BY EMAIL AND BY POST

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I
Admiralty Centre
18 Harcourt Road
Hong Kong

Allen & Overy
安理國際律師事務所
9th Floor Three Exchange Square
Central Hong Kong

Tel +852 2974 7000
Fax +852 2974 6999
Direct +852 2974 7151 /
+852 2974 7025
alan.ewins@allenovery.com /
juliana.lee@allenovery.com

Our ref 0098050-0000156 HK:8461623.7

28 June 2010

Dear Sirs

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

Allen & Overy appreciates the opportunity to express its views on the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations (**Consultation Paper**). We set out below our responses to the questions raised in the Consultation Paper. We would be pleased to discuss the issues below further, or to assist in any way that the Financial Services and the Treasury Bureau (**Bureau**) or the Securities and Futures Commission (**SFC**) deems appropriate.

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?**

On a general basis, we agree with the proposal to adopt the existing definition of "relevant information" from the insider dealing regime under the SFO to define PSI as (1) it is in line with the approaches taken by various major international financial centres such as the United Kingdom and other European Union nations and (2) the concept has been in place for 20 years and it should be

more easy to understand and more acceptable by the market when compared to an entirely new definition.

In relation to the existing definition of PSI under the Listing Rules, it appears that its scope is too wide as it does not identify between public and non-public information and it covers information which may not have any material effect on price. Its emphasis is on whether the information is necessary to enable a person to appraise the position of the group which is quite an abstract, and indeed highly subjective, concept. Since the new regime will attract statutory obligation, we agree that it would be preferable to adopt a more restrictive definition of PSI such as adopting the current definition of "relevant information".

However, we are of the view that in any event the definition of "relevant information" is not clear cut and subjective judgement would be required from time to time to determine whether a particular piece of information is "relevant information". Accordingly, it would be helpful if the SFC could issue circulars and FAQ from time to time to provide guidance to the market in this connection.

Also, we would appreciate if the Bureau could provide some guidance as to the interaction of the PSI disclosure regime and the insider dealing regime since they are sharing the same definition. In particular, if a listed corporation is determined by the SFC to have breached the PSI disclosure rules, would such decision be used against another person who is suspected of insider dealing in securities of the listed corporation involving the same piece of information?

(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?**

Subject to our comments below, we basically 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.

However, we do not agree that a listed corporation should be regarded as having 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. Our concern is that it would be unfair to the listed corporation and other directors/officers to impute information to them as a whole if the subject director or officer does not inform the corporation or other directors about the "inside information" which he/she has, especially where statutory liability is involved. Accordingly, in line with paragraph 44 of the SFC Guidelines on Disclosure of Inside Information, we agree that listed corporations should instead be required to have appropriate and effective systems and procedures to ensure any material information which comes to the knowledge of one or more of the officers should be promptly identified, assessed and escalated for the attention of the board of directors to decide about the need for disclosure. After being notified of such information, the board of directors should then be allowed reasonable time to consider whether to disclose the information though we agree that such decision should be made as soon as reasonably practicable. The need for proper systems is consistent with the drive towards enhanced corporate governance, and for example gels with the incoming UK Bribery Act systems requirements in respect of anti-corruption measures.

As the decision whether to disclose is often subjective, circumstantial and marginal, we do not agree that a listed corporation's liability in this connection should be made absolute which is in contrast with "officers" who would only be made liable for intentional, reckless or negligent acts. In other words, if the directors of a listed corporation have decided in good faith and on reasonable grounds that the subject information is not "inside information" and so does not require disclosure or that it falls within the scope of a safe harbour, the listed corporation and its officers should not be made liable. Such protection can be done through the addition of an extra safe harbour. As a practical matter, to the extent that the listed corporation keeps a record of such decisions by way of audit trail,

that should provide a degree of protection in this type of case, assuming the decision is reasonably properly arrived at.

(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?**

We 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?**

On a general basis, we agree to the provision of the four proposed safe harbours as explained in the Consultation Paper. However, we are of the view that some concepts under the proposed safe harbours are not clear cut and, for some situations, to decide whether a safe harbour is applicable or not would be very subjective and circumstantial. Accordingly, we would suggest the SFC should issue circulars and FAQ from time to time to provide guidance to the market in addition to the informal consultation service it intends to provide as explained below.

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

We agree that the SFC should be empowered to grant waivers, and to attach conditions thereto. However, we are of the view that the proposed situations where the SFC could grant waivers, namely when listed corporations are facing disclosure prohibitions arising from court orders or legislation of another jurisdiction, are too limited. We would suggest to extend the scope of waivers to include other special and exceptional situations provided that the subject listed corporation could justify its application to the reasonable satisfaction of the SFC.

In addition, we would appreciate if the Bureau could clarify whether listed corporations and their officers will be subject to any liability for non-disclosure of "inside information" during the period between the submission of waiver applications and the granting or rejection of the waivers. We presume not.

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

As explained in our response to Question (1)(b), we would suggest the creation of an additional safe harbour such that a listed corporation and its officers would not be subject to any liability if the corporation has implemented appropriate and effective systems and procedures to ensure that any material information which comes to the knowledge of one or more of the officers be promptly identified, assessed and escalated for the attention of the board of directors to decide about the need for disclosure and the board of directors has decided in good faith and on reasonable grounds that the subject information is not "inside information" and so does not require disclosure or that it falls within the scope of another safe harbour.

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

We agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO as the financial market is developing rapidly and there would be unexpected situations, unforeseeable at present, which would require handling in the future. Empowering the SFC to prescribe further safe harbours (together with broader waiver powers on a case by case basis

– please see our response to Question 2(b) above) would provide more flexibility and save time and costs when compared to going through all the required legislative procedures on every occasion.

Question 3

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

We agree with the extension of the jurisdiction of the MMT to handle breaches of the statutory disclosure requirements given that it already has extensive experience with dealing with cases concerning "relevant information", and provided that the MMT is empowered with sufficient authority to impose the sanctions.

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

We have no comments in relation to the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36 and we agree not to impose any criminal sanctions for the time being.

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

We do not disagree with the proposal to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements, without having to first submit the case to the Financial Secretary for his decision to do so, since such streamlined arrangement should be able to enhance the efficiency of the process.

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?

On a general basis, we agree that the SFC should provide informal consultation for listed corporations with regard to the statutory disclosure requirements. However, in view of the statutory obligations imposed in relation to the proposed regime and the rapid development of the financial market, we do not agree that (1) the scope of the SFC service be limited to the application of safe harbours only, but that all aspects in relation to the disclosure requirements should be covered and (2) the service be subject to a time limitation - the SFC should provide such a facility on an ongoing basis at least until it is clear that the new requirements have become sufficiently embedded in the regime and market practice.

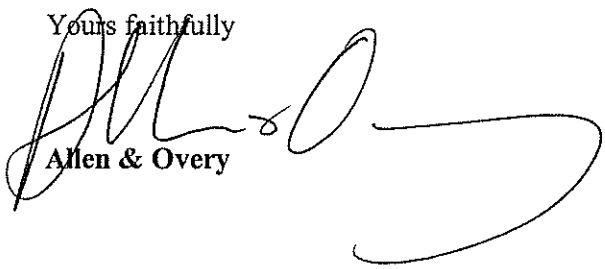
Question 5

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?

We have no comments at this stage in relation to the administration and enforcement arrangements proposed by the SFC and SEHK in paragraphs 3.8 to 3.9 and the respective roles of the SFC and SEHK.

Should you have any further enquiries regarding our responses, please do not hesitate to contact us.

Yours faithfully



Allen & Overy

ASCENT PARTNERS
Together We Flourish

Level 19, Two International
Finance Centre, 8 Finance Street,
Central, Hong Kong.

Tel: 3101-7988
Fax: 3101-7987
www.ascent-partners.com

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

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?

We agree. The proposal to adopt the existing definition of "relevant information" from the insider dealing regime under the SFO can avoid misunderstanding and confusion by a variety of market players. Hence, it can ensure a smooth adoption and transition from SFO into statute requirement.

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?

We agree. More guideline in relation to the definition of "as soon as practicable" is required in the "Guidelines on Disclosure of Insider Information" from SFC.

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?

As selective disclosure can seriously impair the equity market of Hong Kong, we propose we should use the following sentence to rephrase the existing proposal:

"Full and non-selective disclosure must be made in a manner that can provide for equal, timely and effective access by the public to the information disclosed".

ASCENT PARTNERS
Together We Flourish

Level 19, Two International
Finance Centre, 8 Finance Street,
Central, Hong Kong.

Tel: 3101-7988
Fax: 3101-7987
www.ascent-partners.com

With the new amendments, the practice of selective disclosure will be covered.

Question 2

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

We believe that Safe Harbour D is without merit. There is no evident that reducing transparency (especially, related to government's interaction with the private sector) can benefit the society as a whole. On the contrary, it may produce unpopular results similar to the cases such as: Cyberport, Hong Kong Disneyland, and so on. In fact, the only rationale for Government's Exchange Fund or a central bank to provide liquidity support to the listed corporation is to restore public confidence and protect public interest in case of crisis. Providing a proper disclosure related to the government's market action is the best way to achieve both objectives.

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

We agree. SFC is an effective organization to grant waivers.

c) Do you think that the legislation should provide for additional safe harbours? If so, what are these additional safe harbours?
We do not think so. More safe harbours will reduce the market transparency.

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

We disagree. As more safe harbours will reduce the market transparency, we cannot empower anybody to prescribe other than the legislation.

Question 3

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

We agree. MMT is an effective organization to handle breaches of the statutory disclosure requirements.

ASCENT PARTNERS
Together We Flourish

Level 19, Two International
Finance Centre, 8 Finance Street,
Central, Hong Kong.

Tel: 3101-7988
Fax: 3101-7987
www.ascent-partners.com

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

We believe that paragraph 2.31a) in not sufficient. We propose to fine up to HK$50 Million.

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

We agree. Grant SFC direct access to the MMT can speed up the enforcement process.

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?

We disagree. Doing that will lead to conflict of interest (between the role of enforcement agency and a consultancy firm), which can undermine the whole judicial system of Hong Kong. We believe that a better practice is for SFC to act as the enforcement authority, and SEHK to take the informal consultation role

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 an SEHK to further enhance clarity?

We think that the proposed arrangement is appropriate.

Contact Information:

Mr. Simon Mak, CFA
Chief Executive Officer
Ascent Partners Group Limited
simon@ascent-partners.com

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

17 June 2010

Dear Sir

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

On behalf of ACCA (the Association of Chartered Certified Accountants) Hong Kong, we refer to the above consultation paper and would like to submit our comments accordingly.

ACCA Hong Kong in principle supports the underlying rationale of the proposal to help enhance Hong Kong's market transparency and quality so as to sustain Hong Kong as a leading international financial centre and the premier capital formation centre in the region. As such, we agree in general to all the five questions raised in the consultation paper. However, we would like to highlight the following issues for your consideration.

Question 1(b) Definition of "as soon as practicable"

It is proposed 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. ACCA Hong Kong considers that there is inadequate guideline for listed corporations to determine how it fulfils its obligation of a "timely" disclosure of such information, in particular on possession of inside information about the company performance, as the timing of the disclosure of the information could be affected by various factors such as the time required for a consensus achieved by the board of directors, or the judgement involved in determining whether there is a significant difference between the results and the market expectations.

We therefore suggest that more guidelines be provided to assist a listed corporation in determining how it will be able to discharge its obligation of a timely disclosure of the inside information.

ROOM 1901 19/F
WORLD WIDE HOUSE
19 DES VOEUX ROAD CENTRAL HONG KONG
香港 中環德輔道19號 環球大廈19樓1901室

T 電話 852 2524 4988
F 傳真 852 2868 4909

info@hk.accaglobal.com
www.hongkong.accaglobal.com

Question 1(b) Duty of officers of listed corporations

We would like to seek further clarification on the draft wordings relating to the directors' and the officers' duty in respect of the statutory disclosure requirements. Under section 101G(2)(b), if a listed corporation is in breach of a disclosure requirement, an officer of the corporation who has not taken all reasonable measures to prevent the breach is also in breach of that requirement. According to the proposals, and section 101G(1) refers, all directors and officers are 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.

Whilst it is also proposed that a listed corporation 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, we would like to clarify whether all directors and officers of the listed corporation will be held liable for a breach of the disclosure requirement under section 101G(2)(b), and whether only the director or the officer who is in possession of that information is held liable for the breach under section 101G(2)(a).

In addition, we would also like to clarify whether other directors or officers, even who are not in possession of that information, be held liable for the breach of section 101G(1) for not being able to take all reasonable measures to ensure that proper safeguards exist. We consider it necessary to have guidelines for listed corporations in respect of what constitutes "reasonable measures" in ensuring proper safeguards are in place to prevent the corporation from breaching the statutory disclosure requirements.

It is also unclear as to whether the proposed regulatory fine of up to HK$8 million will be imposed separately on the listed corporation as well as each relevant director or whether this is only imposed on either the listed corporation or the director when there is a breach.

Question 2(a) Safe harbours

Notwithstanding that a separate submission will be sent to the Securities and Futures Commission (SFC) in regard of the Draft Guidelines on Disclosure of Inside Information (Draft Guidelines), we would like to take this opportunity to highlight the practical difficulty of violating a contractual obligation in order to comply with the proposed disclosure requirement. Under paragraph 54 of the Draft Guidelines, it is explicitly stated that "the Safe Harbour does not apply to information the disclosure of which is prevented by a contractual duty".

Under most circumstances, the contracting parties enter into a contract of confidentiality when a deal is being negotiated. However, according to the proposals, paragraph 2.16 of the consultation paper refers, where there is any leakage before the negotiations or proposals are concluded, the listed corporation would need to disclose the inside information. Such a disclosure will therefore breach the contract of confidentiality as well as impact the completion of the deal. We suggest that waivers be granted by the SFC, as the enforcement agent, under such circumstances.

Question 4 Informal consultation with the SFC

We fully agree to the proposal that the SFC should provide informal consultation for the listed corporations with regard to the statutory disclosure requirements. Whilst 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, we hope that in addition to dealing with issues on the application of safe harbours, the service will also provide more guidance to the listed corporations upon enquiries of whether certain information has to be disclosed, given that the consequence of non-compliance could be severe.

Should you wish to clarify any of the above issues, please do not hesitate to contact us.

Yours faithfully

Rosanna Choi
Chairman

Australasian Compliance Institute

Principal Members

THE Westpac GROUP

PRICEWATERHOUSECOOPERS

ERNST & YOUNG Quality In Everything We Do

nab

ANZ

AMP

CommonwealthBank

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1 Admiralty Centre
18 Harcourt Rd
Hong Kong

By Email – psi_consultation@fstb.gov.hk

23 June 2010

Proposed Statutory Codification to Disclose Price Sensitive Information

The Australian Compliance Institute (ACI) would like to thank the Financial Services and the Treasury Bureau (FSTB) for providing an opportunity for ACI to respond to its request for public comment in respect to its proposed Corporate Rescue Proposed Statutory Codification to Disclose Price Sensitive Information

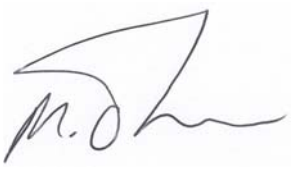
ACI is the peak industry body for the practice of compliance in Australasia. Our members are compliance, risk and governance professionals actively engaged in the private, professional services and Government sectors within Australia, Hong Kong, New Zealand, Singapore, Thailand and Indonesia.

Having taken the opportunity to review the consultation paper issued by the FSTB, ACI believes that its comments should be restricted to question 1(b) of the consultation paper. That being said, ACI is aware that one of its long standing members, Mr. Angus Young has already made a submission to the FSTB (see attached) in this respect.

ACI has taken the opportunity to review the submission made by Mr. Young (and Ms Chu) and rather than submit another submission along similar lines, ACI would like to take this opportunity to add its support to the comments made by Mr. Young and Ms Chu.

Once again ACI would like to thank the FSTB for providing an opportunity to make a submission on these proposed legislative reforms. Should the FSTB require any further information or clarification on the content of this submission, then please do not hesitate to contact me on +612 9290 1788 or via email martin.tolar@compliance.org.au.

Yours sincerely



Martin Tolar

Chief Executive Officer

To: Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I, Admiralty Centre, 18, Harcourt Road, Hong Kong

Email: psi_consultation@fstb.gov.hk

Date of Submission: 19th June 2010

RE: Submission with regards to the consultation paper on the proposed statutory codification of certain requirements to disclose price sensitive information by listed corporations

Submission Drafted by:

Angus Young, Lecturer in Business Law, School of Accountancy, Queensland University of Technology

Tina Chu, Solicitor of the Supreme Court of Queensland and Research Assistant, School of Accountancy, Queensland University of Technology

---

First of all, we would like to applaud the HKSAR government's decision to codify disclosure of price sensitive information of listed companies in Hong Kong. It is in our humble opinion a long overdue reform that will enhance the confidence of local and international investors in Hong Kong's capital market.

Second, the gist of this submission is to respond to question 1(b) of the consultation paper on the proposed statutory codification of certain requirements to disclose price sensitive information by listed corporations.

Kindly note that our submission will not address the entire question of 1(b), rather it is focused on the issue of timing of the disclosure of price sensitive information – "as soon as practicable". We strongly feel that the proposed timing would likely to create some confusion during the implementation of the statutory requirements for the directors and officers of the listed companies in Hong Kong.

As stated in the SFC's Consultation Paper on the Draft Guidelines on Disclosure of Inside Information, the proposed statutory provision governing the disclosure of inside information will be stipulated in section 101B (1) of the *Securities and Futures Ordinance* (SFO) where; "*A listed corporation must, as soon as practicable after any inside information has come to its knowledge, disclose the information to the public.*"[1]

The phase "as soon as practicable" is explained in paragraph 32 of the SFC Consultation Paper on Draft Guidelines on Disclosure of Inside Information in the following: "*For this purpose, "as soon as practicable" means that the corporation should immediately take all*

[1] Securities and Futures Commission, „Consultation Paper on Draft Guidelines on Disclosure of Inside Information' (2010) [2] <https://www.sfc.hk/sfcConsultation/EN/sfcConsultMainServlet?name=dii> at 18 June 2010.

necessary steps that are reasonable in the circumstances to disclose the information to the public. [emphasis added]"[2]

Our contention is with the implications of the timing in the release of inside information stipulated in s101B (1) of the SFO. Confusion could arise between the phases "as soon as practicable" and "immediately take all necessary steps". Furthermore, the disclosure can simply be deferred by arguing that the circumstances to release price sensitive information might not be practicable then.

Furthermore, the legal interpretation of the phase "as soon as practicable" is subjective and ad hoc. In the dicta of *Kuang Teng Industry and Minton Optic Industry v Multispark Ltd and Shinon Indistries,*[3], Chu J contends that a six day delay (even with good reason) is too long to give effect to as soon as practicable to execute a Mareva Injunction. However his honour has left open as to what constitute "as soon as practicable". In another case, *First Shanghai Enterprises v Dahlia Properties*,[4] the court gave an example that the contractual expression of "as soon as practicable" may mean three days if there is no specific contractual period stipulated by the parties. Accordingly, we recommend that the wording of the proposed provision, s101B of the SFO should be amended.

We submit that the wordings and standards found in section 674(2) of the Australian *Corporations Act (2001)* (Cth) (CA) in conjunction with Australian Stock Exchange (ASX) Listing Rule 3.1 is more appropriate for Hong Kong.

ASX Listing Rule 3.1 states that, "*Once an entity is become aware of any information it that a reasonable person would have a material effect on price or value of the entity's securities, the entity must immediately tell ASX that information*. [emphasis added]*"* This rule is backed by section 674(2) of the CA where the entity must notify ASX if, "*the entity has information that those provisions require the entity to notify to the market operator;*[5] *and that information: (i) is not generally available; and (ii) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED(enhanced disclosure) securities of the entity; the entity must notify the market operator of that information in accordance with those provisions [r3.1 of the ASX Listing Rules].*[6]*"*

Note that the timing to release price sensitive information (inside information) in Australia is "immediately". The immediate release of information is in line with the assumptions of the efficient capital market hypothesis (ECMH), where stock prices reflect all available information about the listed entity.[7] The underlying assumptions of ECMH are that: investors are rational; makes decision based on all available information; and cost of disclosure is low.[8] Hence the immediate release of price sensitive information is expected to enhance the

[2] Ibid, 9.
[3] [2001] HKCU 911
[4] [2001] HKCU 375
[5] S674(2)(b) of the *Corporations Act (2001*) (Cth)
[6] S674(2)(c) of the *Corporations Act (2001*) (Cth)
[7] Paul Redmond, *Companies and Securities Law: Commentary and Materials* (5th ed., 2009) 718.
[8] Robert Baxt, Ashley Black, and Pamela Hanrahan, *Securities and Financial Services Law* (7th ed., 2008) 337-8.

confidence of investors and the price of the share of the listed entities are not distorted by information asymmetry.

Australia's corporate regulator, the Australian Securities and Investment Commission (ASIC) issued an infringement notice to Rio Tinto on 5th June 2008 for contravention of s674(2) of CA in failing to inform the ASX immediately when the company was aware that a particular information (a US$38.1 billion acquisition of Alcan Inc) had a material effect on the price of the entity's securities.[9] During the 1 hour and 11 minutes delay in the release of price sensitive information, 725,624 shares were traded (representing 37.6% of the volume of the day's trading) and the value of the shared traded was AUD$64,899,964 (representing 35.3% of the value of the day's trading),[10] it had distorted the value and price of the shares traded during that period. Hence the importance of "immediate" release of price sensitive to the market is exemplified in this example.

Consequently, if Hong Kong adopted the timing of the release of price sensitive information from "as soon as practicable" to "immediately" as well as the wordings found in section 674(2) of the Australian CA in conjunction with ASX Listing Rule 3.1, we believe that it could enhance the reputation of Hong Kong as an international financial hub for the following reasons:

(1) it would remove any possible confusion over what constitute "as soon as possible";

(2) by changing the timing from "as soon as possible" to "immediately", it would not only remove any possibility of listed entities delaying the release of price sensitive information, the availability and promptness in the release of information about listed entities would help investors to make an informed choice about their investments; and

(3) it would remove any price distortions in the shares of listed entities attributed to delayed release of price sensitive information and this in turn would enhance the confidence of local and international investors in Hong Kong's capital market.

