not to adopt the lower threshold of “in good faith”

(A) PSI Disclosure - How to Disclose?

- Manner of disclosure: provide for equal, timely and effective access by the public to the inside information disclosed
- Regarded as compliant with the manner of disclosure if the listed corporation has disseminated the inside information through an electronic publication system operated by a recognized exchange company for disseminating information to the public

(A) PSI Disclosure - Safe Harbours

- (a) Information prohibited from being disclosed by a Hong Kong court or under Hong Kong statutes
- (b) Information concerning an incomplete negotiation or proposal
- (c) Information which is a trade secret
- (d) Information concerns the provision of liquidity support from the Exchange Fund or from a central bank outside Hong Kong to a listed banking group

- Confidentiality applies to safe harbours (b) – (d)
- After consulting the Financial Secretary, SFC may prescribe other safe harbours through subsidiary legislation

(A) PSI Disclosure – Waiver Application from SFC

- If the disclosure—
 - is prohibited under the legislation of a place outside Hong Kong
 - is prohibited under an order of a court outside Hong Kong
 - would constitute a contravention of a restriction imposed by a law enforcement agency of a place outside Hong Kong
 - would constitute a contravention of a restriction imposed by a government authority of a place outside Hong Kong in the exercise of a power conferred by the legislation of that place

⇒ SFC may grant a waiver on a case-by-case basis

- Confidentiality applies when a listed corporation makes use of a waiver

(A) PSI Disclosure - SFC's Guidelines

- To facilitate compliance, SFC will promulgate guidelines on what may constitute inside information and when the safe harbours would be applicable, and issue FAQs for reference
- SFC to provide informal consultation service for listed corporations, initially for 24 months

(A) PSI Disclosure - Obligations of “Officers”

- Every “officer” of a listed corporation must take all reasonable measures from time to time to ensure that proper safeguards exist to prevent a breach of a disclosure requirement in relation to the corporation (e.g. creation of internal control and reporting systems)
- The term “officer” already defined in SFO: “a director, manager or secretary of, or any other person involved in the management of, the corporation”
- SFC’s guidelines: directors, persons below the board level who are charged with management responsibility affecting the whole or a substantial part of the, and company secretary

(A) PSI Disclosure – Breach of Disclosure Requirement

- **Listed corporations:** non-disclosure or late disclosure would be in breach
- An **individual officer** of the corporation is in breach if -
 - the listed corporation is in breach; and
 - the corporation's breach is a result of his intentional, reckless or negligent conduct; or he has not taken all reasonable measures from time to time to ensure that proper safeguards exist to prevent the breach
- An “officer” will not be in breach because of another “officer” having breached the disclosure requirement, so long as the former has acted reasonably and taken all reasonable measures from time to time to ensure proper safeguards exists to prevent the breach by the listed corporation

(A) PSI Disclosure - Civil Sanctions

- MMT may impose-
 - (1) regulatory fine up to \$8 million on the listed corporation, each of its directors and/or its chief executive respectively
 - (2) disqualification of the “officer” from being involved in the management of a listed corporation for up to five years
 - (3) “cold shoulder” order on the “officer” for up to five years
 - (4) “cease and desist” order on the listed corporation and/or “officer”
 - (5) a recommendation order that the “officer” be disciplined by any body of which that person is a member
 - (6) payment of costs of the civil inquiry and/or the SFC investigation by the listed corporation and/or “officer”

(A) PSI Disclosure - Civil Sanctions

- With reference to remedies imposed by Listing Committee, empower MMT to -
 - (7) order the “officer” to undergo training
 - (8) order the corporation to appoint an independent professional adviser to review its compliance procedure
 - (9) order the corporation to appoint an independent professional adviser to advise on compliance matters
- Determination of the MMT proceedings will facilitate those suffering pecuniary loss because of others’ in breach of the disclosure requirement to take civil actions to seek compensation

(A) PSI Disclosure - Enforcement

- Stock Exchange of Hong Kong remains as the front-line regulatory body, continues to monitor price and volume movements of listed securities, so as to ensure an orderly, informed and fair market
- All suspected cases of breach of the statutory PSI disclosure requirement will be referred to SFC for investigation and enforcement actions
- SFC may institute proceedings before the MMT direct, without referring the case to the Financial Secretary

(A) PSI Disclosure - Compared with Listing Rules

- (1) Create a formal statutory obligation for compliance
- (2) Provide a clear set of PSI disclosure requirements with obligations and safe harbours explicitly set out in the law and SFC's guidelines to facilitate compliance
- (3) Allow SFC to resort to its powers under the SFO to conduct more effective investigation
- (4) Enable all alleged breaches to be heard by an independent statutory body (the MMT)

(A) PSI Disclosure - Compared with Listing Rules

- (5) Determination of the MMT proceedings will facilitate those suffering pecuniary loss because of others' in breach of the disclosure requirement to take civil actions to seek compensation
- (6) Impose a wide range of statutory civil sanctions
 - Demonstrate our commitment to enhancing market transparency and quality
 - Enhance Hong Kong's position as China's global financial centre

(B) Direct Institution of MMT Proceedings

- Currently, MMT proceedings can only be instituted by the Financial Secretary (“FS”), and the presenting officer (“PO”) is appointed by the Secretary for Justice (“SJ”) to conduct the proceedings
- To streamline the process, the Bill proposes empowering SFC to institute proceedings before MMT direct, without having to first refer the case to FS. SFC will also be responsible for appointing the PO in place of SJ

(B) Direct Institution of MMT Proceedings

- To ensure the primacy of criminal prosecution, the Bill will provide that SFC must obtain consent from SJ before it institutes any MMT proceedings for market misconduct
- SJ's consent for SFC to institute MMT proceedings is not applicable to cases of breaches of PSI disclosure requirement which will not give rise to any criminal liability

(C) Investor Education Council

- The Bill proposes to strengthen the role of SFC in investor education, and enables SFC to establish a cross-sectoral Investor Education Council (“IEC”) as its wholly-owned subsidiary to holistically oversee the needs of investor education and delivery of related initiatives
- IEC aims to influence the financial attitude and behaviour of the general public by improving their financial literacy and capability

(D) Miscellaneous Amendments

- Proposes to introduce several technical amendments to update SFO
- Amendments are made to-
 - Clarify certain clauses, e.g., SFC may publish details of disciplinary action taken against regulated persons
 - Streamline procedures, e.g., SFC may delegate certain investment functions to consultants, agents or advisers
 - Correct anomalies, e.g., consistency of the Chinese text with the English text



Thank You

www.fstb.gov.hk