References

Legislations

Hong Kong

Securities and Futures Ordinance (Cap. 571)

Australia

Corporations Act 2001 (Cth)

Cases

[9] ASIC, *'08-117 Rio Tinto complies with ASIC Infringement notice'* (Press Release, 5 June 2008).
[10] Ibid.

First Shanghai Enterprises v Dahlia Properties [2001] HKCU 375

Kuang Teng Industry and Minton Optic Industry v Multispark Ltd and Shinon Indistries [2001] HKCU 911

Textbooks

Paul Redmond, *Companies and Securities Law: Commentary and Materials*, 5th ed., (2009)

Robert Baxt, Ashley Black, and Pamela Hanrahan, *Securities and Financial Services Law* 7th ed., (2008)

Government Resources

Hong Kong

Securities and Futures Commission, „Consultation Paper on Draft Guidelines on Disclosure of Inside Information' (2010) [2] <https://www.sfc.hk/sfcConsultation/EN/sfcConsultMainServlet?name=dii> accessed on 18 June 2010.

Australia

ASIC, *„08-117 Rio Tinto complies with ASIC Infringement notice'* (Press Release, 5 June 2008) < http://www.asic.gov.au/asic/asic.nsf/byheadline/08-117+Rio+Tinto+complies+with+ASIC+infringement+notice?openDocument# > accessed on 18 June 2010.

Australian Stock Exchange Listing Rule 3.1 < http://www.asx.net.au/ListingRules/chapters/Chapter03.pdf > accessed on 17 June 2010.

End of Submission

BAKER & McKENZIE
貝克・麥堅時律師事務所

23rd Floor, One Pacific Place
88 Queensway
Hong Kong SAR

香港
金鐘道八十八號
太古廣場一期二十三樓

Tel: +852 2846 1888
Fax: +852 2845 0476
DX 180005 QUEENSWAY 1

14th Floor, Hutchison House
10 Harcourt Road, Central,
Hong Kong SAR

香港中環
夏慤道十號
和記大廈十四樓

Tel: +852 2846 1888
Fax: +852 2845 0476
DX 180005 QUEENSWAY 1

www.bakermckenzie.com

Our Ref: EC:TYP

By email:
psi_consultation@fstb.gov.hk

28 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs,

Response to consultation paper on the proposed statutory codification of certain requirements to disclose price sensitive information by listed corporations (Consultation Paper)

This is the submission by Baker & McKenzie in response to the Consultation Paper. We welcome the proposal to introduce statutory codification of the obligation to disclose price sensitive information by listed corporations. We believe the proposal will align Hong Kong's disclosure regime with other international financial centres. We set out below our response to the questions raised in the Consultation Paper.

Establishing the Statutory Disclosure Obligation

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?

The proposed Part IIIA of the SFO as set out in the Consultation Paper puts an obligation on a listed corporation, its directors and officers to identify and disclose inside information to the public when the information comes to the knowledge of the listed corporation, unless they can take advantage of one of the prescribed safe harbours excusing immediate disclosure.

We agree with the rationale set out in paragraph 2.4 of the Consultation Paper and that it is appropriate to adopt the "relevant information" definition used in the inside dealing regime for the civil PSI disclosure liability regime, subject to our comments set out below.

Question 1(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?

We agree that a listed corporation should be obliged to disclose to the public as soon as practicable after any inside information relating to it (but, for the avoidance of doubt, not any other listed corporation) has come to its knowledge. We also agree that statutory obligations should attach to the directors of a listed corporation.

We respectfully submit that we may be casting the net too wide if officers of a listed corporation, who are not directors, will be held liable under the proposed legislation. Being involved in the management of a company does not necessarily give a non-director officer an overview of all or most of the operations of the group to enable that officer to assess whether a piece of information is inside information required to be disclosed to the public under the proposed legislation.

If FSTB considers that officers must be included in the proposed Part IIIA of the SFO, we invite FSTB to consider limiting "officer" to only the "chief executive" of the listed corporation, and recommend that the definition of chief executive from the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (**Listing Rules**) be incorporated. For your ease of reference, "Chief executive" is defined in the Listing Rules as *"a person who either alone or together with one or more other persons is or will be responsible under the immediate authority of the board of directors for the conduct of the business of a listed issuer."*

We believe the "constructive knowledge" concept in draft s.101B(2) that "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" *[emphasis added]* is too onerous and puts undue burden and pressure on the officers of the listed corporation to constantly be on the "look-out" for information, to assess and make a judgement on whether the information is indeed inside information. We would suggest deleting the words ", *or ought reasonably to have*" from draft s.101B(2).

Draft s.101B(2) attributes an officer's knowledge of inside information to the listed corporation, and draft s.101G requires every officer to take reasonable measures to prevent the breach of a disclosure obligation, and makes him liable for the breach of the listed corporation if, among other things, he has not taken reasonable measures to prevent the breach. We repeat our earlier comment that "officer" should be restricted to directors and perhaps also the "chief executive". We agree that in order for a corporation to fully and effectively comply with its disclosure obligation, it must have in place an efficient internal system for collecting information, analysing the nature of and determining the price sensitivity of the information, and for disclosing it. While we acknowledge that such a system must be manned by people, the principal statutory obligation should be put on the corporation itself, rather than on individual officers. Thus, the very vague obligation of an officer to "take all reasonable measures" provided in draft s.101G(1) should be made more specific, making it clear how it may be complied with, if such a personal obligation is not removed altogether. In addition, with the introduction of a radically new PSI disclosure regime, we believe that more detailed guidance on systems and procedures than is provided in paragraph 44 of the draft guidelines on disclosure of inside information (***SFC Draft Guidelines***) would be necessary.

We believe that an additional defence should be added to draft s.101G whereby if the board of directors has reasonable grounds to believe (if the accusation was that there has been failure to disclose inside information), and did at all material times or up to the time of the relevant announcement is made believe (if the accusation is that there has been a delay in the making of the announcement), that the relevant information did not constitute inside information, it should exonerate the corporation and its directors.

Question 1(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?

We agree with this proposal and we agree that a listed corporation should comply with a requirement to disclose inside information by publishing it on the electronic publication system operated by a recognised exchange company for disclosure to the public.

We note The Stock Exchange of Hong Kong Limited (**HKSE**) has included in the Listing Rules, its news releases, frequently asked questions and other supplementary information, detailed requirements and guidelines for releasing information to the public via the electronic publication system (**EPS**). These requirements include details such as languages in which the announcements must be made, the windows of submission of information to EPS and whether suspension of trading should or should not be required.

We recommend the SFC Draft Guidelines to adopt or make references to the requirements set out in the Listing Rules or other HKSE guidelines so that the publication of price sensitive information may be streamlined.

Safe Harbours

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

We agree with the provision of the safe harbours.

In addition, we propose that Safe Harbour A should be widened.

1. Safe Harbour A – when a disclosure would constitute a breach against an order made by a Hong Kong court or any provisions of other Hong Kong ordinances. We respectfully submit that it should be extended to include:

    a. order made by a court of a "competent jurisdiction" including Hong Kong Special Administrative Region and overseas jurisdictions where the relevant listed corporation conducts business or has substantial assets; and

    b. rules, regulations, orders, codes and decrees stipulated by governmental, legislative and judicial bodies in Hong Kong and overseas jurisdictions where the relevant listed corporation conducts business or has substantial assets.

2. Safe Harbour C – when the information is a trade secret

    We note that the term "trade secret" is a technical concept and is judicially considered predominantly in cases which involved a breach of confidence, or a restraint of trade in an employment law context. We also note that paragraph 57 of the SFC Draft Guidelines gives various examples of what may constitute trade secret (inventions, manufacturing processes or customer lists). We believe more guidance from the SFC is necessary if directors, who may or may not have the benefit of legal training (whether in a common law jurisdiction), are required to make a judgement as to whether a piece of information will constitute a trade secret: for instance, what type of information would the SFC definitely consider not to constitute a trade secret? Otherwise, directors may have a false sense of security that the piece of information they have in possession falls within a Safe Harbour when in fact the SFC would take a contrary view.

Question 2(b) – Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?

We agree.

Question 2(c) – Do you think that the legislation should provide for additional safe harbours? If so, what are these additional safe harbours?

No, not for now.

Question 2(d) – Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?

We agree.

Regulatory Structure and Enforcement

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

We consider the MMT is the appropriate venue to handle breaches of the statutory disclosure requirement because it has the expertise and experience to handle such cases.

We note that there may be an issue of efficiency as the MMT conducts half-day hearings as opposed to full-day hearings in the courts. MMT proceedings may take a longer time to conclude.

Question 3(b) – Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

The proposal in paragraph 2.31 includes the introduction of a regulatory fine up to HK$8 million on the listed corporation and/or directors. We note that, in the previous consultation paper (published in 2005) on proposals for statutory backing to the Listing Rules, an opinion from a Leading Counsel was obtained in relation to the lawfulness of such fines and whether the imposition of such fines violated well established principles of human rights. There is no reference to this issue in the Consultation Paper. We trust the FSTB has considered this issue.

Potentially there is room for argument as to whether the proceedings to be conducted by the MMT are regulatory or disciplinary in nature. The Consultation Paper does not provide adequate reassurance that the fines are regulatory rather than punitive.

Subject to our reservations on whether the SFC should be empowered to impose civil fines at all, we have the following observations on the proposed level of fines.

- The Consultation Paper does not explain the basis of the proposed maximum level of fine of HK$8 million.

- It appears that the only rationale for such a proposal is that the maximum is lower than the maximum penalty on indictment for certain criminal offences under the SFO.

- Has FSTB considered the maximum fine for other breaches? And has FSTB compared the proposed fine with other offences and their relative gravity?

We agree with the proposal in paragraph 2.35 which is in line with the civil remedy under SFO s. 281.

We disagree with the proposal in paragraph 2.36. At present, the circumstances in which the SFC may invoke ss. 213 and 214 are clear and can be applied in a case concerning breaches of disclosure obligation if the statutory requirements are met. While it is noted that the MMT does not have power to grant injunctive and other relief granted by the court under s. 213, it is hard to see why similar relief should be permitted for a non-compliance of disclosure obligation in the present context.

Question 3(c) – Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

We disagree that the SFC should have direct access to the MMT.

At present, under the SFO, proceedings in the MMT are instituted by the Department of Justice after it has considered the recommendation of the SFC. The rationale behind this regime (at the time of drafting of the SFO) was partly to ensure a "check and balance". While the SFC is empowered to investigate suspected market misconduct and prepare a report with its conclusions based on the findings, the final decision to institute proceedings in the MMT rests with the Department of Justice after its independent review of the evidence and other relevant factors. No strong arguments have been given in the Consultation Paper why this "check and balance" should be removed for a breach of the statutory disclosure regime and we suggest that it should be retained.

Informal Consultation with the SFC

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?

We agree.

Enforcement of the Statutory Disclosure Obligation

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?

We trust the SFC and the HKSE will handle the administration and enforcement arrangements in an efficient manner and the responsibility of each regulator will be made clear to the public.

* *

If you have any questions in relation to this submission or would like to discuss further please contact Elsa Chan at 2846 1982 or Terri Poon at 2846 2536.

Yours faithfully,

Baker & McKenzie

cc: Corporate Finance Division
The Securities and Futures Commission
8th Floor Chater House
8 Connaught Road Central
Hong Kong

By email: cfdconsult@sfc.hk

FSTB/SFC CONSULTATION PAPER ON STATUTORY PSI ANNOUNCEMENTS

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?

See covering letter. Prefer a comprehensive approach to statutory backing for the Listing Rules (LRs) rather than partial solution aimed at continuous disclosure element via the insider dealing regime: but this approach acceptable as a first step to statutory backing to whole LRs.

(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?

Yes: but should be "immediately". Using "as soon as practicable" inevitably allows wriggle room, meaning that announcements are delayed for days.

(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?

Yes: essential: EPS and, after publication, media / website and staff.

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

Yes: essential

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

Yes: essential

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

Yes: essential

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

Yes: essential

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

Yes

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

Yes except not clear why the company is fined under 2.31(a). This only punishes victims; the minority interests. Penalties and restitution should focus on the perpetrators.

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

Yes

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-months period?

Yes: essential

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?

Yes.

In our experience of a similar and successful regime in Australia, it is very important for the system to be accepted and, more importantly, trusted by issuers and their advisers that the authorities establish a mechanism for issuers to obtain guidance, on a without-prejudice basis, on whether particular circumstances warrant a PSI announcement.

This form of mechanism engenders a culture of greater openness and a preparedness to make an announcement in borderline cases.

In our view, this mechanism is better when it is operated by the Exchange rather than the Commission principally because the Exchange is less bound by legal and enforcement obligations.

The British
Chamber of Commerce
in Hong Kong

香港英商會

8 July 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18,Harcourt Road
Hong Kong

Dear Sirs

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

We write on behalf of the British Chamber of Commerce in Hong Kong. The British Chamber is one of Hong Kong's largest international business organisations, comprising major multinational companies and institutions, as well as a substantial number of SMEs. The Chamber represents a broad spectrum of British, Hong Kong, international and Chinese companies. Collectively, this membership makes a significant contribution to the Hong Kong economy and its members employ approximately 10% of the Hong Kong workforce, and, as such, constitutes a significant and representative cross-section of business opinion in the SAR.

While we are supportive of measures to further promote a culture of disclosure among Hong Kong listed companies, we have a number of serious concerns in relation to the specific proposals in the Consultation, as set out in the Appendix attached.

We sincerely hope these comments can be taken into account and the proposals, when implemented, are modified as suggested. Otherwise many of these measures, if implemented without amendment will, we fear, have a very negative impact on Hong Kong's future as an international financial services centre, and capital raising location.

If you wish to meet with our members to go through these matters we shall be happy to arrange a meeting.

Yours faithfully

Brigadier Christopher Hammerbeck CB, CBE
Executive Director

Rm 1201, Emperor Group Centre, 288 Hennessy Road, Wanchai, HK Tel: (852) 2824 2211 Fax: (852) 2824 1333
Email: cjah@britcham.com Website: www.britcham.com

Appendix

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

While we are supportive of measures to further promote a culture of disclosure among Hong Kong listed companies, we have a number of serious concerns in relation to the specific proposals, as set out in this Appendix .

Of the disclosure obligations originally proposed for statutory codification[1], we consider the disclosure of price sensitive or inside information, being incapable of precise definition, to be the least well suited. The definition is necessarily broad and a decision as to whether a matter falls within its scope invariably involves a judgement call on the part of the company's board. The difficulty of the analysis coupled with the severity of the proposed sanctions, would put directors in an extremely unenviable position.

The primary difficulty in determining whether particular information is discloseable is that directors are required to determine, beforehand, whether the information would be likely to materially affect the price of the company's shares if generally known to persons likely to invest in the company's shares. As noted in the draft SFC Guidelines on Disclosure of Information ("SFC Guidelines"), the test is a hypothetical one and determining whether it is satisfied "has necessarily to be an assessment"[2]. As enforcement agencies, however, the SFC and MMT will have the luxury of hindsight and the knowledge that non-disclosed information in fact had a material affect on the share price obviously makes it harder for the directors to justify a decision made in good faith that it was unlikely to do so. With the need to second-guess investors' response to disclosure of any particular piece of information, there will inevitably be situations where directors simply get it wrong notwithstanding considered analysis of the information and the taking of professional advice. This gives rise to our primary concern, that the current proposals give insufficient protection to directors who make an honest and reasonable mistake.

For these reasons, we consider it essential that there is a complete defence from liability for listed companies, their directors and officers if they have acted honestly, reasonably and in good faith in the performance of their duties. Timely disclosure of price-sensitive information will be achieved not only by regulation and punitive deterrents but through the continued ability of Hong Kong listed companies to attract competent and responsible directors able to ensure compliance. The onerous nature of directors' responsibilities and harsh penalties proposed by the Consultation Paper are however likely to deter many suitable candidates from taking up company directorships, thus potentially undermining rather than enhancing the ability of listed companies, particularly SMEs, to meet their disclosure obligations.

It is considered that the severe penalties proposed could only be justified if "inside information" were defined by way of an exhaustive list of specific matters so that there could be certainty for those responsible for disclosure. However, that approach runs the

[1] SFC Consultation Paper on Proposed Amendments to the Securities and Futures (Stock Market Listing) Rules of January 2005.
[2] At paragraph 23 of the SFC draft Guidelines on Disclosure of Information.

risk that important information will not be disclosed as it would be impossible to conceive of every situation that investors would consider important for all companies. It would also be difficult to keep the definition up-to-date with financial innovation and changing market conditions.

The more serious cases of non-disclosure warranting more severe penalties than those available to the Stock Exchange ("SEHK"), should in any event already be covered by existing provisions of the Securities and Futures Ordinance ("SFO"). Section 384 SFO imposes criminal liability if any public disclosure under the Hong Kong Listing Rules contains information which is false or misleading in a material particular, if there is knowledge or recklessness as to whether that is the case. The SFC has also recently prosecuted non-disclosure of price sensitive information under the Listing Rules under Section 214 SFO. In March 2010, directors of Wardley International Holdings Ltd. were disqualified for five years from being directors or otherwise involved in the management of a company for failing to ensure disclosure of material information to the company's shareholders.[3] Given the number of statutory provisions already imposing liability for false or misleading disclosure and the ability to impose penalties for non-disclosure under Section 214 SFO, we see little need for an additional statutory offence.

The temptation for listed companies and their advisers will be to err on the side of caution and disclose which could result in a large amount of superfluous disclosure. The strategy is also not without risk: the premature disclosure of incomplete or indefinite matters risks creating a false market and could well constitute an offence under the market misconduct regime of the SFO.

We note the intention that the Listing Rules' existing general obligation of disclosure will be amended to dovetail with the statutory provisions following a further public consultation to be conducted by me SEHK[4]. We believe that the proposed statutory codification would be best considered in conjunction with the proposed amendments to the Listing Rules. It is considered that the disclosure obligation under the Listing Rules and the SFO will need to be identical to avoid creating two overlapping but different regimes administered by two separate regulators. If there are matters which Listing Rules 13.09(1) and 17.10 and the notes thereto currently require to be disclosed which may not constitute inside information, these would be best dealt with elsewhere in the Listing Rules. With respect to the draft SFC Guidelines, it is not clear whether these are intended to replace or merely supplement the detailed guidelines already published by Hong Kong Exchanges and Clearing Limited in its Guide on Disclosure of Price Sensitive Information. We believe that compliance with, and enforcement of, the proposed statutory obligation will be best facilitated by the adoption of one set of rules with one comprehensive set of guidance. Anything that creates confusion as to the continuing disclosure obligations of listed companies risks damaging the reputation of the Hong Kong market.

We are also concerned at the suggestion that criminal sanctions could be imposed in the future for breach of the statutory obligations[5]. For the reasons set out in this letter, the imposition of criminal liability would be entirely inappropriate. As noted in the

---

[3] SFC Enforcement News "First director disqualification over timely disclosure of information", 17 March 2010

[4] Paragraph 3.4 of the Consultation Paper.

[5] At paragraph 2.29 of the Consultation Paper

Consultation Paper, the EU does not require member states to impose criminal liability and breach of the comparable provisions of the UK Financial Services and Markets Act attracts civil liability only (fines or censure).

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?

As highlighted above, decisions on disclosure of price sensitive information involve difficult and subjective judgements. The amount of case law in jurisdictions adopting similar concepts of inside information pays testament to the ambiguity of the definition. Particular difficulty surrounds the hypothetical test of whether the information "would be likely" to "materially" affect the price of listed securities. What may seem obvious in hindsight is unlikely to have been so at the time the relevant matter occurred.

The draft SFC Guidelines do not address the degree of likelihood which would be required. They also refer to determining how the "general investor" would behave if in possession of relevant information without giving any guidance as to who would be a "general investor". These guidelines are considerably less clear than the guidance given in the Financial Services and Markets Act 2000 and the Disclosure and Transparency Rules ("DTR") and consideration should be given to more precise guidance, particularly on the meaning of "inside information", and ensuring that the companies will be able to rely on such guidance to justify their decisions in any MMT proceedings. For example, DTR 2.2.4(1) sets out the following explicit "reasonable investor" test: "In determining the likely price significance of the information an issuer should assess whether the information in question would be likely to be used by a reasonable investor as part of the basis of his investment decisions and would therefore be likely to have a significant effect on the price of the issuer's financial instruments." It should be noted that in the decision of the Irish Supreme Court in Fyffes Plc v DCC Plc [2007] IESC 36, the "reasonable investor test" was rejected because it was not provided for in the relevant statute or EU directive.

Question 1(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?

The obligation should be to disclose such information as soon as *reasonably* practicable, which is the current requirement under Listing Rules 13.09(1) and 17.10. Paragraph 34 of the draft SFC Guidelines states that the proposed requirement to disclose information "as soon as practicable' means that the issuer should "immediately take all necessary steps that are reasonable in the circumstances" to make the disclosure. It should be made clear that such reasonable necessary steps will allow directors to ascertain relevant facts and take professional advice, where necessary, in order to reach a decision.

We agree with the proposal that information in the actual possession of the directors and officers of a company acquired in the performance of their duties should be attributed to

the company. It does not however agree with the actual wording in the draft Section 101B(2)[6] which additionally attributes information that "ought reasonably to have come into possession" of such directors and officers. A disclosure obligation in respect of information which company officers ought to have known (but did not in fact know) takes companies' disclosure obligations one step too far and should therefore be deleted. This would also be in line with the insider dealing offence[7] which requires actual knowledge that information is inside information.

It is considered that the term "officer" should be restricted to members of an issuer's senior management, i.e. those to whom the board has directly delegated management responsibilities. The current SFO definition which catches a manager or secretary of a company or any other person involved in its management is too wide. In the United Kingdom, a "person discharging managerial responsibilities" is defined in the DTR as either a director of an issuer or a senior executive who: (i) has regular access to inside information relating, directly or indirectly, to the issuer; and (ii) has power to make managerial decisions affecting the future development and business prospects of the issuer[8]. The Group would favour narrowing the category of officers whose knowledge is attributed to the issuer in a similar way to that adopted by the F.S.A.

There would also need to a defence from liability for a company to cover the situation where a director or officer is "on a frolic of his own", for example where an officer deliberately fails to disclose a matter to the board. This could take the form of a defence for the listed company and the other directors where a director or other officer is in breach of a duty owed to the company or in circumstances where reasonable steps have been taken to ensure compliance with the disclosure obligation.

The proposed Section 101B(3) which deems the disclosure of false or misleading information to be non disclosure of "inside information", and thus an offence under proposed Section 101B(1), should be deleted. The disclosure of false or misleading information in public disclosures under the Listing Rules is already a criminal offence under Section 384 SFO. If the information is likely to affect the issuer's share price, the disclosure of that information may also amount to a criminal or civil offence under Sections 277 and 298 of the SFO, respectively.

Question 1(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?

Yes.

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

Yes, subject to the comments in the response to Question 2(c) below.

Question 2(b): Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?

---

[6] At page 30 of the Consultation Paper.
[7] At Section 270 SFO.
[8] FSA Handbook: Glossary definition of "person discharging managerial responsibilities".

Yes. We believe that the SFC should have much wider powers to grant waivers. The SFC's ability to waive the disclosure obligation is restricted under the proposals to situations where disclosure is prohibited by a foreign law or court order. It is suggested that the power to grant waivers, with or without conditions, should exist in any circumstances in which it is considered appropriate.

Question 2(c): Do you think that the legislation should provide for additional safe harbours? If so, what are these additional safe harbours?

As mentioned above, it will be crucial that listed companies, their directors and officers do not risk liability for decisions taken honestly, reasonably and in good faith. The proposed Section 101G(2) will make a director or officer liable for a company's breach if:

a. the breach was the result of an intentional, reckless or negligent act or omission on his part; or

b. he failed to take all reasonable measures to prevent the breach.

We are concerned at the breadth of paragraph (b) above. If the failure to take all reasonable measures involved negligence on the part of the director or officer, it should already be caught under paragraph (a) as a negligent act or omission. Paragraph (b) therefore seems to involve behaviour which is not negligent. It is our view that directors and officers should not be liable in the absence of intent, recklessness or negligence on the part of the individual and that paragraph (b) should therefore be deleted.

With respect to safe harbours, we further consider that:

i. there should be a specific safe harbour for a decision that information does not constitute "inside information" which is made by a company's directors acting honestly, reasonably and in good faith in the performance of their fiduciary duties;

ii. the safe harbour for information concerning "an incomplete proposal or negotiation" should not be subject to the condition that the outcome may be prejudiced if the information is prematurely disclosed;

iii. the above safe harbour should be extended to expressly cover negotiations in relation to litigation, hedging activities and fair value accounting issues under review;

iv. a safe harbour should be provided for information that comprises matters of supposition or is insufficiently definite to warrant disclosure; and

v. a safe harbour should exist for information generated for the internal management purposes of the company.

The proposed safe harbours at paragraphs (iv) and (v) are taken from the Australian Securities Exchange Listing Rules (Rule 3.1A.3).

Question 2(d): Do you think that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?

Yes.

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

Yes.

Question 3(b): Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

No. The proposed maximum fine of HK$8 million, only HK$2 million less than the maximum fine which can be imposed for a criminal offence under the SFO's market misconduct regime, is excessive for civil liability. The proposed HK$8 million fine is therefore at best, only marginally below the level requiring the adoption of a criminal standard of proof and rendering inadmissible compelled self-incriminating evidence. It should also be noted that the MMT has no fining power in the case of civil market misconduct offences under Section 257 SFO. While the MMT may order the payment of an amount up to the amount of any profit made or loss avoided, it has no fining power if there has been no financial benefit to the perpetrator of market misconduct. We see no reason why the MMT should have greater fining powers under the proposals than under Section 257 SFO.[*Note: proportionality is dealt with at paragraph 2.33 on page 16 of the Consultation Paper]* As already mentioned, only directors and members of senior management should face liability and only if they are knowingly, recklessly or negligently involved in the breach.

We consider that "disqualification orders" and "cold shoulder orders", which could effectively end a person's career, are inappropriate. In the limited circumstances in which they might be justified, it is more than likely that the individual would face charges under one of the market misconduct offences. Neither the FSA in the UK nor the Australian Securities and Investment Commission ("ASIC") can impose these penalties for breach of the continuous disclosure rules.

A particular shortcoming of the proposed civil sanctions is they do not provide for a timely rectification of the non-disclosure. Cases of suspected non-disclosure will often be able to be dealt with and remedied informally. We consider it essential that the enforcement authority, whether the MMT or SEHK, should be able to issue a private reprimand (as provided for by Rule 2A.09 of the Main Board Listing Rules) to deal with less serious breaches of the disclosure obligation. In the U.K., private warnings may be given by the FSA and in Australia, "infringement notices" have been adopted by ASIC as a remedy for less serious breaches of the statutory continuous disclosure requirements. Features of "infringement notices" are that the issuer can make submissions in a private hearing before the notice is issued; the issuer can choose to remedy the alleged breach without this being taken as an admission of liability; and ASIC can impose fines.

Question 3(c): Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

No. We consider that referral to the Financial Secretary in the first instance provides an important safeguard.

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 ?

Given the many years of experience of SEHK in interpreting and giving guidance on the continuous disclosure obligations of the Listing Rules, the Group considers that the consultation process should continue to be provided by SEHK. If consultation were to be provided by the SFC, this would need to be provided for more than the proposed 12-month period. We are concerned in particular by the statement at paragraph 20 of the Consultation Paper that "*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 consultation process should involve the regulator assisting the issuer in reaching a decision as to whether certain information is discloseable given the particular circumstances of the issuer.

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

While we agree that the proposed statutory disclosure obligations coupled with the ability of the MMT to impose fines would serve to underpin the Listing Rules' disclosure obligations, it nevertheless feels that SEHK's role as the frontline regulator puts it in the best position to deal with these obligations on a day-to-day basis. SEHK's proximity to the market facilitates the pragmatic application of the continuous disclosure obligations with regard to the particular circumstances of individual issuers.

We would suggest borrowing from the Australian model under which the Australian Stock Exchange ("ASX") is primarily responsible for monitoring and enforcing compliance with the listing rules' disclosure requirements whereas ASIC has responsibility for enforcement of the Corporations Act provisions. Other than drawing matters to the attention of the market and suspending a listed company's securities, ASX has no disciplinary powers in respect of companies or their officers. Thus, in cases where ASX believes there has been a serious breach of the disclosure obligations or the Corporations Act, it will refer the matter to ASIC for further investigation under the terms of a Memorandum of Understanding. This is very similar to the current Hong Kong model and suggests that the day-to-day discussions with issuers regarding compliance could be the responsibility of SEHK while enforcement of the statutory provisions could be vested with the SFC.

In conclusion, we sincerely hope that the above points will be taken into consideration in finalising the statutory disclosure obligations, and that this consultation will be effective. It is **imperative** that the disclosure obligations of listed companies are looked at in the context of the existing provisions of the SFO, the Companies Ordinance and the Listing Rules as a whole. We would therefore like to see the issue of SEHK's consultation paper on the proposed amendments to the Listing Rules as soon as possible and would urge that SFO amendments are made simultaneously with, and not in advance of, the Listing Rule amendments. Clarity as to the disclosure obligations and comprehensive guidance on their interpretation provide the best means of ensuring compliance. Hence the importance of putting in place one comprehensive framework governing disclosure of price sensitive information.

WITH THANKS TO CHARLTONS LAW FIRM FOR THE DRAFTING OF THIS APPENDIX

Submitted by: Cathay Pacific Airways Limited
Stock Code: 293
Date: 18th June 2010

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

Responses to Questions for Consultation

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?*

Yes.

(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?*

Yes, subject to the company secretary being substituted for an officer. Given the serious consequences of non-disclosure, the knowledge of those who are not responsible for the governance of the listed corporation should not be attributed to those who are.

(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?*

Yes.

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

Yes, subject to two points. First, safe harbour A should not be lost by disclosure by a third party, if the legislation still prohibits disclosure by the listed corporation notwithstanding the disclosure by the third party (see paragraphs 47 and 48 of the draft SFC Guidelines). Second, we see no reason why foreign law (or foreign court) prohibitions on disclosure should not be within safe harbour A. If the concern is that the SFC will not have the knowledge of the relevant foreign law in order to check whether the prohibition is genuine, the listed corporation could be required (if so requested by the SFC) to provide a legal opinion issued by a law firm practising in the relevant jurisdiction to the effect that the prohibition is genuine.

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

Yes, but (see answer to 2(a) above) a waiver should not be necessary where disclosure is prohibited by a foreign law or court order.

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

Yes.

Additional safe harbours include:

(i) when trading of the securities of the listed corporation on the Hong Kong Stock Exchange is suspended.

(ii) when the listed corporation has responded to enquiries from the Stock Exchange under Rule 13.10 of the Listing Rules, following which the Stock Exchange does not exercise its power to suspend trading of the securities of that listed corporation.

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

Yes.

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

Yes.

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

We have no comment on this question.

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

We think that the decision to institute proceedings should be taken by the Department of Justice, in order to provide an independent review of the case by a party which has not investigated it. We think that the safeguard of an independent review is desirable in view of the lower burden of proof required in civil matters and the possibility of civil claims being made by third parties.

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?*

   Yes.

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?*

   The division of work and responsibilities between the SFC and SEHK should be set out clearly in order to avoid duplication and gaps and particularly to enable listed corporations to promptly respond to any enquiries in relation to unusual movements in share price or share trading volume.

   It is submitted that the SEHK should issue enquiries, on behalf of itself and the SFC (under the dual filing regime), to listed corporations in relation to unusual movements in share price or share trading volume and that the listed corporations only need to respond to such enquiries to the SEHK (and therefore the SFC under the dual filing regime).

- END -

CASH

Celestial Asia Securities Holdings Limited
CASH Financial Services Group Limited
28/F, Manhattan Place, 23 Wang Tai Road, Kowloon Bay, Hong Kong
Tel: (852) 2287 8888 Fax: (852) 2169 0339
時富投資集團有限公司
時富金融服務集團有限公司

25 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs

Re: Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

This letter states our views towards the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

We have the following overall comments:

1) We support the introduction of civil remedies, not criminal, for this legislation.

2) The definition of "officer" is too wide, and it should include only "director".

3) Both elements of the *mens rea* (the "guilty mind") and *actus reus* (the "guilty act") must be present if a disclosure obligation is deemed to be breached, hence the strict liability concept must not be applied here. A corporation and its directors that could show they had duly and carefully considered a piece of information and made a non-disclose decision based on prevailing circumstances and information should not be held liable even if the information had eventually caused material effect to share price.

Our response to specific questions listed in the Consultation Paper as follows:

Q.1a 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?

We agree.

Q.1b 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?

We agree a listed corporation should disclose inside information promptly but feel that the SFC should provide more guidance on how long is "practicable" in its view and their definition of "immediate". We also suggest "practicable" be changed to "reasonably". A corporation needs to verify the information, make necessary internal review, and assess its impact and this may take time.

For a large corporation with a large number of officers, it is difficult for the corporation to ensure all directors or officers would report inside information instantly that has come to their knowledge. It is our view that if a corporation has established and maintained appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable.

Further, the existing definition of "officer" which includes directors, secretaries and managers is too wide. Under the UK regime, only directors who *knowingly* breach the disclosure requirement would be held liable. We concur with this and recommend Hong Kong follows the UK approach. The definition of "officer" should include only "director" throughout this draft legislation.

The phrase "ought reasonably to have" in s.101B(2) of the "draft legislation" should be taken out. This phrase suggests that it is possible that the information may not have been actually known by the officers and thus it is impossible for the corporation to disclose information on this basis.

Q.1c *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?*

We agree.

Q.2a *Do you agree to the provision of the four proposed Safe Harbours?*

We agree.

Q.2b *Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?*

We agree.

Q.2c *Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?*

We recommend an additional safe harbour which provides that if a corporation and its directors have duly and carefully considered a piece of inside information

and come to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change -- due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show clear and proper records of board deliberations leading to a reasonable conclusion that the information needed not to be disclosed at the time.

Q.2d Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?

We agree. We also think that other market participants should also be given the opportunity to suggest Safe Harbours to match with market developments.

Question 3

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

We do not object.

Q.3b Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

We agree and would want to add that the proposed range of civil remedies is highly deterrent already.

Q.3c Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

Allowing SFC direct access to the MMT lacks the checks-and-balances under the existing arrangement of having the cases referred to the Financial Secretary first. While we support a more efficient process, some checks-and-balances controls are important. Moreover, under the proposed legislation, the other proceedings that cover the six types of market misconduct would be referred to the MMT directly by the SFC. This is a major change. The Government must consider this with a view to balance the market's need for checks-and-balances and whether the resources of MMT can cope with the possible increase in the number of cases referred to it.

Q.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?

We agree and add that this should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new Safe Harbours that may be prescribed from time to time.

Q.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?*

The lines of authorities and responsibilities between the SFC and SEHK must be clearly defined without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by Listing Committee.

We thank you for your attention.

Yours sincerely,

For and on behalf of
Celestial Asia Securities Holdings Limited (stock code: 1049)
CA$H Financial Services Group Limited (stock code: 510)

Suzanne Luke
Company Secretary

Century Legend (Holdings) Limited

25th June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs

Re: Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

This letter states our views towards the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

We have the following overall comments:

1) We support the introduction of civil remedies, not criminal, for this legislation.

2) Both elements of the *mens rea* (the "guilty mind") and *actus reus* (the "guilty act") must be present if a disclosure obligation is deemed to be breached, hence the strict liability concept must not be applied here. A corporation and its directors that could show they had duly and carefully considered a piece of information and made a non-disclose decision based on prevailing circumstances and information should not be held liable even if the information had eventually caused material effect to share price.

Our response to specific questions listed in the Consultation Paper as follows:

Q.1a 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?

We agree.

Q.1b 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?

We agree a listed corporation should disclose inside information promptly but feel that the SFC should provide more guidance on how long is "practicable" in its view and their definition of "immediate". A corporation needs to verify the information, make necessary internal review, and assess its impact and this may take time.

For a large corporation with a large number of officers, it is difficult for the

CENTURY LEGEND GROUP
世 紀 建 業 集 團
Room 3403-04, 34/F., West Tower, Shun Tak Centre, 168-200 Connaught Road Central, Hong Kong
香港干諾道中168-200號信德中心西翼34樓3403-04室
Tel電話: 852-2525 2669 Fax傳真: 852-2971 0333

corporation to ensure all directors or officers would report inside information instantly that has come to their knowledge. It is our view that if a corporation has established and maintained appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable.

Further, the existing definition of "officer" which includes directors, secretaries and managers is too wide. Under the UK regime, only directors who *knowingly* breach the disclosure requirement would be held liable. We concur with this and recommend Hong Kong follows the UK approach. The definition of "officer" should include only "director" throughout this draft legislation.

The phrase "ought reasonably to have" in s.101B(2) of the "draft legislation" should be taken out. This phrase suggests that it is possible that the information may not have been actually known by the officers and thus it is impossible for the corporation to disclose information on this basis.

Q.1c 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?

We agree.

Q.2a Do you agree to the provision of the four proposed Safe Harbours?

We agree.

Q.2b Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?

We agree.

Q.2c Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?

We recommend an additional safe harbour which provides that if a corporation and its directors have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change -- due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show clear and proper records of board deliberations leading to a reasonable conclusion that the information needed not to be disclosed at the time.

Q.2d Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?

We agree. We also think that other market participants should also be given the opportunity to suggest Safe Harbours to match with market developments.

CENTURY LEGEND GROUP
世 紀 建 業 集 團
Room 3403-04, 34/F., West Tower, Shun Tak Centre, 168-200 Connaught Road Central, Hong Kong
香港干諾道中168-200號信德中心西翼34樓3403-04室
Tel電話：852-2525 2669 Fax傳真：852-2971 0333

Question 3

Q.3a *Do you agree to extend the jurisdiction of the MMT to handle breaches of the statutory disclosure requirements?*

We do not object.

Q.3b *Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?*

We agree and would want to add that the proposed range of civil remedies is highly deterrent already.

Q.3c *Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?*

Allowing SFC direct access to the MMT lacks the checks-and-balances under the existing arrangement of having the cases referred to the Financial Secretary first. While we support a more efficient process, some checks-and-balances controls are important. Moreover, under the proposed legislation, the other proceedings that cover the six types of market misconduct would be referred to the MMT directly by the SFC. This is a major change. The Government must consider this with a view to balance the market's need for checks-and-balances and whether the resources of MMT can cope with the possible increase in the number of cases referred to it.

Q.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?*

We agree and add that this should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new Safe Harbours that may be prescribed from time to time.

Q.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?*

The lines of authorities and responsibilities between the SFC and SEHK must be clearly defined without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by Listing Committee.

We thank you for your attention.

Yours sincerely,

For and on behalf of
Century Legend (Holdings) Limited (Stock code:00079)

CENTURY LEGEND GROUP
世 紀 建 業 集 團
Room 3403-04, 34/F., West Tower, Shun Tak Centre, 168-200 Connaught Road Central, Hong Kong
香港干諾道中168-200號信德中心西翼34樓3403-04室
Tel電話: 852-2525 2669 Fax傳真: 852-2971 0333

香 港 上 市 公 司 商 會
THE CHAMBER OF HONG KONG LISTED COMPANIES

15 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1, Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sir,

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

The Chamber of Hong Kong Listed Companies (the "Chamber" or "We") is pleased to submit a response to the Consultation Paper as follows. Words and expressions used herein shall have the same meaning as those defined in the Consultation Paper.

General

Before we address the specific questions under consultation, we would like to express our support for the introduction of civil remedies for this proposed legislation, not criminal. In principle, we maintain our view that there are sufficient laws and regulations both in the existing legislative framework, in particular, the Securities and Futures Ordinance, Companies Ordinance and the regulatory framework, notably, the Main Board and GEM Listing Rules of the SEHK that govern the disclosure of price sensitive information and the prevention of illicit market activities associated with non-disclosure. However, if requirement of disclosure is to be subject to a new statutory provision, it is in our view that civil sanctions, not criminal, are far more suitable in light of the nature of price sensitive information.

The Consultation Paper proposes adopting the "relevant information" concept currently used in s.245 of the SFO. Even so, the concept of "relevant information" and the definition of what amounts to "material" effect are practically no clear cut matter and are difficult to be put in precise terms. Determining what is price sensitive or not, and over the timing of disclosure, if it is deemed necessary, will always to some extent be a matter of subjective judgment and discretionary based on what is known at the time as such decision is made. More importantly, in the absence of the benefit of foresight, how the market will react to a piece of information, and the magnitude of any reaction to it, are not easy matters that the company and directors may forecast. On this point, even the draft guidelines on disclosure of information by the SFC states that *"the test of whether the information is likely to materially affect the price is a hypothetical one"* and *"the exercise in determining how the general investor would behave ... has necessarily to be an assessment."* (paragraph 23 of SFC Consultation Paper on the Draft Guidelines on Disclosure of Inside Information (the "SFC guidelines"). In light of this, the Chamber's view is that it would be less onerous to the market for the proposed legislation to carry civil sanctions only.

香港灣仔皇后大道東183號合和中心2102室
Room 2102, 21st Floor, Hopewell Centre, 183 Queen's Road East, Wanchai, Hong Kong
電話 Tel: (852) 2970 0886 傳真 Fax: (852) 2970 0555 網址 Website: http://www.chklc.org

Secondly, since whether a piece of information would materially affect the share price is of an uncertain nature and in many cases could only be determined in hindsight, it is important that the SFC, when determining whether the disclosure obligation is breached, must require that both the elements of "*mens rea*" and "*actus reus*" are present. For illustration, a listed corporation and its directors had duly and carefully considered a piece of information and based on prevailing circumstances and information available to them at that time, decided that it would not cause material effect to the share price and hence no disclosure was made, but in the end the share price recorded a material change which was attributable to that particular piece of information. In this situation, though an "act" of non-disclosure could be established, there was however clearly an absence of "intention". In this regard we would suggest strongly that the company and its directors should not be held liable for breaching the disclosure requirement on grounds that due consideration had been given and a decision was made in good faith, and after having exercised reasonable skill and care, save that the market unexpectedly over-reacted contrary to their assessment. Certainly, the strict liability concept must not be applied here. The draft clause 101G(2) recognises this in relation to 'officers', but the requirement for the non-disclosure to be intentional, reckless or negligent also needs to be recognized in relation to the company itself.

The specific questions listed out in the Consultation Paper as addressed as follows:

Question 1

(a) Although the existing definition of "relevant information" is no clear cut matter itself and there are differences of views about the application of this definition, for the benefit of not introducing a new set of concept and definition, we agree to the adoption of the existing definition.

(b) We agree in principle a listed corporation has the duty to disclose "inside information". However concerning the obligation to disclose "as soon as practicable", we have reservations that the notion of "practicable" is not easy to comply with and disputes about this may arise. The SFC guidelines further state that "the corporation should *immediately* take all necessary steps that are reasonable in the circumstances to disclose the information to the public" (paragraph 32), which from compliance viewpoint may make it more difficult to follow. For example, upon obtaining a piece of inside information, it is possible that it will take some time to conduct investigation to verify its validity, consult its overseas offices, or seek legal advice to assess the implications. This may take a few days, if not longer. Will this amount to a failure to meet the "immediate" requirement? To the company, the checking, verification and consulting and assessment are all necessary before releasing any information, in the absence of which it may run the risk of misinforming or misleading the market. Issuing a holding statement, as the SFC guidelines suggest, would also be inappropriate before the validity of the information could be confirmed if the company does not wish to release information that might later be proved invalid or incorrect. The SFC's stance on what is "immediate" and how long is "practicable" is crucial. More guidance and clarification need to be provided in this respect.

The second part of this question asks the views about the provision that a listed corporation will be regarded as having knowledge of inside information if a director or 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 (as contained in s.101B(2) of the "Indicative Draft Legislative Provisions on Disclosure Obligations and Safe Harbours" (the "draft legislation")). We have reservation about this and our views are as follows:

- We consider the definition of scope of "officer" which includes director, manager and secretary too wide. For a large corporation, especially in the case of a multi-national corporation, there may be thousands of "managers" and it would be extremely challenging for the company to ensure that all managers report inside information immediately. We also observe that fact that under the UK regime for price sensitive information disclosure, it is only the directors who *knowingly* breach the disclosure requirement would be held liable, not even company secretaries. It is inappropriate for individual employees such as managers, as opposed to directors, to be held liable for the company's breach, even if they have acted intentionally, recklessly or negligently, but this would be the effect of Clause 101G(2). We agree with the UK approach of holding only directors liable since it is they who make the decision. We recommend that Hong Kong should follow the UK and require only directors to be subjected to the proposed legislation. The definition of "officer" should therefore include only "director" throughout this draft legislation.

- The phrase "ought reasonably to have" suggests that it is possible that the information may not have been actually known by the officer. To require the corporation to disclose information that may not be known by its officers, or employees of any level, for that matter, is to require the impossible. We suggest that this phrase be taken out.

- Therefore, if a corporation has established and maintained appropriate and effective systems and procedures requiring its officers or employees of any level to report inside information, but should the officers or employee fail to follow them, it is they who are primarily at fault, not the corporation. This should be a good defense if the corporation could demonstrate that appropriate and effective systems and procedures are in place and officers and employees are made aware of them, yet it has never had knowledge of the information, because the officers or employees possessing the price sensitive information had failed to inform it, and it has not acted intentionally, recklessly and negligently.

On a similar issue, s.101G of the draft legislation 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". Our views on this are that, as said before, the definition of officers, which include "managers", is too wide. At most, "managers" should be expected to follow the safeguards put in place by the listed corporation but not assuming the obligations to "ensure that proper safeguards exits". The civil remedies of breaching the disclosure requirement for the individual directors or officers are deterrent enough and would provide sufficient disincentive to non-compliance. It would be excessive to impose further obligations on them.

(c) We agree to this and further agree that the Electronic Publication System operated by the HKEx would serve the purpose.

Question 2

(a) We agree to the provision of the four safe harbours as proposed.

(b) We agree the SFC should be empowered to grant waivers to cases where court orders or legislation of another jurisdiction are involved and to impose appropriate conditions.

(c) We would recommend an additional safe harbour which states clearly that when directors of a listed corporation have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect the share price, then the listed corporation can withhold disclosure. Under this Safe Harbour, if subsequently the information is found to be causing material price change -- due to unexpected market reaction or change in market circumstances which is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show clear and proper records of proper board deliberations leading to a reasonable conclusion that, without the benefit of hindsight, the information needed not to be disclosed at the material time.

(d) We agree the SFC should be empowered to prescribe additional safe harbours that would further balance the need of disclosure and commercial confidentiality of listed corporations. Likewise, other market participants should also be given the opportunity to make suggestions for additional safe harbours to further reflect changing market realities and from time to time plug any loopholes after the enforcement of the legislation has commenced. These additional safe harbours need to be introduced fairly expeditiously without lengthy legislative process to avoid causing prolonged disclosure challenges to listed corporations.

As a general comment, we believe there is a need to further clarify the handling of rumours under the safe harbours. According to draft Clause 101D(1)(b) and the SFC guidelines, if the information intended to be kept confidential is leaked, any safe harbours will no longer apply. However, say for example, under Safe Harbour A, disclosure of an investigation by the ICAC is withheld by a listed corporation but subsequently there are market rumours about such investigation suggesting the confidentiality has been lost. According to the SFC guidelines, disclosure has to be made. However, making such disclosure will still be seen as contravening the Prevention of Bribery Ordinance. The listed corporation concerned is then caught in a dilemma. Definite and specific guidance from the SFC as to the extent of disclosure should be made while without prejudicing the criminal investigations (or even the judicial process) would be necessary.

Sometimes, an inside information may be leaked but the leakage is not caused by the company and is beyond its control. To withdraw the safe harbour in this circumstance is too restrictive. We suggest that if a leakage does not contain extensive and accurate information about the event that requires disclosure, for example, it only touches on the fact that the company is negotiating a major acquisition but not the crucial details, the company can seek a waiver from the SFC from making a disclosure. This will allow the company to continue its negotiation and not divulge crucial information prematurely that would jeopardise the negotiation.

Question 3

(a) We do not object that the jurisdiction of the MMT is extended to handle breaches of the statutory disclosure requirements for reasons outlined in the Consultative Paper.

(b) In our view, the proposed range of civil remedies is sufficiently deterrent. Although no criminal sanctions are involved, the proposed remedies are wide-ranging, from monetary fine, disqualification of directorship to barring from market activities, amongst others. These remedies have serious implications, especially to individual directors and officers. In particular, the proposed fine of up to HK$8 million is very high for some directors and senior management of some H-shares companies and may be beyond their means. In addition, under the proposal, civil actions can also be taken to seek compensation from the company and/or directors and officers; and the financial implications to them can be huge. We do not object to these civil remedies but want to add that they are strong measures and have effective deterrent effects to discourage unlawful non-disclosure.

(c) Regarding the proposal of allowing the SFC direct access to the MMT to institute proceedings on PSI-related breaches, we think that the existing system of having the cases referred to the Financial Secretary first has the merit of providing stronger checks-and-balances and would avoid the undesirable situation of having both powers of investigation and instituting proceedings vested with the same organization, although we recognize the existing arrangement might slow down the process. Furthermore, under the proposed legislation, not only PSI-related breaches will be referred to MMT directly by the SFC but the other proceedings that cover the six types of market misconduct as well. This is a major deviation from existing arrangements and we think this needs to be considered and discussed more thoroughly. There is also the concern of how the MMT could cope with the potentially increased number of cases under the direct access arrangement. We therefore urge the Government to reconsider the whole issue of allowing SFC direct access to MMT balancing the market's need for checks-and-balances and the resources consideration against the "streamlined process" requirement as suggested in the consultation document. We are, however, supportive of an efficient process, but with some checks-and-balances control put in place.

Question 4

It is important that SFC provides informal consultation to listed corporations to help them interpret the guidelines and come to understand what constitutes inside information and when it is necessary to disclose on a case-by-case basis. Under the new statutory regime, SFC will be the enforcement authority but it lacks the long experience of dealing with listed corporations on disclosure matters that the SEHK has. The SFC should adopt a proactive stance to establish working relationship with listed corporations to enable them to better understand SFC's expectation and standards of listed corporations in handling disclosure. Likewise, the consultation service would enable the SFC to understand the day-to-day issues faced by listed corporations in relation to PSI. Such service needs to be easily accessible so that a listed corporation can form a view about a disclosure issue promptly and can take actions accordingly. The service should be modeled after a help desk, or hotline service, with designated SFC officers assigned to particular listed corporations, much like the existing system of SEHK, to facilitate ease of communication.

Instead of having a 12-month limit to the informal consultation service, we think a continuous service by the SFC is necessary to ensure that the market is well informed as to its expectations which could be changing from time to time due to rapid market developments. Besides, further safe harbours may be prescribed from time to time in the future which necessitates the continuous consultation with the SFC in relation to the application of the new safe harbours.

It would be useful if the SFC could publish the common questions they receive from listed corporations or even case examples for the reference of others. This helps the market understand the approach and philosophy of the SFC and may actually reduce the number of enquiries they receive in future.

Question 5

It has been stated in the consultation paper that the SEHK will modify the general disclosure obligations in the Listing Rules to dovetail them with the statutory provisions. Accordingly, there would be a possible duplication of regulatory effort and listed corporations would thus potentially need to face the MMT proceedings as well as the disciplinary hearings by the Listing Committee in respect of the same incident of non-disclosure. It is important that this would not be the case. Under the new statutory regime, the lines of authorities and responsibilities between the SFC and SEHK must be clearly defined without duplication, and listed companies will not be subject to dual regulation and duplicate investigation. We agree that where there is a breach of the statutory PSI disclosure requirements, SFC investigation and enforcement should take precedence over SEHK so that the concerned company or individual will be subject to investigation and proceeding under the statutory regime only but not also the Listing Rules at the same time.

We hope our comments above would receive your due consideration and if you wish to discuss any of the above, please feel free to contact the undersigned.

Yours sincerely,
For and on behalf of
The Chamber of Hong Kong Listed Companies

Mike Wong
Chief Executive Officer

CHARLTONS
易周律師行
Solicitors

10th Floor
Hutchison House
10 Harcourt Road
Hong Kong

香港夏慤道十號
和記大廈十樓

Tel 電話 : (852) 2905 7888
Fax 傳真 : (852) 2854 9596
www.charltonslaw.com

BY HAND

24 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18, Harcourt Road
Hong Kong

Your Ref:
Our Ref: OFFICE/JFC/KAL
Direct Dial: 852 2905 7641

Dear Sirs

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

We are instructed by the companies whose names appear in the Schedule to this letter (the "Group") to respond to the proposals set out in the Consultation Paper.

While the Group is supportive of measures to further promote a culture of disclosure among Hong Kong listed companies, it has a number of serious concerns in relation to the specific proposals as set out in this letter.

Of the disclosure obligations originally proposed for statutory codification[1], the Group considers the disclosure of price sensitive or inside information, being incapable of precise definition, to be the least well suited. The definition is necessarily broad and a decision as to whether a matter falls within its scope invariably involves a judgement call on the part of the company's board. The difficulty of the analysis coupled with the severity of the proposed sanctions, would put directors in an extremely unenviable position.

The primary difficulty in determining whether particular information is discloseable is that directors are required to determine *ex ante* whether the information would be likely to materially affect the price of the company's shares if generally known to persons likely to invest in the company's shares. As noted in the draft SFC Guidelines on Disclosure of Information ("SFC Guidelines"), the test is a hypothetical one and

[1] SFC Consultation Paper on Proposed Amendments to the Securities and Futures (Stock Market Listing) Rules of January 2005.

determining whether it is satisfied "has necessarily to be an assessment"[2]. As enforcement agencies, however, the SFC and MMT will have the luxury of hindsight and the knowledge that non-disclosed information in fact had a material affect on the share price obviously makes it harder for the directors to justify a decision made in good faith that it was unlikely to do so. With the need to second-guess investors' response to disclosure of any particular piece of information, there will inevitably be situations where directors simply get it wrong notwithstanding considered analysis of the information and the taking of professional advice. This gives rise to the Group's primary concern, that the current proposals give insufficient protection to directors who make an honest and reasonable mistake.

For these reasons, the Group considers it essential that there is a complete defence from liability for listed companies, their directors and officers if they have acted honestly, reasonably and in good faith in the performance of their duties. Timely disclosure of price-sensitive information will be achieved not only by regulation and punitive deterrents but through the continued ability of Hong Kong listed companies to attract competent and responsible directors able to ensure compliance. The onerous nature of directors' responsibilities and harsh penalties proposed by the Consultation Paper are however likely to deter many suitable candidates from taking up company directorships, thus potentially undermining rather than enhancing the ability of listed companies, particularly SMEs, to meet their disclosure obligations.

It is considered that the severe penalties proposed could only be justified if "inside information" were defined by way of an exhaustive list of specific matters so that there could be certainty for those responsible for disclosure. However, that approach runs the risk that important information will not be disclosed as it would be impossible to conceive of every situation that investors would consider important for all companies. It would also be difficult to keep the definition up-to-date with financial innovation and changing market conditions.

The more egregious cases of non-disclosure warranting more severe penalties than those available to the Stock Exchange ("SEHK"), should in any event already be covered by existing provisions of the Securities and Futures Ordinance ("SFO"). Section 384 SFO imposes criminal liability if any public disclosure under the Hong Kong Listing Rules contains information which is false or misleading in a material particular, if there is knowledge or recklessness as to whether that is the case. The SFC has also recently prosecuted non-disclosure of price sensitive information under the Listing Rules under Section 214 SFO. In March 2010, directors of Warderly International Holdings Ltd. were disqualified for five years from being directors or otherwise involved in the management of a company for failing to ensure disclosure of material information to the company's shareholders.[3] Given the number of statutory provisions already imposing liability for false or misleading disclosure and the ability to impose penalties for non-disclosure under Section 214 SFO, the Group sees little need for an additional statutory offence.

---

[2] At paragraph 23 of the SFC draft Guidelines on Disclosure of Information.
[3] SFC Enforcement News "First director disqualification over timely disclosure of information", 17 March 2010

The temptation for listed companies and their advisers will be to err on the side of caution and disclose which could result in a large amount of superfluous disclosure. The strategy is also not without risk: the premature disclosure of incomplete or indefinite matters risks creating a false market and could well constitute an offence under the market misconduct regime of the SFO.

The Group notes the intention that the Listing Rules' existing general obligation of disclosure will be amended to dovetail with the statutory provisions following a further public consultation to be conducted by SEHK[4]. The Group believes that the proposed statutory codification would be best considered in conjunction with the proposed amendments to the Listing Rules. It is considered that the disclosure obligation under the Listing Rules and the SFO will need to be identical to avoid creating two overlapping but different regimes administered by two separate regulators. If there are matters which Listing Rules 13.09(1) and 17.10 and the notes thereto currently require to be disclosed which may not constitute inside information, these would be best dealt with elsewhere in the Listing Rules. With respect to the draft SFC Guidelines, it is not clear whether these are intended to replace or merely supplement the detailed guidelines already published by Hong Kong Exchanges and Clearing Limited in its Guide on Disclosure of Price Sensitive Information. The Group believes that compliance with, and enforcement of, the proposed statutory obligation will be best facilitated by the adoption of one set of rules with one comprehensive set of guidance. Anything that creates confusion as to the continuing disclosure obligations of listed companies risks damaging the reputation of the Hong Kong market.

The Group is also concerned at the suggestion that criminal sanctions could be imposed in the future for breach of the statutory obligations[5]. For the reasons set out in this letter, the imposition of criminal liability would be entirely inappropriate. As noted in the Consultation Paper, the EU does not require member states to impose criminal liability and breach of the comparable provisions of the UK Financial Services and Markets Act attracts civil liability only (fines or censure).

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?

As highlighted above, decisions on disclosure of price sensitive information involve difficult and subjective judgements. The amount of case law in jurisdictions adopting similar concepts of inside information pays testament to the ambiguity of the definition. Particular difficulty surrounds the hypothetical test of whether the information "would be likely" to "materially" affect the price of listed securities. What may seem obvious in hindsight is unlikely to have been so at the time the relevant matter occurred.

The draft SFC Guidelines do not address the degree of likelihood which would be required. They also refer to determining how the "general investor" would behave if in possession of relevant information without

[4] Paragraph 3.4 of the Consultation Paper.
[5] At paragraph 2.29 of the Consultation Paper

giving any guidance as to who would be a "general investor". These guidelines are considerably less clear than the guidance given in the Financial Services and Markets Act 2000 and the Disclosure and Transparency Rules ("DTR") and consideration should be given to more precise guidance, particularly on the meaning of "inside information", and ensuring that the companies will be able to rely on such guidance to justify their decisions in any MMT proceedings. For example, DTR 2.2.4(1) sets out the following explicit "reasonable investor" test: "In determining the likely price significance of the information an issuer should assess whether the information in question would be likely to be used by a reasonable investor as part of the basis of his investment decisions and would therefore be likely to have a significant effect on the price of the issuer's financial instruments." It should be noted that in the decision of the Irish Supreme Court in Fyffes Plc v DCC Plc [2007] IESC 36, the "reasonable investor test" was rejected because it was not provided for in the relevant statute or EU directive.

Question 1(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?

The obligation should be to disclose such information as soon as *reasonably* practicable, which is the current requirement under Listing Rules 13.09(1) and 17.10. Paragraph 34 of the draft SFC Guidelines states that the proposed requirement to disclose information "as soon as practicable' means that the issuer should "immediately take all necessary steps that are reasonable in the circumstances" to make the disclosure. It should be made clear that such reasonable necessary steps will allow directors to ascertain relevant facts and take professional advice, where necessary, in order to reach a decision.

The Group agrees with the proposal that information in the actual possession of the directors and officers of a company acquired in the performance of their duties should be attributed to the company. It does not however agree with the actual wording in the draft Section 101B(2)[6] which additionally attributes information that "ought reasonably to have come into possession" of such directors and officers. A disclosure obligation in respect of information which company officers ought to have known (but did not in fact know) takes companies' disclosure obligations one step too far and should therefore be deleted. This would also be in line with the insider dealing offence[7] which requires actual knowledge that information is inside information.

It is considered that the term "officer" should be restricted to members of an issuer's senior management, i.e. those to whom the board has directly delegated management responsibilities. The current SFO definition which catches a manager or secretary of a company or any other person involved in its management is too wide. In the United Kingdom, a "person discharging managerial responsibilities" is defined in the DTR as

[6] At page 30 of the Consultation Paper.
[7] At Section 270 SFO.

either a director of an issuer or a senior executive who: (i) has regular access to inside information relating, directly or indirectly, to the issuer; and (ii) has power to make managerial decisions affecting the future development and business prospects of the issuer[8]. The Group would favour narrowing the category of officers whose knowledge is attributed to the issuer in a similar way to that adopted by the F.S.A.

There would also need to a defence from liability for a company to cover the situation where a director or officer is "on a frolic of his own", for example where an officer deliberately fails to disclose a matter to the board. This could take the form of a defence for the listed company and the other directors where a director or other officer is in breach of a duty owed to the company or in circumstances where reasonable steps have been taken to ensure compliance with the disclosure obligation.

The proposed Section 101B(3) which deems the disclosure of false or misleading information to be non disclosure of "inside information", and thus an offence under proposed Section 101B(1), should be deleted. The disclosure of false or misleading information in public disclosures under the Listing Rules is already a criminal offence under Section 384 SFO. If the information is likely to affect the issuer's share price, the disclosure of that information may also amount to a criminal or civil offence under Sections 277 and 298 of the SFO, respectively.

Question 1(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?

Yes.

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

Yes, subject to the comments in the response to Question 2(c) below.

Question 2(b): Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?

Yes. The Group believes that the SFC should have much wider powers to grant waivers. The SFC's ability to waive the disclosure obligation is restricted under the proposals to situations where disclosure is prohibited by a foreign law or court order. It is suggested that the power to grant waivers, with or without conditions, should exist in any circumstances in which it is considered appropriate.

Question 2(c): Do you think that the legislation should provide for additional safe harbours? If so, what are these additional safe harbours?

[8] FSA Handbook: Glossary definition of "person discharging managerial responsibilities".

As mentioned above, it will be crucial that listed companies, their directors and officers do not risk liability for decisions taken honestly, reasonably and in good faith. The proposed Section 101G(2) will make a director or officer liable for a company's breach if:

a. the breach was the result of an intentional, reckless or negligent act or omission on his part; or

b. he failed to take all reasonable measures to prevent the breach.

The Group is concerned at the breadth of paragraph (b) above. If the failure to take all reasonable measures involved negligence on the part of the director or officer, it should already be caught under paragraph (a) as a negligent act or omission. Paragraph (b) therefore seems to involve behaviour which is not negligent. It is the Group's view that directors and officers should not be liable in the absence of intent, recklessness or negligence on the part of the individual and that paragraph (b) should therefore be deleted.

With respect to safe harbours, the Group further considers that:

i. there should be a specific safe harbour for a decision that information does not constitute "inside information" which is made by a company's directors acting honestly, reasonably and in good faith in the performance of their fiduciary duties;

ii. the safe harbour for information concerning "an incomplete proposal or negotiation" should not be subject to the condition that the outcome may be prejudiced if the information is prematurely disclosed;

iii. the above safe harbour should be extended to expressly cover negotiations in relation to litigation, hedging activities and fair value accounting issues under review;

iv. a safe harbour should be provided for information that comprises matters of supposition or is insufficiently definite to warrant disclosure; and

v. a safe harbour should exist for information generated for the internal management purposes of the company.

The proposed safe harbours at paragraphs (iv) and (v) are taken from the Australian Securities Exchange Listing Rules (Rule 3.1A.3).

Question 2(d): Do you think that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?

Yes.

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

Yes.

Question 3(b): Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

No. The proposed maximum fine of HK$8 million, only HK$2 million less than the maximum fine which can be imposed for a criminal offence under the SFO's market misconduct regime, is excessive for civil liability. If the fine is to be set this high, the criminal standard of proof and other criminal law principles should apply. It should also be noted that the MMT has no fining power in the case of civil market misconduct offences under Section 257 SFO. While the MMT may order the payment of an amount up to the amount of any profit made or loss avoided, it has no fining power if there has been no financial benefit to the perpetrator of market misconduct. The Group sees no reason why the MMT should have greater fining powers under the proposals than under Section 257 SFO. As already mentioned, only directors and members of senior management should face liability and only if they are knowingly, recklessly or negligently involved in the breach.

The Group considers that "disqualification orders" and "cold shoulder orders", which could effectively end a person's career, are inappropriate. In the limited circumstances in which they might be justified, it is more than likely that the individual would face charges under one of the market misconduct offences. Neither the FSA in the UK nor the Australian Securities and Investment Commission ("ASIC") can impose these penalties for breach of the continuous disclosure rules.

A particular shortcoming of the proposed civil sanctions is they do not provide for a timely rectification of the non-disclosure. Cases of suspected non-disclosure will often be able to be dealt with and remedied informally. The Group considers it essential that the enforcement authority, whether the MMT or SEHK, should be able to issue a private reprimand (as provided for by Rule 2A.09 of the Main Board Listing Rules) to deal with less serious breaches of the disclosure obligation. In the U.K., private warnings may be given by the FSA and in Australia, "infringement notices" have been adopted by ASIC as a remedy for less serious breaches of the statutory continuous disclosure requirements. Features of "infringement notices" are that the issuer can make submissions in a private hearing before the notice is issued; the issuer can choose to remedy the alleged breach without this being taken as an admission of liability; and ASIC can impose fines.

Question 3(c): Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

No. The Group considers that referral to the Financial Secretary in the first instance provides an important safeguard.

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 ?

Given the many years of experience of SEHK in interpreting and giving guidance on the continuous disclosure obligations of the Listing Rules, the Group considers that the consultation process should continue to be provided by SEHK. If consultation were to be provided by the SFC, this would need to be provided for more than the proposed 12-month period. The Group is concerned in particular by the statement at paragraph 20 of the Consultation Paper that "*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 consultation process should involve the regulator assisting the issuer in reaching a decision as to whether certain information is discloseable given the particular circumstances of the issuer.

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

While the Group agrees that the proposed statutory disclosure obligations coupled with the ability of the MMT to impose fines would serve to underpin the Listing Rules' disclosure obligations, it nevertheless feels that SEHK's role as the frontline regulator puts it in the best position to deal with these obligations on a day-to-day basis. SEHK's proximity to the market facilitates the pragmatic application of the continuous disclosure obligations with regard to the particular circumstances of individual issuers.

The Group would suggest borrowing from the Australian model under which the Australian Stock Exchange ("ASX") is primarily responsible for monitoring and enforcing compliance with the listing rules' disclosure requirements whereas ASIC has responsibility for enforcement of the Corporations Act provisions. Other than drawing matters to the attention of the market and suspending a listed company's securities, ASX has no disciplinary powers in respect of companies or their officers. Thus, in cases where ASX believes there has been a serious breach of the disclosure obligations or the Corporations Act, it will refer the matter to ASIC for further investigation under the terms of a Memorandum of Understanding. This is very similar to the current Hong Kong model and suggests that the day-to-day discussions with issuers regarding compliance could be the responsibility of SEHK while enforcement of the statutory provisions could be vested with the SFC.

In conclusion, the Group very much hopes that the above points will be taken into consideration in finalising the statutory disclosure obligations. It is imperative that the disclosure obligations of listed companies are looked at in the context of the existing provisions of the SFO, the Companies Ordinance and the Listing Rules as a whole. The Group would therefore like to see the issue of SEHK's consultation paper on the proposed amendments to the Listing Rules as soon as possible and would urge that SFO amendments are

made simultaneously with, and not in advance of, the Listing Rule amendments. Clarity as to the disclosure obligations and comprehensive guidance on their interpretation provide the best means of ensuring compliance. Hence the importance of putting in place one comprehensive framework governing disclosure of price sensitive information.

Yours faithfully

Charltons

CHARLTONS

SCHEDULE

Access Capital Limited

Anglo Chinese Corporate Finance, Limited

CIMB Securities (HK) Ltd.

Quam Limited

Somerley Limited

Taifook Capital Limited

CHEUNG KONG (HOLDINGS) LIMITED 長江實業(集團)有限公司

24th June, 2010

BY FAX (2529 2075) & BY HAND

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs,

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

We welcome and support the Government's decision for not introducing criminal sanctions to the statutory disclosure regime proposed in the Consultation Paper.

Below are our comments to the questions set out in the Consultation Paper:

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?***

Our comments

1. Yes. The familiarity with the concept of "relevant information", which has been used by the market for two decades, should facilitate listed corporations in determining whether a particular piece of information is PSI and hence the need for disclosure.

(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?***

Our comments

2. We agree that a listed corporation should be obliged to disclose to the public as soon as practicable any "inside information" which would be likely to materially affect the price of its listed securities that has come to its knowledge.

NP/Consult/PSI/CKH letter- PSI Consult Response/1
7-12/F Cheung Kong Center, 2 Queen's Road Central, Hong Kong Tel : (852) 2128 8888 / (852) 2526 6911 Fax : (852) 2845 2940

3. However, we do not agree with the drafting of the proposed section 101B in that a listed corporation should be regarded to have knowledge of the inside information if its director or officer has, or ought reasonably to have, come into possession of that information in the course of the performance of his duties. The phrase "ought reasonably to have" in the draft sections 101B(2) and 101B(3) suggests that the listed corporation will be liable for non-disclosure in cases where the PSI may not have been actually known to any officer of the corporation. This will place an absolute or strict liability on the corporation to disclose PSI. A corporation should only be held responsible if the breach is "intentional" or "recklessly". Accordingly, the words "ought reasonably to have" should be deleted from the draft sections 101B(2) and 101B(3).

4. We disagree with the adoption of the "negligence" standard in draft sections 101B and 101G as this is setting a standard higher than the other types of more serious market misconduct offences under Part XIII of the SFO (e.g. false trading, market manipulation). The only market misconduct offence under Part XIII of the SFO which apply the "negligence" standard is "disclosure of false or misleading information inducing transactions" (section 277 of the SFO). However, this has to be differentiated from the proposed PSI offences in that S277 requires a positive act on the part of the offender while the proposed PSI offences could also be triggered through an omission to disclose. In addition, the offence under S277 requires an additional element of "inducing transactions". Accordingly, a consistent standard should be adopted for the proposed PSI offences, and that the words "or negligent" should be deleted from the draft sections 101B(3)(b) and 101G(2)(a).

5. The definition of "officer" in the draft legislation which includes a director, manager or secretary of, or any other person involved in the management of the listed corporation, is just too wide. The reference to an "officer" in the draft section 101G should be replaced by "director". It is inappropriate for any officer below director level to be subject to individual legal liability since the decision to whether or not disclose is solely a matter for the directors of a listed corporation. Officers other than the directors have no power or authority to effect the disclosure and it is inconceivable that they should be held responsible for a matter over which they have no control. For the same reason as stated in paragraph 3 above, the individual liability for officers under draft section 101G(2) should only be triggered if the breach of the PSI requirement is "intentional" or "reckless".

6. Further, a corporation's liability for failure to comply with the PSI requirements should not be made absolute since decisions for whether or not to disclose often involve fine judgment call based on the available information and the specific circumstances at the material time. There is a strong subjective element involved and is not merely a test of what a reasonable man would do at the material time. A corporation which has followed proper internal procedures and made a reasonable and good faith judgment not to disclose should not be held liable. We suggest that a safe harbour or a statutory defence in respect of this to be provided for in the legislation. Please refer to paragraph 12 below.

(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?***

Our comments

7. Yes, we agree 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 and that the Electronic Publication System operated by the HKEx should be able to serve this purpose.

Question 2

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

Our comments

8. Yes, we agree to the provision of the four proposed safe harbours.

9. In respect of the safe harbour to allow listed corporations not disclosing or delay disclosing certain PSI when the disclosure would constitute a breach against an order made by a Hong Kong court or any provision of other Hong Kong statutes, we suggest that it should be made clear in the law that this safe harbour should not be lost even when there is a leakage say by a third party thus contravening the proposed section 101D(1)(b). In the absence of such protection, the listed corporation and its officer will either have to breach the court order/relevant Hong Kong statutes or the PSI requirements.

10. As to the safe harbour for trade secret, it should be acknowledged that trade secrets may vary from industry to industry and its interpretation should not only be restricted to inventions, manufacturing processes or customer lists. Further, a listed corporation should not be required to disclose its trade secrets to the public even if there is a leakage as disclosure will only be aggravating the damage already made to the listed corporation.

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

Our comments

11. Yes, to allow for flexibility, the SFC should be empowered to grant waivers, and to attach conditions thereto, to listed corporations.

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

Our comments

12. We propose that additional safe harbours are to be provided for under the legislation in the following cases:

Safe Harbour of Due Process

As explained in paragraph 6 above, a corporation's liability for failure to comply with the PSI requirements should not be absolute or strict since decisions for whether or not to disclose often involve fine judgment call based on the available information and the specific circumstances at the material time. If a corporation is able to prove that it has put in place proper and effective system and procedures to prevent the breach of the PSI requirements by requiring its employees to escalate potential PSI to its board of directors which duly considers the same and comes to a reasonable conclusion in good faith that the information is not PSI, it should not be held liable under the PSI regime if its decision later proved to be incorrect with the benefit of the hindsight or if its employees fail to follow its prescribed internal procedures leading to a failure or delay for the disclosure of the PSI.

Safe Harbour of Consistent Application

Where a listed corporation has responded to enquiries from the SEHK concerning ususual movements in the price or trading volume of its listed securities or any other matters under Rule 13.10 of the Listing Rules, following which the Stock Exchange does not request the listed corporation to issue a Rule 13.10 announcement, the listed corporation should not be held responsible for non-disclosure under the proposed PSI legislation. From an issuer's perspective, it is reasonable for it to expect the SFC and the SEHK to adopt a consistent approach in applying PSI requirements.

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

Our comments

13. Yes, the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO to allow for flexibility and to cater for unforeseen circumstances or as a result of future market developments. Market participants should be given the opportunity to recommend additional safe harbours and the new rules for any such additional safe harbours should be introduced expeditiously without having to go through a lengthy legislative process.

Question 3

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

Our comments

14. Yes, the MMT has already had experience in dealing with cases concerning "inside information" and in considering the proposed civil sanctions (other than the regulatory fines).

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

Our comments

15. Yes, subject to our comments in paragraphs 16 and 17 below.

16. Paragraph 2.33 of the Consultation Paper sets out the factors which MMT may take into account when determining the amount of regulatory fines, one of which is the financial resources of the one breaching the disclosure requirements. We disagree that this should be a factor to be considered for determining the quantum of the fines as the resources or means of the offender, unlike the quantum of the profit made or loss avoided in the case of insider dealing, should not be a relevant consideration as it has no correlation with the offender's conduct.

17. The power of the MMT to issue cease and desist orders for PSI breaches should be restricted to cases where the breach is intentional and the listed corporation has a history of previous intentional PSI breaches, given that the failure to comply with the said order by the listed corporation or its officers imposed by the MMT will lead to criminal conviction under section 257(10) of the SFO. To empower the MMT to issue cease and desist order in the case of a first time offender and a case where the mens rea of the offender is less than "intentional" would be inconsistent with the announced policy not to introduce criminal sanction for PSI breaches in this consultation.

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

Our comments

18. The Consultation Paper has failed to explain why the proposed streamlined process to enforce the statutory disclosure requirement is required. There was no suggestion that there had been any problem with the existing procedure under S252(2) of the SFO whereby the Financial Secretary institutes proceedings before the MMT. We do have reservation for the proposal 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). We believe that the Financial Secretary, which would not be involved in the initial investigation and evidence-gathering process, will play an important role when deciding whether to institute MMT proceedings. Accordingly, we recommend that the existing procedure under S252(2) of the SFO be preserved. The separation of the investigation and prosecution functions will provide appropriate checks and balances in respect of instituting MMT proceedings.

19. Further and more importantly, we noted from paragraph 2.34 of the Consultation Paper that the proposed streamlined process is also proposed to apply to the existing six types of MMT proceedings under Part XIII of the SFO. We believe that this is a serious and substantial issue that warrants thorough consideration and discussion before a decision or even recommendation should be made. The market should be provided with more information for consideration and discussions. Given the lack of information contained in the Consultation Paper, a separate and proper market consultation should be conducted on this proposal, and the same should not be dealt with in the present consultation.

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?

Our comments

20. The SFC should provide informal consultation for the listed corporations with regard to the statutory disclosure requirements for as so long as it is designated by the SFO to enforce such requirements for the following reasons:

    (i) Further safe harbours may be prescribed from time to time which necessitates continuous consultation with the SFC in relation to the application of the new safe harbours; and

    (ii) Continuous informal consultation service with regard to the statutory disclosure requirements is necessary with a view to ensure the market is well informed as to the expectations of the SFC which could be changing from time to time due to market developments.

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?

Our comments

21. It has been stated in the consultation paper that the SEHK will modify the general disclosure obligations in the Listing Rules to dovetail them with the statutory provisions. Accordingly, it is important to ensure that under the new statutory regime, the authorities and responsibilities between the SFC and the SEHK are clearly defined and without duplication such that listed corporations will not be subject to dual regulation and face duplicate investigations which would unnecessarily increase compliance costs. It would therefore be helpful if clarifications could be made to the public on the regulatory roles of the SFC and SEHK in respect of non-statutory and statutory PSI requirements.

22. In address the above concerns, we suggest that the SFC should only investigate any potential breaches of the statutory disclosure requirements following the referral or recommendation by the SEHK. This will be consistent with the existing role of the SEHK as the frontline regulator to monitor unusual price and trading volume movements.

Our other comments

A separate duty to implement proper compliance safeguards is unnecessary and inappropriate

23. The draft section 101G will impose a statutory duty on each officer of the listed corporation to put in place proper safeguards to prevent the breach of a statutory disclosure requirement. This is unnecessary and inappropriate for the following reasons:

(i) Listed corporations and their officers being subject to the new statutory disclosure requirements will have every incentive to ensure proper safeguards are in place to prevent a breach;

(ii) It is unusual to include a separate obligation to ensure compliance with the main obligation (i.e. statutory disclosure obligation); and

(iii) The failure to put in place adequate safeguards to prevent a breach should only be considered as a relevant factor in determining whether the corporation has breached the statutory duty to disclose PSI, but not as a separate offence.

We hope that the above comments are helpful. For any queries in relation to the above, please contact the undersigned at telephone no. (852)2122 2033, or at email address eirene.yeung@ckh.com.hk or my colleague Nicole Pao at telephone no. (852)2122 2771, or at email address nicole.pao@ckh.com.hk.

Yours faithfully,
For and on behalf of
Cheung Kong (Holdings) Limited

Eirene Yeung
Director, Corporate Strategy Unit &
Company Secretary

香港中華總商會
The Chinese General Chamber of Commerce
於香港註冊成立的擔保有限公司
Incorporated in Hong Kong and limited by guarantee
香港干諾道中24-25號香港中華總商會大廈4字樓 Tel: 2525 6385 Fax: 2845 2610
4/F, CGCC Building, 24-25 Connaught Road Central, Hong Kong E-mail: cgcc@cgcc.org.hk Web Site: www.cgcc.org.hk

中總 CGCC 110 周年 Anniversary

編號：RM (2010) 6-73

(郵寄及電郵：psi_consultation@fstb.gov.hk)

香港夏慤道 18 號
海富中心第 1 座 18 樓
財經事務及庫務局
財經事務科第 2 組

敬啓者：

有關擬將上市法團披露股價敏感資料的若干規定納入法例的諮詢文件

月前端接　貴局上述諮詢文件，本會爲此成立專責小組討論。茲將意見重點羅列如下，謹供　貴局參考。

本會認同特區政府把上市法團披露股價敏感資料納入法例的建議，相信有助完善本港的上市規管制度，進一步提升金融市場的透明度和質素，鞏固香港作爲區內主要國際金融中心和集資中心的地位。

訂定法定的披露責任

本會贊同採用現時《證券及期貨條例》就打擊內幕交易的“有關消息”定義。此概念已沿用多年，市場人士對此已有相當了解，相信有助上市法團對何爲股價敏感資料有更清晰的了解，避免出現混淆。

爲提升市場資訊的透明度並加強投資者信心，本會認爲上市法團有責任盡快披露任何已獲悉的“內幕消息”，讓公眾能平等、適時及有效地獲取相關訊息。與此同時，本會亦認同倘若上市法團董事或高級人員在執行職能時知道某些內幕消息，則該上市法團即屬已知悉該等內幕消息，相信此舉可有效提升上市法團管理層對消息披露的責任和承擔。

安全港的訂定與涵蓋範圍

對於諮詢文件建議訂定四個安全港，讓上市法團在合理情況下可延遲或豁免披露某些內幕消息，本會相信有關做法可確保市場透明度和公平性的同時，亦爲上市法團的合理權益提供適當保障。然而，建議的安全港 B 給予上市法團可豁免一些因過早披露而會影響磋商或建議結果的相關資料，本會關注如何定義“過早披露”將對有效執行資料披露制度有著相當影響，建議有關方面需就此給予更清晰的界定。

諮詢文件亦建議無須規定上市法團回應純粹謠傳，惟當謠傳顯示原擬保密的內幕消息已遭外泄，則上市法團將須披露有關的內幕消息。本會認爲，證監會在如何判斷純粹謠傳、以及如何界定謠傳令內幕消息被外泄等問題上，或會面對不少灰色地帶和豁免執行上的困難，有關方面對此應多加關注，並向市場提供清晰指引。

此外，本會贊同應賦予證監會適當權力，按市場需要訂明其他安全港，以提升處理披露股價敏感資料的靈活性，減輕上市法團在資料披露事宜的成本負擔，惟所有安全港的制訂必須以清晰易明爲大前提，避免引起市場混亂。證監會也應加強與上市法團溝通聯繫，加深了解上市法團申請豁免的各種原因，並增加審議申請個案準則的透明度，藉以提升處理豁免申請的效率。

制裁措施

在處理違反法定披露要求的個案方面，鑒於目前市場失當行爲審裁處在處理有關“內幕消息”的個案已有一定經驗，本會認同諮詢文件建議，擴大該審裁處的管轄權，以涵蓋違反法定披露要求的個案。

至於向違反法定披露要求的上市法團及個別董事、高級人員施加諮詢文件中提及的各項民事補救措施，本會表示贊同，惟對於向違規人士發出“冷淡對待”令一項，本會認爲有需要就“不得使用市場設施”作出更明確定義和具體說明其涵蓋範圍，以避免不必要爭拗。

本會亦贊成讓證監會就違反法定披露要求的個案，可無須先向財政司司長報告和作出決定的情況下，直接在市場失當行爲審裁處席前進行研訊，藉以簡化相關程序，提升效率。

監管架構

諮詢文件提出，由證監會就法定的披露要求，爲上市公司提供一個初步爲期 12 個月的非正式諮詢服務。本會贊同此做法，相信有關安排可爲上市公司提供便捷的查詢途徑。本會認爲，證監會應密切留意市場對有關諮詢服務的需求和反應，並檢討是否有需要延長有關服務。證監會亦應爲每個查詢設訂回覆期限，在合理時間內作出回應，讓上市公司可就披露資料事宜盡快作出相應部署。

此外，諮詢文件指出有關的諮詢服務主要涉及安全港的適用性，而非爲上市法團決定某些資料是否須予披露。然而，本會仍關注證監會會否因避免在判斷安全港的適當應用上出現偏差，而未能給予查詢個案客觀中肯的評估參考。

本會贊同諮詢文件就證監會和聯交所在監察股價和披露責任的執法安排與分工。此舉在加強證監會執法職能和賦予其主動調查權力的同時，亦能維持聯交所現行的監察工作。

總括而言，金融業是香港經濟的重要支柱。面對全球金融市場瞬息萬變，香港的金融規管制度亦必須與時俱進，不斷提升市場質素，努力優化規管制度，方能維持本港金融市場的吸引力與競爭優勢。

以上意見，謹供參考。

此致
財經事務及庫務局

香港中華總商會
2010年6月28日

香港中華廠商聯合會
The Chinese Manufacturers' Association of Hong Kong
(一九三四年成立 Established in 1934)

2 June 2010

Secretary for Financial Services
and the Treasury
(Attn.: Ms Jane Lee)
18th Floor, Admiralty Centre Tower 1
18 Harcourt Road
Hong Kong
(Fax: 2529 2075)

Dear Ms Lee,

Views on Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

Thank you for the letter to our President Dr. David Wong on 29 March 2010, inviting the Association to comment on the Consultation Paper for the Statutory Codification of Certain Requirements to Disclose Price Sensitive Information (PSI) by Listed Corporations.

While supporting the Government's policy objective of enhancing Hong Kong's market transparency and quality through the cultivation of a continuous disclosure culture among listed corporations, the Association sees neither the necessity nor the urgency to oblige timely disclosure of PSI under our statue at this moment. The current regime, which mainly relies on the non-statutory Listing Rules administered by the Stock Exchange of Hong Kong, has been functioning well for years and proved to be sufficiently effective. Indeed, there are no signs that breaches of the disclosure requirements have been rampant or damaging in Hong Kong to such an extent that a drastic tightening-up move like statutory codification can be justified. We are also concerned that the implementation of a statutory obligation to disclose PSI would impose additional compliance burdens on the listed companies and hinder their operation and business development, thus undermining Hong Kong's competitiveness as the premier capital formation center in the region.

Should you have any query about the above, please feel free to contact Mr. Hilson Yan, General Manager, at tel: 2542 8631.

Yours sincerely

Paul S W Leung
Chief Executive Officer

總辦事處
HEAD OFFICE
香港中環干諾道中64-66號maritime大廈
CMA Building,
64-66 Connaught Rd Central, H.K.
電話 Tel: 2545 6166 / 2542 8600
傳真 Facsimile: 2541 4541
網址 Web Site: http://www.cma.org.hk
電郵 E-mail: info@cma.org.hk

旺角辦事處
MONGKOK OFFICE
九龍旺角彌敦道664號
惠豐中心 701-2室
Room 701-2, Wai Fung Plaza,
664 Nathan Road,
Mongkok, Kowloon
Tel: 2393 2189
Fax: 2789 1869

觀塘辦事處
KWUN TONG OFFICE
九龍興業坊興業街111-113號
富利廣場23樓B室
Room B, 23/F, Futura Plaza,
111-113 Hing Yip Street,
Kwun Tong, Kowloon
Tel: 2344 3360
Fax: 2790 4850

廣州代表處
GUANGZHOU OFFICE
中國廣東省中山七路85-99號廣東海珠大廈1604室
邮编：510145
Rm. 1605, Guangdong Artex Bldg.,
85-99 Zhong Shan Rd. 7, Guangzhou, China
P.C.: 510145
Tel: (86) (20) 8129 8969
Fax: (86) (20) 8129 8875

驗證檢定中心
CMA TESTING & CERTIFICATION LABORATORIES
新界沙田火炭黃竹洋街9-13號仁興中心1302室
Room 1302, Yan Hing Centre,
9-13 Wang Chuk Yeung St, Fo Tan, Shatin, NT
Tel: 2698 8198 Fax: 2695 4177
Web Site: http://www.cmatcl.com
E-mail: info@cmatcl.com

RESPONSE
TO
CONSULTATION PAPER ON
PROPOSED STATUTORY CODIFICATION
OF
CERTAIN REQUIREMENTS TO DISCLOSE
PRICE SENSITIVE INFORMATION
BY
LISTED CORPORATIONS

FROM
CHINESE SECURITIES ASSOCIATION OF HONG KONG

INTRODUCTION

1.1 This is a submission by Chinese Securities Association of Hong Kong ("**we**") in response to the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations (the "**Consultation Paper**") issued by the Financial Services and the Treasury Bureau ("**FSTB**"). The Consultation Paper seeks comments from the public on the proposed statutory codification of certain requirements to disclose price sensitive information ("**PSI**") by listed corporations.

Capitalised terms used but not otherwise defined herein have the same meanings as ascribed to them in the Consultation Paper.

1.2 If you have any questions in relation to this submission, please contact the following:

Mr. Tse Yung Hoi
Chairman
Chinese Securities Association of Hong Kong
Telephone: (852) 2230 8802
Fax: (852) 2537 3280

28 June 2010

We set out our response to the questions in the Consultation Paper as follows.

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?

We generally agree to the concept that PSI shall be the same set of information currently prohibited from being used for insider dealings for reasons of consistency and familiarity by the market.

We also note that the new PSI definition will represent a departure in terms of the current market practice of who determines what is, as a matter of fact, PSI i.e. the current Listing Rules (Main Board's 13.09 and GEM's 17.10 which were derived from paragraph 2 of the (now defunct) listing agreement ("P2") including and explanation of the application of P2 via a 1997 SEHK announcement ("1997 Announcement") and a SEHK 2002 guide on PSI ("2002 Guide")) puts the responsibility of determining what is PSI on the Company (its directors/officers) and whether to disclose it and at what time - the Company (its directors/officers) determines when and what information to publish that is necessary to enable the public to appraise the position of the group; or is necessary to avoid the establishment of a false market in its securities; or might be reasonably expected materially to affect market activity in and the price of its securities. The proposal now is that the law will define such information that would affect the market price and trading activity (volume).

We believe that the adoption of the existing definition of "relevant information" from the insider dealing regime under the SFO to define PSI is a logical development as the MMT now has the requisite experience to deal with potential issues arising from the legislation and may help simplify insider dealing prosecutions. This is also a trend which Hong Kong has decided to and must follow – we note that the motion has been propounded by the FSTB which "works closely together with market regulators and participants to strengthen our role as an international financial centre". This is a statutory responsibility of the Financial Secretary and so, the implementation must be seen to be done. It may be that the quality of how well it is done may be left for later (fine tuning) and arguably, less important from this perspective.

There are certain differences in terms of the semantics used in the SFO and the Listing Rules, e.g. the SFO refers 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; while the Listing Rules refers to any information relating to the group i.e. the listed corporation, guarantor and its subsidiaries according to Rule 1.01 of the Listing Rules and the authorities may wish ensure that they meant the scope of "relevant information" refers to the corporation on a group level. The Listing Rules also refers to its requirements as a minimum standard ("*the continuous disclosure obligations in the listing rules should be regarded as a floor rather than a ceiling…*") but once the legislation has been passed, that will itself, be the standard. We therefore believe that, notwithstanding that there would be informal consultation afforded by the SFC and there is from other jurisdictions, a body of case law, there may be a period of uncertainty until the market becomes comfortable with what the expectations are.

(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?

We agree that there is an obligation of disclosure to the public as soon as practicable – this is, as a matter of fact, the current Listing Rules requirements and the market practice. The P2 and the 1997 Announcement stated that a duty is imposed on listed companies to keep SEHK, members of the listed company and other holders of the of the listed company's securities informed. No specific timing was specified and the onus is on the listed company. The 2002 Guide, Main Board's 13.09 and GEM's 17.10 as well as SFC's consultation paper makes references to the timing as being, subject to confidentiality being maintained or preserved, as soon as reasonably practicable.

As for the timing of the disclosure i.e. when "inside information" has come to the listed company's knowledge, and the listed company will be regarded to have this knowledge if a director or an officer has come into possession of that information in the course of the performance of his duties. We expect that difficulties may arise re "in the course of his duties" especially where directors have different caps to put on (including one where he is also a shareholder) and the regulators may have to consider providing more scenario or case specific guidance and explanation regarding the non-statutory principles would be applied and interpreted, at least from a regulatory perspective (including what is expected and where a potential conflict may arise). There are no clear guide lines on this and matters/scenarios would still be "judged" as a matter of hindsight making inadvertent mistake inevitable.

The wording further states that the listed company will be regarded to have this knowledge if a director or an officer has come into possession of that information in the course of the performance of his duties. However, it may be that the knowledge cannot be imputed to the listed company's until its board, the collective brain, is aware of that information i.e. when a board meeting has been convened and the members of the board have been briefed. It is the board who is the decision making body in a corporation and therefore, it may not be just to deem a listed company to have knowledge of the inside information where only a director or an officer has come into possession of that information in the course of the performance of his duties. We further suggest that the reference to "officer" be amended to clarify that this should be referring to the senior management of the listed company as opposed to the SFO's definition.

(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?

We agree as this is the "codification" of the market practice and 2.03 and 2.07 of the Listing Rules. However, there is a limitation – this equal, timely and effective access by the public to the information disclosed through EPS is not without its compromise - the access and knowledge of how to use a computer is a pre-requisite. The old newspaper regime (not without criticisms) gave way to the EPS in a cost saving exercise to make a Hong Kong listing more attractive by eliminating certain costs of compliance, but, ironically, it is the Hong Kong retail investors, who provided or contributed to the liquidity of the Hong Kong market, were the ones to lose out when the newspaper system for disclosure was phased out.

Question 2

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

We agree with the provision of the safe harbours as this would not work otherwise. We note that the safe harbours are only applicable subject to confidentiality being preserved i.e. where information has been leaked, no safe harbour(s) would apply. And, as is noted under the SFC's Consultation Paper on the draft Guidelines on Disclosure of Insider Information in

Annex 2 to the Consultation Paper - any unexplained changes to the share price of the corporation's securities or any comments about the corporation in the media or analysts reports may indicate that confidentiality has been lost. This may be a arbitrary/subjective judgment call that may easily(?) lead to listed corporation losing the safe harbour at the slightest of market rumours or even speculative/inaccurate reports including leakage of information through the default of person(s) other than the listed corporation, its directors or officers. Further consideration/clarification of how the safe harbours may be applied and denied would be advisable.

Safe harbour D, which may be used to safeguard Hong Kong's financial stability would however, require further clarification as to

- the categories of companies that this applies to (e.g. banking corporations, Hang Seng Index constituents, the Tracker Fund …)
- under what specific circumstances when this safe harbour D would this becomes operational
- the duration of the operation and/or the type of information that would be provided to the public (before or after) not to mention who would be responsible for the release of such information

This would provide the transparency of its operation upfront and promote public confidence. The transparency of when safe harbour D is at work maybe by itself a singular piece of information that would affect the price and trading activity of those listed companies in question.

We also believe that maybe the safe harbours should not be dealt with by legislation itself but be left at the discretion of the SFC to cater for more flexibility and provide a quicker reaction to the market should circumstances require. It is much harder to change the law and via a much longer process.

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

We agree that SFC be empowered to grant waivers, and to attach conditions for the benefits of flexibility, versatility and responsiveness to constantly changing market conditions. This is in line with the current practice of SFC granting waivers from compliance with the Companies Ordinance (subject to conditions or otherwise).

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

We believe that no additional safe harbours are needed, because, with reference to the response above, we believe that the SFC should be empowered to consider and determine appropriate waivers as market practice and circumstances changes as it is not possible to envisage all (potential) safe harbours as there are to many variables which will be at play at any given equation. It should be sufficient to have SFC being empowered to provide for further safe harbours with conditions or otherwise or for a limited time etc.

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

We agree that the legislation should empower the SFC to prescribe further safe harbours.

This is a natural extension of the waivers. If there are sufficient waivers granted to the extent that the application for a waiver is more procedural than real deliberation, the set of circumstances for that waiver may be converted into a safe harbour (where appropriate, subject to conditions and/or be limited in time or subject to a grand-father rule/treatment as applicable). This would reduce the cost of compliance for listed companies. A further consideration may be to let SFC determine the safe harbours in its entirety as opposed to have such safe harbours codified in statute which makes changing/modifying them etc. more onerous (e.g. in the lines of the Practice Notes in the Listing Rules). This would enable the regulators to react quicker to changes.

Question 3

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

We believe that it would be appropriate for the MMT to handle the breaches to the proposed legislation as other courts/tribunals will not have the expertise in an area as specialised as this and the MMT already has experience from dealing with insider information cases as well as some of the sanctions involved. The members of the MMT, however, should therefore possess relevant and appropriate knowledge and experience in handling the disclosure of price sensitive information. As such, the criteria for consideration and the selection process for MMT candidates (hence the composition of the MMT) would have an impact to the execution of MMT's new additional function.

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

We generally agree with the proposed civil remedies but would like to put forward some points for consideration.

- The fine (of up to HK$ 8 million) on the listed corporation and/or the director and the payment of costs of the civil inquiry and/or the SFC investigation should be modified to allow for it be levied on either on the listed corporation – where if the board has been found to have behaved incorrectly on a collective basis, or have an allocation of liability between the board and the director(s) both of whom are found to have contributed significantly to the mischief and where it can be demonstrated that a single (or group) of director(s) can be singled out for the withholding of information, the fine should be personal to the director(s)

- Where a listed corporation is fined, the shareholders would also be penalised twice, once when they are deprived of the information and then the depreciation in asset value as reduced by the fine. The only other option is to sell the securities (as a vote against the board and/or the management) but that maybe a substantial discount and not necessarily an attractive "option"

- In certain listed companies, there may be shadow director issues in cases disqualification – the directorship maybe terminated but the influence is not

- Executive Directors, Non Executive Directors and Independent Non Executive Directors may have to be considered in a different light

- May deter quality directors from taking up the directorship when there is a potential threat to the reputation

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

We agree and support the grant of direct access to MMT because this would contribute to enhance the image and reputation of the Hong Kong market through a quicker response and a cut down on bureaucracy to reduce the time it takes to institute proceedings. The knowledge/experience on the issues involved and expertise in dealing with such issues weighs very much in favour of the combination of SFC and MMT as opposed to the a form of "filtering" Financial Secretary and the Secretary for Financial Services and the Treasury who may not be as close to the market and the practices of it. This is a proper and appropriate delegation of power by the Financial Secretary and the Secretary for Financial Services and the Treasury who are best left with dealing with macro issues (e.g. implementing measures in maintaining the status of Hong Kong as an international financial centre) rather than be put into a position to determine whether proceedings should take place which requires first hand knowledge and experience within the industry.

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?

We strongly believe that the SFC should provide informal consultation for listed corporations. However, the period should not be limited to a 12 month period. It is in the interests of the market and its users, that the consultation should be on a continuous basis and the SFC should selectively publish the results of such guidance in order to update the market users/advisors and the public generally in terms of the statutory provision's application. This may take the form similar to "Listing Decisions" from SEHK.

We also believe that this initial 12 month may be considered as a phasing in period for transition and where the civil remedies may or may not be applied in full (with or without the fine).

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?

We believe that the administration/monitoring and enforcement maybe best executed solely by the SFC, not least to avoid duplication.

SEHK's statutory duty in monitoring on price and volume movements differs from SFC's in manner and practice. SEHK's monitoring involves real time monitoring of intraday fluctuations in price and volume of listed companies shares by referencing intraday fluctuations with reference to previous (number of days) averages (i.e. whether it crosses a arbitrary threshold with intraday market movement(s) taken into account). Triggering the threshold results in an enquiry to the listed company's nominated authorized representatives ("AR") being asked whether there are any reasons or unpublished information for the increase/decrease in the price and/or volume of the listed company's shares*. The objective is to ensure the timely release of PSI resulting from the enquiry in order to discharge its statutory duty for ensuring an orderly, informed and fair market is via disclosure. The process

takes place within that trading day which may or may not result in an appropriate announcement. Such monitoring of unusual price and volume movements could easily be transferred to the SFC since under the proposal, SFC will assume the responsibility for handling all alleged breaches of the statutory obligation anyway. If there is an announcement to be published, this can still be done via SEHK's EPS and SEHK's statutory can still be discharged by making the disclosure available via the EPS.

* *The AR is not always a director (e.g. can be the company secretary) and their knowledge is limited to what they actually know or be given. In any case, the AR may or may not have access to the entire board at the material time. Even if the AR is a director, that director may be limited to know what the listed company is involved in but may not be aware of e.g. another director/controlling shareholder being in the process of negotiation(s) of selling the controlling stake*

SFC's investigative powers would also be utilised and even taped conversation can be used. If the Listing Rules are to be dovetailed, it may simply require the ARs and directors to cooperate in full with any of SFC's inquiries in relation to the statutory duties. SEHK/SFC could keep the market informed of the enquiry/investigation process and the publication of such information could be on both the SEHK's and the SFC's web.

Financial Services and the Treasury Bureau

Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations (March 2010)

Joint Submission of Clifford Chance and Linklaters

Executive Summary:

- This paper sets out the views of Clifford Chance and Linklaters on the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations released by the Financial Services and the Treasury Bureau in March 2010.
- Clifford Chance and Linklaters have also made a joint submission to the Securities and Futures Commission ("**SFC**") in response to its related Consultation Paper on the Draft Guidelines on Disclosure of Inside Information released in March 2010. The joint submission is appended to this Paper.
- Clifford Chance and Linklaters do not seek to challenge the Bureau's regulatory objective to codify certain requirements to disclose price sensitive information ("**PSI**") and note, in particular, that the sanctions behind the proposed statutory regime are restricted to civil sanctions. We also do not seek to challenge the primary proposal to adopt the definition of "relevant information" from the insider dealing regime under the Securities and Futures Ordinance ("**SFO**") to define PSI.
- However, we have comments on certain specific aspects of the proposals, including: the SFC's views on what constitutes information "generally known" to the market; the limited disclosure mechanism; the wide definition of "officers"; the provision that deems the listed corporation to have knowledge of the PSI if its officers "ought reasonably to have" known the information; and the proposal to remove the Financial Secretary as the decision-maker concerning the commencement of Market Misconduct Tribunal inquiries.
- Our responses to the questions posed for consultation are set out below.

1 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?

1.1 We do not disagree with the adoption of the definition of "relevant information" from the insider dealing regime under the SFO to define PSI.

1.2 The Draft Guidelines on Disclosure of Inside Information ("**Draft Guidelines**") published by the SFC set out to summarise the key aspects of what has been viewed by the tribunals in Hong Kong as constituting "relevant information". We believe it would be helpful to include principles from the ***case relating to the listed securities of Tingyi (Cayman Islands) Holding Corp.***, which was omitted from the cases listed in the Draft Guidelines, including that:

- Information will be "specific" if it is capable of being "pointed to, identified and unequivocally expressed", which, in the case of financial information about a listed group means whether the information carried such particularity about aspects of the listed group's financial and economic functioning so as to allow those matters to be identified and coherently described and the information about them to be understood.
- Before information can qualify as being specific information about a company it must be real information. If it is misinformation it cannot be real information. To describe a company as prosperous and stable when it is in the throes of a financial crisis is to provide no information about that company at all. Small inaccuracies in information will not, however, render the information not real information: it is a matter of degree when it comes to financial information.
- In most cases only net profit figures ("bottom line results") are likely to be price-sensitive, and therefore raw financial data would not be price-sensitive unless it was possible to calculate net profit data from them.
- In most cases, an understanding of the market's knowledge of a company's affairs is obtainable only by considering what has been said or published in the media, or in other materials which are readily accessible by the market. An assessment must be made of the completeness of the information released into the market and the degree of penetration of the market.

2 Question 1(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?

2.1 "As soon as practicable"

- We agree with the general principle that a listed corporation should disclose PSI as soon as practicable. However, the Draft Guidelines suggest that "as soon as practicable" means "immediately"[1]. We do not think this is correct. We ask that the SFC provides further guidance on what actions a listed corporation could take to comply with the "as soon as practicable" requirement in circumstances where immediate disclosure is not practicable, for instance:
  - Upon the receipt of a whistle blower's report or discovery of a potential problem, the scale of which is completely unknown, on a matter that is potentially price sensitive, the listed corporation may need some time to verify whether the allegations have any substance or the potential scope of what may need to be investigated to get to the bottom of the issue, before deciding whether to disclose the matter (be it in a "holding announcement" or a "full

[1] para. 32 of the Draft Guidelines

announcement"), otherwise the market may be inundated with information that lacks integrity and that may even mislead investors.

- There may be some time lag between the time when an officer comes into possession of a piece of inside information and the time when the decision makers in the listed corporation are made aware of the information. This is especially the case for larger size listed corporations. Please also see our submission below in relation to the definition of "officer".

- We ask that the regulators take a practical and reasonable approach in determining whether disclosure has been made "as soon as practicable".

2.2 "Officer"

- We agree with the principle that a listed corporation should be regarded to have knowledge of the inside information if certain of its officers have come into possession of that information in the course of the performance of their duties.

- However, many listed corporations in Hong Kong are very sizeable and may have thousands of managers. The proposed definition of "officer" is so wide that many staff who do not have the authority to influence the decision on PSI disclosure, or from whom there are a few levels of reporting before the information will reach the decision makers, are considered as "officers". To deem a listed corporation to have the knowledge that any of its officers (which can include junior managers) has would make the legislation very difficult and costly to comply with, and again may lead to "over-disclosure" if officers choose to "play it safe" and make disclosure indiscriminately.

- We note that the Chinese translation of "officer" in the proposed legislation refers to "senior officer" but the English definition does not contain the same qualification. We propose that for the purpose of the new Part IIIA of the SFO, the definition of "officer" be refined so that it will only include:

  - directors; and

  - senior officers who are expected to come into possession of PSI because of the nature of their role within the listed corporation. We suggest that such senior officers should be company secretaries, senior public relations managers, and senior legal counsel / senior compliance officers.

2.3 Corporations listed on Hong Kong and PRC exchanges

- Whilst the Draft Guidelines provide guidance on disclosure in cases where inside information is released to another market when the market in Hong Kong is closed (including the possibility of requesting a suspension in trading its securities pending the issue of the announcement in Hong Kong[2]), there is no similar guideline addressing the situation where the release of inside information in Hong Kong is on hold pending a synchronised release in another market.

[2] para. 65 and 66 of the Draft Guidelines

- We understand that a corporation that is dual-listed on a PRC stock exchange and the Stock Exchange of Hong Kong ("**SEHK**") cannot post announcements directly on the websites of the PRC exchange, and as a result the timing of posting announcements in the PRC is beyond the corporation's control. We further understand that the periods for posting announcements on PRC exchange websites are more restrictive than those for posting announcements through HKEx-EPS. In order for a PRC / Hong Kong dual-listed corporation to ensure equal dissemination of information to its shareholders, there may be a delay in the disclosure in Hong Kong. We therefore ask that:

  – the regulators take into account the need to wait for the PRC exchange(s) to post the announcement when determining whether a disclosure in Hong Kong has been made "as soon as practicable"; and

  – the SFC provides guidance on disclosure in a case where disclosure in Hong Kong needs to be delayed pending disclosure in the PRC (including the possibility of a trading suspension in the meantime).

2.4 "ought reasonably to have"

- The proposed legislation[3] provides that a listed corporation is deemed to have knowledge of the inside information if an officer of the corporation ought reasonably to have come into possession of the information in the course of performing functions as an officer of the corporation.

- Since a breach of the proposed disclosure obligation might not involve a clear deliberate act or behaviour, we are of the view that if:

  – as proposed, there is already a requirement to take all reasonable measures to ensure that proper safeguards exist to prevent the breach of a disclosure requirement[4];

  – the officers have indeed taken all reasonable measures to ensure compliance; and

  – the officers do not have actual knowledge of the inside information,

  then the listed corporation should not be liable for a failure to disclose. The requirement under the proposed s.101G(1) should provide enough protection to the public. To include an additional deeming provision on the basis of constructive knowledge would suggest that there is something else the officers should do on top of taking all reasonable measures to ensure compliance. Any such additional obligations may (i) create undue administrative burden on the listed corporations and their officers; and (ii) result in listed corporations making disclosure indiscriminately in order to "play it safe".

[3] s.101B(2) of the SFO

[4] s.101G(1) of the SFO

3 Question 1(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?

3.1 We agree with the principle that disclosure should be made in a manner that can provide for equal, timely and effective access by the public to the information disclosed. However, we see some practical difficulties in complying with the operative provisions (further discussed in 3.2 below). In addition, we are concerned that an overly strict approach in determining what constitutes information "generally known" to the market might unfairly restrict institutional investors from participating in capital raising activities (further discussed in 3.3 below).

3.2 HKEx-EPS

- The proposed disclosure mechanism appears to be overly restrictive. Under the current proposals, listed corporations can comply with the disclosure requirement by disseminating information via the Electronic Publication System adopted by the Hong Kong Exchanges and Clearing Limited ("**HKEx-EPS**"). While the draft legislation does not limit the manner of disclosure, the SFC has stated in its Draft Guidelines that the disclosure requirement is only likely to be satisfied by disseminating information via the HKEx-EPS. This will likely cause compliance difficulties for listed corporations, especially where a price sensitive event takes place outside of the operating hours of the HKEx-EPS.
- As such, we submit that:
  - (i) disclosure of information via other means should also be allowed, e.g., via widely subscribed news or wire services (such as Bloomberg and Reuters), and posting an announcement on the listed corporation's own website; or
  - (ii) if the Bureau is not prepared to accept other disclosure mechanisms, then the SEHK should at least enhance the HKEx-EPS to allow continuous disclosure.

3.3 "Generally known"

- To date, the institutional market has carried out capital raising activities (in particular, convertible bond offerings) on the basis that launch communication and news coverage published via widely subscribed news / wire services, such as Bloomberg or Reuters, are sufficient public disclosure of the relevant information to make it "generally known" among the institutional investor community.
- Accordingly, institutional investors who participate in capital raising activities have proceeded on the basis that they can borrow stock to hedge their exposure before the issuer's announcement on the SEHK.

- The Draft Guidelines, however, provide that widely circulated press reports cannot constitute sufficient public disclosure[5]. This suggests that the SFC considers disclosure via widely subscribed news / wire services not sufficiently public for the purposes of insider dealing prohibitions. If this is the case, any over-the-counter stock borrowing that happens before the issuer's announcement may risk contravening the insider dealing prohibition. In other words, the whole institutional market in the issuer's stock will effectively be restricted pending the formal announcement on the SEHK.

- Stock borrowing activity is critically important to certain capital raising activities. We urge that the SFC provides specific guidance as to its views on the application of the insider dealing prohibition to these stock borrowing activities. If the SFC is of the view, contrary to current market practice, that the launch communication of a deal is not sufficient public disclosure to make all relevant information "generally known" among the institutional investor community, and therefore that the stock borrowing activities by investors is inappropriate prior to the formal announcement by the issuers, it is likely to materially impact the willingness of institutional investors to participate in certain capital raising activities and, therefore, the continued viability of certain capital raising options for listed issuers.

- We understand that in some jurisdictions (e.g., the UK), disclosure via widely subscribed news information services is expressly permitted as a form of public disclosure, and in some other jurisdictions (e.g., Singapore and Australia) it is generally accepted that disclosure via widely subscribed news information services is sufficiently public among the institutional investor community, for the purposes of their respective insider dealing prohibitions.

4 Question 2(a)

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

4.1 We welcome the provision of the four proposed safe harbours. However, we submit that certain of these safe harbours should be extended and additional safe harbours should be introduced – see our submission under Question 2(c) below.

5 Question 2(b)

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

5.1 We agree that the SFC should be empowered to grant waivers, and to attach conditions thereto.

5.2 We believe it would be helpful to the market if the SFC could publish on its website or otherwise in a manner that allows easy public access the details of the waivers granted and conditions imposed (or at least the more representative ones).

[5] para. 19 of the Draft Guidelines

6 Question 2(c)

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

6.1 We believe that certain of the proposed safe harbours should be extended and that additional safe harbours should be introduced. We discuss these below.

6.2 Safe Harbour B (incomplete negotiations or proposals)

- There are incomplete negotiations or proposals the outcome of which may not be prejudiced if the information is disclosed prematurely (and therefore the proposed Safe Harbour B would not be applicable), but the information so disclosed may be misleading due to the lack of integrity, certainty or details. The following are a couple of examples:
  - Management accounts: The Draft Guidelines[6] seem to suggest that once a listed corporation becomes aware that its financial results may not meet the market expectation, it should immediately disclose such information even if the final accounts are not yet available. We would like to ask the SFC to confirm whether this understanding is correct. If it is, we submit that listed issuers should not be required to make a disclosure if the information subject to disclosure may be misleading to the market. Information may be misleading if it is based on preliminary results which have not been verified or are pending expert reports;
  - Share placing: The Draft Guidelines[7] provide that the contemplation of a forthcoming share placing will need to be disclosed if the placing is likely to materially affect the price of the shares. Disclosure is required even if the details of the placing are not known. Since the details of a placing (such as the size, price and timing of it) can materially affect the price of the shares, the announcement of a contemplation of a share placing without details of the placing can be misleading.
- Accordingly, we propose that Safe Harbour B be amended as follows:

  "When the information is related to impending negotiations or incomplete proposals:

  (i) *the outcome of which may be prejudiced if the information is disclosed prematurely; or*

  (ii) *the information may be misleading to the persons who are accustomed or would be likely to deal in the listed securities of the corporation*."

6.3 Safe Harbour D (liquidity support)

- Safe Harbour D currently only applies when the Government Exchange Fund or a central bank provides liquidity support to the listed corporation.

[6] Para. 27 of the Draft Guidelines

[7] Para. 16(b) of the Draft Guidelines

- We ask the Bureau to consider extending this safe harbour to cover all types of liquidity support, financing proposal and rescue plan, whether provided by the Government Exchange Fund or a central bank or otherwise. This is because the same problems with immediate disclosure arise regardless of the type of support, and who provides the support. Immediate disclosure of the receipt of liquidity support or other types of assistance by a listed corporation could lead to a loss of confidence in the corporation, resulting in further liquidity difficulties and the support / assistance having insufficient time to serve its intended purpose of helping the corporation resolve its difficulties.

6.4 Trading suspension

- We ask the Bureau to consider adding a safe harbour for a listed corporation which has suspended trading of its securities on the SEHK pending release of an announcement containing inside information. Of course, listed companies must not abuse the ability to suspend trading. As already reflected in the Listing Rules, suspension of trading must be kept to a minimum.

6.5 We note that a listed corporation is required to preserve the confidentiality of the inside information if it wishes to take advantage of the safe harbours. Once there is a leak, the listed corporation must disclose the information. In the case of a leakage of information regarding an impending negotiation or incomplete proposal, this would mean that the listed corporation will have to disclose the information even if doing so will prejudice the outcome of the negotiation or the proposal. We submit that in such circumstances, rather than requiring the listed corporation to disclose all relevant information, it should be allowed to just make a clarification announcement so that the market will be kept generally informed.

7 Question 2(d)

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

7.1 We agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO.

8 Question 3(a)

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

8.1 Assuming the definition of "relevant information" is adopted for continuous disclosure obligations of listed companies in the manner that is contemplated, there is a high degree of overlap, in terms of the legal questions and factual enquiries that would need to be undertaken, between the existing jurisdiction of the MMT, as regards insider dealing, and the proposed new statutory provisions. In principle, therefore, it would appear to make sense for the MMT to be given extended jurisdiction to handle breaches of the statutory disclosure requirements.

8.2 Also, we would certainly prefer to see any such breaches investigated and dealt with by a tribunal that is independent of the SFC itself, to ensure the avoidance of

any perception of absence of adequate due process and fairness, given the other aspects of the SFC's role (as enforcement authority and the provider of guidance) in regard to the proposed new provisions.

8.3 We would be anxious to ensure that only "serious" breaches become the subject of MMT inquiries, not least because the MMT will inevitably have limited resources and it is important that those resources are devoted to serious cases. The involvement of the Financial Secretary was a way of ensuring that this filtering occurred. If the filter is to be removed, we believe it is important that some form of guidelines be developed to ensure that this filtering process continues to be effective. This is particularly important if, as envisaged, the removal of the Financial Secretary's involvement is to be extended to market misconduct matters as well. We do recognize that the filtering system has slowed down the process of cases getting before the Tribunal and lengthy delays corrodes the perception of effectiveness of the Tribunal system as well as, in certain cases, being disadvantageous to those whom are subject to inquiries. However, some form of effective filter, which can be independently monitored is important. Amongst other things, we would not want to see respondents feeling under pressure to settle disciplinary or civil actions in the face of threatened Tribunal proceedings, where the matters are on any objective basis not serious enough to warrant Tribunal proceedings. We suggest that this issue be carefully explored further before any change is made to the existing legislative provisions.

8.4 In addition in the case of alleged breaches that are referred to the tribunal, it is likely that the tribunal would be faced with a new subset of issues, which it does not have to deal with in the context of insider dealing inquiries. This subset of issues concern the exercise of judgement by directors as to: (i) the appropriate timing for the making of an announcement; (ii) in cases of alleged negligence by directors in particular INEDs (independent non-executive directors) who were not directly involved in the decision whether to make an announcement or not, an assessment of whether they did what they reasonable could in the circumstances to prevent the alleged breach from occurring. Directors of listed companies facing the prospect of such scrutiny by the tribunal, are entitled to be assured that the members of the tribunal have sufficient practical experience of the challenges and complexities involved by being a director of a listed company so as to reach conclusions in respect of these issue of judgement which are fair and appropriate in all the circumstances. Nothing in the Consultation Paper indicates a clear intention to review the panel of potential members of the tribunal. We believe that this should be addressed.

9 Question 3(b)

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

9.1 We note that the maximum fine of HK$8 million is a considerably high amount for directors of PRC state-owned enterprises. The fine together with disqualification orders should be sufficiently deterrent. We are concerned that the remedy set out in paragraph 2.35 will lead to so high a financial exposure for listed corporations that they would choose to disclose information indiscriminately, resulting in the

market being inundated with too much information which may not help the investors in making an informed decision.

9.2 We would also be concerned to ensure that the approach adopted to imposing civil remedies does not have an undue deterrent effect on good quality individuals being willing to become directors of listed companies.

10 Question 3(c)

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

10.1 See comments above in response to question 3(a).

11 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?

11.1 We 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, subject to review as to whether an additional period would be necessary.

11.2 We believe it would be helpful to the market if the SFC could publish on its website or otherwise in a manner that allows easy access by the public FAQ type guidance (containing questions asked by the enquirers and answers provided by the SFC, as well as any views of the SFC on issues raised) during and at the conclusion of the consultation period.

11.3 We understand that the SFC expects that the questions for consultation will generally relate to the application of the safe harbours, rather than deciding for a listed corporation whether certain information has to be disclosed. In other words, the SFC expects that the listed corporations have decided whether or not the information in question is inside information before they consult the SFC in relation to the application of the safe harbours. This limited approach to the SFC's role appears correct to us – the question in particular of whether information is price-sensitive must be left ultimately to the judgement of directors, who are best placed to answer that question. Kindly confirm whether this understanding is correct.

12 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?

12.1 We are of the view that the regime would be more efficiently regulated by one regulator rather than two. This would minimise the possibility of conflicting decisions or approaches between two regulators and compliance costs. To this end, the SFC can be the frontline regulator and as pointed out in the consultation

paper, SEHK may bring disciplinary action against a listed corporation and/or its directors based on infringements found in proceedings brought by the SFC.

CLIMAX
INTERNATIONAL
COMPANY
LIMITED
(Incorporated in Bermuda with limited liability)
(A company listed on The Stock Exchange of Hong Kong Limi

UNIT A, 10/F WINGS BUILDIN
110-116 QUEEN'S ROAD CENT
CENTRAL, HONG KONG

TEL: (852) 2389 8292
FAX: (852) 2389 8291

Date: 28 JUN 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs

Re: Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

This letter states our views towards the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

We have the following overall comments:

1) We support the introduction of civil remedies, not criminal, for this legislation.

2) Both elements of the *mens rea* (the "guilty mind") and *actus reus* (the "guilty act") must be present if a disclosure obligation is deemed to be breached, hence the strict liability concept must not be applied here. A corporation and its directors that could show they had duly and carefully considered a piece of information and made a non-disclose decision based on prevailing circumstances and information should not be held liable even if the information had eventually caused material effect to share price.

Our response to specific questions listed in the Consultation Paper as follows:

Q.1a 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?

We agree.

Q.1b 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?

We agree a listed corporation should disclose inside information promptly but feel that the SFC should provide more guidance on how long is "practicable" in its view and their definition of "immediate". A corporation needs to verify the information, make necessary internal review, and assess its impact and this may take time.

For a large corporation with a large number of officers, it is difficult for the corporation to ensure all directors or officers would report inside information instantly that has come to their knowledge. It is our view that if a corporation has

established and maintained appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable.

Further, the existing definition of "officer" which includes directors, secretaries and managers is too wide. Under the UK regime, only directors who *knowingly* breach the disclosure requirement would be held liable. We concur with this and recommend Hong Kong follows the UK approach. The definition of "officer" should include only "director" throughout this draft legislation.

The phrase "ought reasonably to have" in s.101B(2) of the "draft legislation" should be taken out. This phrase suggests that it is possible that the information may not have been actually known by the officers and thus it is impossible for the corporation to disclose information on this basis.

Q.1c *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?*

We agree.

Q.2a *Do you agree to the provision of the four proposed Safe Harbours?*

We agree.

Q.2b *Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?*

We agree.

Q.2c *Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?*

We recommend an additional safe harbour which provides that if a corporation and its directors have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change -- due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show clear and proper records of board deliberations leading to a reasonable conclusion that the information needed not to be disclosed at the time.

Q.2d *Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?*

We agree. We also think that other market participants should also be given the opportunity to suggest Safe Harbours to match with market developments.

Question 3

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

We do not object.

Q.3b Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

We agree and would want to add that the proposed range of civil remedies is highly deterrent already.

Q.3c Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

Allowing SFC direct access to the MMT lacks the checks-and-balances under the existing arrangement of having the cases referred to the Financial Secretary first. While we support a more efficient process, some checks-and-balances controls are important. Moreover, under the proposed legislation, the other proceedings that cover the six types of market misconduct would be referred to the MMT directly by the SFC. This is a major change. The Government must consider this with a view to balance the market's need for checks-and-balances and whether the resources of MMT can cope with the possible increase in the number of cases referred to it.

Q.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?

We agree and add that this should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new Safe Harbours that may be prescribed from time to time.

Q.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?

The lines of authorities and responsibilities between the SFC and SEHK must be clearly defined without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by Listing Committee.

We thank you for your attention.

Yours sincerely,
For and on behalf of
Climax International Company Limited (Stock code: 439)

For and on behalf of
CLIMAX INTERNATIONAL COMPANY LIMITED

.....
Authorized Signature(s)

CLP 中電

中電控股有限公司
CLP Holdings Limited

香港九龍亞皆老街147號
147 Argyle Street, Kowloon, Hong Kong

電話 Tel (852) 2678 8111
傳真 Fax (852) 2760 4448
網址 Website www.clpgroup.com

By Fax (2529 2075) and By Post

25 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I
Admiralty Centre
18 Harbour Road
Hong Kong

Dear Sirs,

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

We refer to the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations issued by the Financial Services and the Treasury Bureau (FSTB) on 29 March 2010 ("Consultation Paper").

In general, we welcome the Government's initiative to continuously improve the regulatory regime in respect of listing, with a view to enhancing market transparency and quality. This letter sets out our views on the specific issues on which feedback is sought in the Consultation Paper by replying to the questions raised in respect of each of those issues.

Legislative Approach – Question 1

(a) Subject to the views expressed in respect of (b) below, we believe this proposal would be acceptable.

The Guidelines on Disclosure of Inside Information, which are intended to provide clarity as to the nature of "relevant information" are not legally drafted nor have legal standing and effect. On the contrary, as mentioned in paragraph 3 of the Guidelines, they only provide examples and discuss issues on particular situations to illustrate the Securities and Futures Commission's (SFC's) views. Moreover, as appeared in paragraph 5, the summary is not intended to be exhaustive, is included for guidance only, and may not represent the latest legal authority.

(b) We believe it is appropriate that "inside information" should only be information that a director or officer has coming to possession of in the course of the performance of his duties – as opposed to through any other route.

However, and this relates to (a) above also, it is unclear from the Consultation Proposal what would be the categorisation of information such as business plans and budgets (which would not readily seem to fall within the distinction contemplated in paragraph 26, for example, of the SFC Guidelines on Disclosure of Inside Information).

(c) We broadly agree with this proposal save for two concerns:

(i) It is unclear how any individual director (and this is important, because the liabilities contemplated by the Consultation Paper apply to individuals) could actually himself or herself arrange for equal timely and effective access by the public to "inside information".

(ii) We are unsure how this proposal would apply to, for example, discussions with credit rating agencies who, for the purposes of granting, maintaining or amending a credit rating may well request access to information on the basis and at a time that may be different from that to which disclosure is made to other parties.

Safe Harbours – Question 2

(a) The four proposed safe harbours should be maintained.

(b) We consider that the SFC should be empowered to grant waivers. However, we do not consider that those waivers should be limited only to the circumstances where disclosure under Hong Kong legislation would mean a contravention of a court order or legislation in other jurisdictions. Given the importance of an effective and sensible regime for disclosure of price-sensitive information, the immense variety of circumstances which may arise and the severe sanctions attached to any non-compliance, we believe that the SFC should take on a broader authority to grant waivers – even if these might be sparingly exercised.

(c) We would welcome the provision of additional safe harbours, having regard to the nature of the statutory obligation and the consequences of non-compliance. There are at least two additional safe harbours which should be considered.

(i) Information provided to or by the Government of the Hong Kong Special Administrative Region (or any department or authority within Government) whether pursuant to a specific statutory obligation or not. The reason is that, as a matter of course, Government, and its various agencies and officials, is party to (and often requires or expects) significant, substantial and frequent exchanges of information and views with listed corporations, their directors and officers. We doubt whether it would be the intention of the legislation contemplated in the Consultation Paper that any communication with Government, which might constitute "inside information" would be required to be immediately disclosed to the public at large. In fact, a requirement to maintain confidentiality in such exchanges is often requested by Government itself and is a pre-requisite for those exchanges to be made or to continue.

(ii) Given the severity of the sanctions for non-compliance and the inherent difficulty in the definition of "inside information" we believe that it should be a safe harbour that the individual concerned considered on reasonable grounds that a particular piece of information did not constitute "inside information". We do not believe (and refer to paragraph 2.30 of the Consultation Paper in this regard) that any individual director or officer who gave proper consideration to a decision whether to release "inside information" and, on reasonable grounds, formed the intention not to disclose that information, should be found to have breached statutory disclosure requirements.

(d) We agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the Securities and Futures Ordinance.

Sanctions – Question 3

Before responding to the three specific sub-questions raised under this heading, we should comment that the Consultation Paper refers to "Civil Sanctions" and makes a clear distinction between these and "Criminal Sanctions". However, having regard to the severity of the list of punishments contemplated in paragraph 2.31 of the Consultation Paper we do not believe that any such distinction should be used as grounds for contemplating any less stringent standard, controls and definitions being applied to the breach of the statutory disclosure requirements. These are extremely serious matters indeed, as contemplated in the Consultation Paper. Uncertainty, ambiguity or lack of clarity in the terms of these statutory requirements should operate to minimise the scope of the liability for non-disclosure, rather than maximise the scope of possible application of these obligations.

(a) We agree to the Market Misconduct Tribunal (MMT) handling breaches of the statutory disclosure requirements.

(b) We do not agree with the description of the statutory breaches set out in paragraph 2.30 of the Consultation Paper. This paragraph contemplates two separate offences.

(i) Breach of the statutory disclosure requirements as a result of any intentional, reckless or negligent act or omission. As previously explained, we do not think that an intentional act or omission, based on proper consideration by an individual director or officer, followed by a decision to act or omit to act, should constitute a breach.

(ii) The second of breach is not taking all reasonable measures to prevent the listed corporation from breaching the statutory disclosure requirements. We suggest that this merits careful reconsideration and revision. As far as we can understand, what is contemplated, and both the concept and wording are troubling, is that the breach would take the form of a failure to prevent a company from failing to do something (namely disclose information). We can understand the concept of a breach which takes the form of a failure to do something. It is considerably more difficult to grapple with the notion of a breach which takes the form of a failure to fail to do something.

Moreover, it is unclear to us what reasonable measure an individual director might take to prevent non-disclosure. The proposal seems to contemplate that he himself would unilaterally disclose the information – an unusual course to take. However the director would still be liable if he had expressed his opposition to the board's collective decision not to disclose that information (bearing in mind that this is not a safe harbour envisaged by the Consultation Paper). Expressing a dissenting view and having that recorded in a meeting's minutes, would not appear to be taking a step to prevent non-disclosure as presently expressed in the proposals – even though, in practice this might be all he could do.

We consider that the regulatory fine of up to HK$8 million on the listed corporation and the director is excessive, at least in respect of individual directors. It ought to be borne in mind that, under the Stock Exchange's Code on Corporate Governance, at least one-third of those directors will be independent non-executive directors. We do not see how it would be reasonable to expose them to this degree of sanction, especially in circumstances where the benefits of service as an independent non-executive director are not considerable and, as non-executives, they may be less well placed than the executive members of the board to actually take steps to avoid non-compliance with the statutory obligations. This is also one of the reasons why the safe harbour provisions should be reviewed – the circumstances of individual directors should be taken into account in the legislation as finally promulgated, in order to recognise that the circumstances of individual directors, especially as regards executive and non-executive status, vary widely.

It is proposed 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. We do not know what is intended by the notion of reliance on the MMT findings. In particular, we are unclear as to how the decision of the MMT, taken by a different tribunal from the civil courts, applying the specific provisions of the statutory codification on disclosure of price-sensitive information, hearing different witnesses and considering different evidence than that which might be available in a subsequent civil proceedings, could form a basis on which the MMT's findings could be relied upon.

We also note, and no reference is made to this in the Consultation Paper, that as far as we understand the case to be, the liability contemplated by paragraph 2.35 is not capable of being insured against under D&O Liability insurance. If, which we take to be the case, the intention of the Consultation Paper is to create civil obligations, rather than criminal sanctions, we do not believe it is appropriate for sanctions to be established, and liabilities created, which are incapable of being insured against. We would recommend that the FSTB consult the insurance industry in this regard. It would readily be appreciated that inability to insure against this liabilities will be a matter of serious concern to directors and officers of listed corporations, in particular, independent non-executive directors.

(c) We agree that the SFC should be granted direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements.

Informal Consultation with the SFC – Question 4

We do not understand why the SFC proposes to limit informal consultation to a period of twelve months after the commencement of the statutory regime. Whilst the Consultation Paper contemplates a review on continuing the service for an additional period, the test that is expressed for that extension to occur is whether it is "necessary" to do so. We would have thought that the consultation should be extended if it proves appropriate and helpful to do so.

As regard the nature of that consultation, it seemed that the SFC envisages the service being limited to a bare minimum, rather than offering feedback and guidance on a more useful and constructive basis. In particular, we understand that

(a) the SFC will not advise on particular cases. Instead, they will merely explain the meaning of the Guidelines on Disclosure of Inside Information. On the basis that a listed corporation is as capable of reading the Guidelines as the SFC, it is not apparent what benefits such consultation will bring.

(b) the SFC will usually ask an issuer to explain why it cannot disclose the information under consideration. That is not a question which should be the subject of a consultation. The question is whether an issuer has a statutory duty to disclose an element of "inside information" – not why it cannot disclose any particular information. There is a difference.

We understand that the reason the SFC is unwilling to extend the scope of consultation (and in any event intends this to relate primarily to the application of "safe harbours") is based on its concern about either the volume of consultations or the consequences of having been consulted, in terms of the SFC's subsequent ability, through the MMT, to punish breach. We do not see on what basis the SFC should avoid the duty to assist listed companies in compliance with the statutory obligation – as opposed to the duty to punish breaches. If the SFC is concerned about possible excessive use or abuse of a consultation service, there would seem to us to be no reason why listed companies should not pay for that service – as it is already the case with the granting of waivers under the Takeovers Code.

Enforcement of the Statutory Disclosure Obligation – Question 5

We agree with the proposed administration and enforcement arrangements proposed in paragraphs 3.8 – 3.9 of the Consultation Paper.

More generally, as regards the Consultation Paper, it was helpful that a number of footnotes were provided giving background or explanation to particular provisions, including UK or EU practice. The Consultation Paper would have benefited from the inclusion, perhaps by way of an appendix, of a broader comparison of the proposed new regime with that in place in other leading and comparable jurisdictions as there might otherwise be an inference, possibly unjustified, that the proposals follow practice elsewhere with regard to the range and severity of the proposed new regime, but without fully incorporating the waivers, exemptions and other elements of those regimes. In other words, reference to practice elsewhere should not merely be to those elements which might seem to favour the regulator or make its task easier, but also those which help preserve a fair balance between the legitimate demand of regulation and the legitimate protection of listed companies, their directors and officers.

We have welcomed the opportunity to comment on the Consultation Paper and to support the goal of maintaining and improving the quality of our equity market.

Yours faithfully,

April Chan
Company Secretary

CompliancePlus Consulting

Compliance Consulting • Funds Consulting
Regulatory Consulting • Compliance Training

Submission to the FTSB Consultation: The Disclosure of Price-sensitive Information

Josephine Chung, Director, CompliancePlus Consulting Limited

Stanley Wong, Research Assistant

Tom Ng, Research Assistant

June 2010

CompliancePlus Consulting Limited provides comprehensive compliance support and solutions to hedge fund managers and mutual fund management companies. For enquiries on this submission, please contact **Josephine Chung** at jchung@complianceplus.hk. Josephine has been specializing in compliance matters relating to fund managers with almost 10 years of industry experience. Prior to joining **CompliancePlus Consulting Limited**, she was the Head of Legal and Compliance with a major asset management company in Hong Kong.

CompliancePlus Consulting Limited understands and agrees that our name and/or submission may be published by the Financial Services and Treasury Bureau.

Introduction

This document is submitted to the Financial Services and Treasury Bureau (FSTB) in response to its Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations published in March. In this paper we will discuss the issues raised by the FSTB in the Consultation Paper. We have also filed another submission to the Securities and Futures Commission, attached in this document as an appendix for the sake of completeness.

Background of the proposed codification

The objective of the proposed legislation is to foster transparency by providing that all Listed Companies should disclose information that can materially affect their securities' prices (Price-sensitive Information, "PSI"). On the other hand, the proposal has to cater for the legitimate interest of the Listed Companies. In particular, the rules ought to be sufficiently certain and should not impose too heavy a burden on the companies. Otherwise, the officials of the companies may release too much irrelevant information so as to ensure that they comply with the rules, and the public can be confused, defeating the underlying purpose of this legislation. The proposal should strike a balance between these competing interests.

Rethinking the proposed legal framework

The first issue is whether the SFC guidelines should also be codified as a piece of subsidiary legislation. This can be done in pursuant to Section 397(P) of the Securities and Futures Ordinance ("SFO"). As aforesaid, the need of certainty is of paramount importance. A statutory backing can reduce the litigation risk and give more certainty to the regime. This is especially so when a breach of the legislation may lead to civil liabilities. It is not uncommon for the Securities and Futures Commission ("SFC") to promulgate rules in the form of subsidiary legislations. The Securities and Futures (Disclosure of Interests – Securities Borrowing and Lending) Rules (Cap. 571X) may serve as an example.

Currently, Section 399(6) SFO provides that:

"A failure on the part of any person to comply with the provisions set out in any code or guideline published under this section that apply to him shall not by itself render him liable to any judicial or other proceedings, but in any proceedings under this Ordinance before any court the code or guideline shall be admissible in

evidence, and if any provision set out in the code or guideline appears to the court to be relevant to any question arising in the proceedings it shall be taken into account in determining that question."

It seems that the guidelines may not be conclusive evidence in the Market Misconduct Tribunal ("MMT") hearing, since a breach of the guidelines will not by itself make the person or company liable. Subsidiary legislation, in contrast, will provide certainty to the scheme.

On the other hand, in an ever-changing business world, flexibility is also an important consideration, so that the rules can keep abreast of the latest changes in the market. We understand that enacting a piece of subsidiary legislation will reduce flexibility, as any amendment to the legislation has to be gazetted, and is subject to the approval of the Legislative Council. In this respect, issuing guidelines seems to be advantageous. Nevertheless, given the importance of this legislation, and the significance of its effect, it can be argued that any changes to the rules must be scrutinized by the Legislative Council, and hence codification is also in the interest of the public. In any event, we urge the FSTB and the SFC to explain the rationale behind the use of guidelines.

Please find below our submissions on several issues arising from the Consultation Paper.

Question 1(a): Definition of PSI

The proposed legislation utilizes the concept of "relevant information" in the context of insider dealing. "Relevant information" is defined as the following in S.245 SFO:

"relevant information" (有關消息), 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.

We agree with the proposal. The proposed definition introduces a single test: whether the information is likely to cause material price change. According to case laws,

PSI consists of three elements. Firstly, the information has to be specific. Secondly, it has to be material. Lastly, the information should not be generally known. In relation to materiality, the touchstone is whether the information is capable of affecting the mind of a reasonable investor.

Thus, the definition is investor-oriented. The Listed Companies have to evaluate the information from the investors' point-of-view. The legislation therefore can afford greater protection to the investors. From the companies' perspective, the new definition seems to be clearer: all the criteria in the listing rules are subsumed into one single test, namely whether the information may affect the price. Moreover, there are sufficient case laws on this point, and the concept of "relevant information" is now fully understood, since it has been introduced in the context of insider dealing for 20 years. The companies can have a good grasp of the PSI concept. We therefore agree with the proposal.

Question 1 (b): Timing of disclosure

Under the proposal, once the company is aware of the information, the information has to be disclosed as soon as practicable. We agree that the companies should disclose such information as soon as practicable.

Nonetheless, ascertaining when the companies know the information is not without difficulties. The proposed legislation introduces the concept of constructive knowledge. The companies have knowledge of the PSI once an officer actually knows or "ought to have" known the PSI in the course of performing his functions. The proposal can be contrasted with the existing disclosure rules. According to paragraph 10 of the Guide on Disclosure of Price-sensitive Information, issued by the Hong Kong Stock Exchange in January 2002,

> *The guiding principle is that information which is expected to be price-sensitive should be announced promptly after it becomes known to a director or senior management of the issuer and/or is the subject of a decision by the directors or senior management of the issuer.*

Under the current regime, the company will not be deemed to have knowledge unless its senior members or directors know the piece of information in question. However, under the proposed rules, the company will be deemed to have knowledge of the information as long as an "officer" knows the information. "Officer" is defined in SFO Sch.1 as:

> *"officer" (高級人員)-*

(a) in relation to a corporation, means a director, manager or secretary of, or any other person involved in the management of, the corporation; or
(b) in relation to an unincorporated body, means any member of the governing body of the unincorporated body

This imposes a heavy burden on the listed company. While it may be reasonable to expect the company to disclose information that the directors are aware of, it will be too strict if we expect the company to disclose a piece of information when a middle-level manager is aware of it. Therefore, we suggest that the company should not be fixed with constructive knowledge unless the senior management or the directors ought to have known the PSI.

Question 1 (c): manner of disclosure

We agree that the information should be disclosed in an "equal, timely and effective" manner. We agree that the companies can comply with such requirement by disseminating the information through the current electronic publication system (HKEx-EPS).

Question 2 (a)(c): The 4 safe harbors

Disclosure prohibited by HK law

We agree with the proposal. The companies need not disclose the information if the disclosure is prohibited by local legislation

Negotiation

We agree that information in relation to the on-going negotiation needs not be disclosed. It should be emphasized that the companies ought to disclose such information if the relevant information is leaked. This is in line with the UK and the EU position.

Trade secret

The proposed legislation and the drafted SFC guidelines contain no definition of the term "trade secret'. Given that the concept of "trade secret" is potentially vague, we suggest that the legislation or the guidelines should define the term with greater precision.

Under the proposal, blanket immunity is granted. On the Contrary, in the United Kingdom, information in respect of product development and intellectual property needs

not be disclosed, while important information that affect major projects should be disclosed.

We suggest that the proposed legislation requires a balance between the importance of protecting the trade secret and fostering transparency in the market. It seems unwise to grant a blanket safe harbor. There may be cases where the advantages of disclosure will outweigh the possible harm to the companies. Therefore, we suggest that this safe harbor should be qualified by conditions similar to that of the UK provision

Liquidity support

Similarly, under the proposal blanket immunity is granted. The Consultation paper cited the UK position as an example. Nevertheless, it should be emphasized that before the Northern Rock crisis, companies in the United Kingdom are still obliged to announce their underlying financial problems, even if they are in serious financial difficulties. It was only after the Northern Rock crisis did the Financial Services Authority (FSA) began to re-consider this rule. The FSA eventually amend this rule in December 2008. Thus, it must be emphasized that establishing this safe harbor is rather uncommon before the Financial Tsunami.

We agreed that when a company is in dire financial difficulties, a delay in disclosure may be desirable, especially when the very existence of the company is under jeopardy. Nevertheless, it is unwise to grant blanket immunity. This safe harbor creates a weird scenario: when the news is so bad that disclosure will seriously affect the price of the company's security, the company, ironically, needs not disclose the information. Obviously, this safe harbor can frustrate the entire purpose of the proposed legislation.

The better approach is to authorize the SFC to grant waiver on a case-by-case basis. Again, the SFC should also be empowered to attach condition to the waiver.

There should be guidelines on how the SFC exercises its discretion and an appeal procedure should be established.

The legislation should clarify that the companies must disclose the information as soon as their financial problems are relieved.

Question 2 (b)(d): SFC's empowerment

We agree that the SFC should be empowered to grant conditional waiver in

relation to possible breach of legislation or court order in other jurisdiction. There should be proper guidelines and an appeal procedure in this regard, and the application must be dealt with in timely basis.

We agree that the SFC should be empowered to create new safe harbors if it is in the public interest to do so, and suggest that the SFC should consult the relevant stakeholders regularly.

Question 3 (a): Jurisdiction

We agree with the proposal that the MMT is the proper forum, given that the MMT specializes in this area and is experienced in dealing with cases involving "relevant information".

Question 3 (b): Remedies

This part concerns the legal consequences of a failure to disclose.

It seems that as to the individual officer, their obligation is not strict, but only to exercise reasonable care. We agree with this standard. Wholly innocent failure to disclose should not be sanctioned. On the other hand, the companies' obligation is relatively strict.

The company or the officer in question may be liable to damages if it is "fair, just and reasonable" to make them compensate the victims. This confers a wide discretion. We suggest that the legislation can draw an analogy with some tort actions, e.g. provides that "the person in breach may be liable to damages in accordance with the law of negligence".

We agree that a failure to disclose should not be made a criminal offence, although the intention of the company or officer in breach of the disclosure requirement may be relevant in determining the appropriate remedy.

In principle, we agree that the civil remedies proposed should be adopted. With respect to the maximum fine of $8 Million, we suggest that the legislation should not impose a maximum amount. There exists no sound policy reason to set a statutory limit. Otherwise, the companies or the officers may be able to benefit from a breach, although such scenario is rare. Another possible remedy is a disgorgement order if the companies/officers profit from the breach.

Question 3 (c): SFC's direct access to the MMT

The current system is a dual criminal and civil regimes.

As to the civil regime, the case is brought to the MMT by the Financial Secretary. This happens when the Secretary himself detects market misconduct, or when the SFC or the Department of Justice ("DOJ") refers cases to the Secretary.

Simultaneously, the SFC or the Secretary can refer the case to the DOJ. The DOJ may also detect misconduct itself. The DOJ will then decide whether to initiate criminal proceedings at the same time. It should be noted that the standard of proof in civil case is lower.

Under the proposal there will be no criminal proceeding. Thus, we agree with the proposed arrangement in relation to disclosure of PSI, i.e. the SFC can bring the case to the MMT directly. There is no need to refer the case to the DOJ or to report to the Financial Secretary. Nevertheless, the DOJ and the Financial Secretary should still refer cases to the SFC if they detect any possible breach.

In respect of the other market misconduct, we disagree with the proposal. The DOJ must be involved (because the DOJ have to decide whether prosecution should be brought), and it will not be desirable to allow the SFC to access the MMT directly without notifying the DOJ.

Question 4: SFC's Informal consultation

The proposal proposes that the SFC will only provide consultation in relation to the application of safe harbors to the Listed Companies. There will be no consultation as to the definition of PSI and the need of disclosure.

In providing such consultation service, a standardized answer is to be avoided and the SFC should give concrete and specific answers to the companies.

We suggest that the SFC should provide consultation in relation to both PSI and safe harbors to the Listed Companies. Nevertheless, its advice should be "without prejudice" (in relation to liability), and cannot be used as an evidence in MMT in respect of liability.

With respect to the remedy, we suggest that the MMT can take the SFC advice into account when considering the remedy, so that if the SFC has been consulted, the

company may still be liable, but the "penalty" may be mitigated. On the other hand, we understand that this will give companies an incentive to consult the SFC, since this gesture can reduce the severity of the penalty if it turns out that the companies are in breach. A possible solution is to provide that if a company over-uses the consultation service, the fact that it has consulted the SFC will not be taken into account in determining the penalty.

Question 5: SFC and SEHK's division of works

Under the proposal, the Stock Exchange of Hong Kong ("SEHK") will inform the SFC when it detects possible breach. Moreover, the SEHK's listing rules will still apply, so SEHK can also bring disciplinary action based on possible breach, in addition to the MMT proceeding brought by the SFC.

We suggest that there shall be no "double jeopardy" in the sense that a company may face an investigation of SEHK and a trial in the MMT (brought about by the SFC) for the same breach. We suggest that SEHK can still bring disciplinary action simultaneously, but it should be provided in its listing rules that when there is a parallel MMT hearing, the SEHK will treat the judgment of MMT conclusive evidence in respect of liability.

Conclusion

It is hoped that the proposed legislation can further foster transparency in the market on the one hand, and on the other hand ensure that the Listed Corporations' legitimate interest is not hampered. We sincerely hope that the FSTB can refine the proposed legislation after this consultation exercise.

END

消費者委員會 CONSUMER COUNCIL

北角電氣道191號
電氣廣場中心22樓
查詢電話：2856 3113
傳真電話：2856 3611
電子郵件：cc@consumer.org.hk
網址：www.consumer.org.hk

22/F, Tic Wan Centre, 191 Java Road
North Point, Hong Kong.
Main Exchange : 2856 3113
Fax: 2856 3611
Email : cc@consumer.org.hk
Website : www.consumer.org.hk

來函檔號 YOUR REF. SUB/12/2/2/5
本函檔號 OUR REF. CC 1/24/1

2 July, 2010

Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I, Admiralty Centre
18 Harcourt Road
Hong Kong

Attn : Mr. Anthony LI

Dear Mr. Li,

Re: Submission on the Proposed Statutory Codification of certain Requirements to Disclose Price Sensitive Information by Listed Corporations

The Consumer Council would like to submit its views on the captioned consultation paper for the Proposed Statutory Codification of certain Requirements to Disclose Price Sensitive Information by Listed Corporations. We shall be happy to address any query you or your colleagues may have regarding the submission.

Yours sincerely,

Connie LAU
Chief Executive
Consumer Council

Encl.

Consumer Council

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

INTRODUCTION

1. The Consumer Council (the Council) is pleased to provide its views on the consultation paper issued by the Financial Services and the Treasury Bureau (FSTB) regarding the proposed statutory codification of certain requirements to disclose price sensitive information (PSI) by listed corporations in Hong Kong.

2. The Council pledges its full support of the FSTB's determination to promote a transparent and accountable disclosure regime for the listed corporations, with the aim of maintaining investor confidence and thereby enhancing reputation of Hong Kong as a leading international financial centre in the region.

3. The following sets out the Council's views to some of the questions raised in the consultation paper that have direct implications to the interests of consumers/investors.

COUNCIL'S RESPONSE

Establishing the Statutory Disclosure Obligation

Q1 (a): Do you agree with the proposal to adopt the existing definition of "relevant information" from the insider dealing regime under the Securities and Futures Ordinance (SFO) to define PSI?

4. The Council agrees that there will be the advantage of familiarity for adoption of the definition of PSI from the existing definition of "relevant information" from the insider dealing regime under the SFO. However, the Council considers it important to give elaborations on what constitutes PSI to the extent possible so as to prevent listed corporations from putting up uncertainty as excuse for not meeting the requirements in disclosing PSI to the investing public. In this respect, the Council welcomes the Securities and Futures Commission's (SFC) proposed issue of the draft "Guidelines on Disclosure of Inside Information" to illustrate how the disclosure requirements work and what the compliance issues are.

Q1 (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?

5. The Council supports making it an obligation for a listed corporation to disclose to the public as soon as practicable any "inside information" that has come to its knowledge. The Council agrees to imputing a director or an officer's inside information to the listed corporation, and further is of the view that the scope should be broadened to cover any inside information whether it comes by in the course of the performance of his duties or not.

Q1 (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?

6. Since sensitive information can spark market response within a short time span, the Council agrees to 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. The Council is of the view that corporations which are listed on more than one exchange be required to disclose any inside information to the investing public in Hong Kong at the same time as it makes disclosure to the other markets.

7. In case of delay in disclosure, the Council considers that a listed corporation should be required to give full explanation for its failure to disclose the relevant information in time, and to disclose whether any of its director or officer has engaged in any dealing in any of the securities of the corporation during the period for which the disclosure has been late.

Safe Harbours

Q2 (b): Do you agree that the Securities and Futures Commission (SFC) should be empowered to grant waivers, and to attach conditions thereto?

8. The Council agrees that the SFC should be empowered to grant an exemption to waive disclosure of information in circumstances where making the disclosure would render listed corporations in breach of court orders or law. The Council also supports empowering SFC to impose conditions in relation to the exemption granted so that changing circumstances can be provided for.

CONCLUSION

9. The Council welcomes the proposed statutory disclosure regime which would require listed corporations to make timely and fair disclosure of inside information to the investing public. It is nevertheless noted that in the SFC's draft "Guidelines on Disclosure of Inside Information", some of the disclosure requirements are only required to be made to the public "as soon as practicable". In the Council's opinion, it is important to have proper safeguards to prevent non-disclosure (e.g. keeping silent), selective disclosure (e.g. asymmetrical disclosure of identical/similar information in different jurisdictions), and late disclosure which are material to an investor's decision.

July 2010
Consumer Council

COSCO Pacific Limited
(Incorporated in Bermuda with limited liability)
49th Floor, COSCO Tower, 183 Queen's Road Central, Hong Kong.
Tel: (852) 2809 8188 Fax: (852) 2907 6088

中遠太平洋有限公司
(於百慕達註冊成立之有限公司)
香港皇后大道中183號
中遠大廈49樓

28 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I
Admiralty Centre
18, Harcourt Road
Hong Kong

BY POST, BY FAX & BY EMAIL
Fax no.: 2529 2075

Dear Sir/Madam,

R.E.: Comments on Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information ("PSI") by Listed Corporations (the "Proposal")

In regard to the captioned Consultation Paper issued by the Financial Services and the Treasury Bureau dated March 2010, we are writing to set out the views of COSCO Pacific Limited ("COSCO Pacific", the "Company") on the above Proposal as follows:

COSCO Pacific has implemented different processes and systems to achieve a high standard of corporate conduct and governance. The Company has complied with the relevant regulations and rules to disclose the important information in a timely, accurate, transparent and informative manner. We believe that the market and the investors are well-informed and support this practice of the Company.

COSCO Pacific agrees with and supports the principle of a continuous disclosure regime but is of a view that the existing Listing Rules administered by The Stock Exchange of Hong Kong Limited ("SEHK") are sufficient to impose the disclosure obligations on the Listed Corporations.

RATIONALE

The rationale behind the Proposal is not agreed. There are mainly three reasons:

(a) the existing Listing Rules administered by SEHK are considered to be sufficient to impose the disclosure obligations on the Listed Corporations.

In case of any failure to disclose the required information (including the PSI) accurately and promptly, the directors will be liable for such failure and SEHK may publicize sanction or criticism.

The Company has been keeping up with the highest standards of corporate conduct and governance and ensuring the general principle of timely disclosure. It is understood that the Proposal aims to ensure that all Listed Corporations will adhere to this but it will be unfair, unreasonable and too stringent for some Listed Corporations which have been working hard in this regard.

(b) The penalty to be imposed is unreasonably high, taking into consideration that a director/officer who has made a judgmental error of either (a) not regarding certain information as price sensitive, or (b) regarding a one or two days/weeks delay in not disclosing the PSI as "as soon as practicable", in fact will not be making any gain out of the failure.

(c) With the huge structure of a group company, it is difficult to ensure the all directors/officers possess the same level of actual knowledge of PSI. As the definitions of PSI and officers are considered to be too wide and vague (details are mentioned in response to specific question below), this will inevitably create a lot of false alarms amongst a listed corporation and hinder the daily operation and business management.

RESPONSES TO THE QUESTIONS

We believe that the Government should withdraw the Proposal. In any event, the Company's responses to the Questions posed in the Consultation Paper are as follows:

Question 1

(a) It is not agreed that the existing definition of "relevant information" from the insider dealing regime under the SFO be used to define PSI. It is because by nature price sensitive information is not necessarily the same as insider information.

(b) It is not agreed 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. It is not agreed that the listed corporation 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.

It is because one will be regarded as committing the offence of insider dealing only if the following two elements are present, namely, (i) possession of the "inside information" and (ii) the action of dealing in securities. By imposing penalty on a director/officer for (i) not publishing or (ii) delay in publishing PSI (i.e. inaction) is totally unsatisfactory in that possession of "inside information" alone will already lead to the risk of infringing the proposed statutory provisions.

Furthermore, if the definition of "relevant information" in the SFO is to be taken reference in defining "inside information", essentially most of the information during the operation of the business may be included and this will be too wide. In that case, a listed corporation will disclose any information coming into its possession and the market will be bombarded with information which may not be constructive.

An example is made in order to illustrate how the market will be confused with the flooding information – if a listed corporation has prepared a preliminary profit forecast (with pessimistic figures) for internal reference in pursuing a proposed project and the forecast is considered as price-sensitive information, the listed corporation has to disclose at that stage. However, if the economic and business market change as the project develops, the forecast figures may be improved and the listed corporation has to disclose the revised forecast again.

The investors who have made their investment decision when the listed corporation announced the first forecast will be relying on different information as the investors who make the investment decision after the second forecast is released. If the Listed Corporation wants to eliminate this, it has to predict the market change precisely which is not realistic and very difficult.

Defining "officer" as covering a wide range of people including directors, company secretaries and managers are not acceptable as well. Some company secretaries and middle-level managers do not possess the same level of knowledge as the directors do. Also, amongst the board of directors, only executive directors are working full time to oversee the operation of a listed corporation. It is unfair and unreasonable to expect non-executive directors and independent non-executive directors to have the same level of knowledge on the PSI. It is practically not possible for the SFC or MMT to determine which director has a greater responsibility in the delay or failure in disclosing PSI.

Furthermore, the definition of "as soon as practicable" should be included.

(c) It is considered that the existing provisions in the Listing Rules are able to serve the same purpose and the reasons behind the Proposal are not strongly grounded.

The present public sanction and criticism have already provided effective deterrence to those who breach the Listing Rules. The investors are able to judge and value a listed corporation based on this information. The breach will cause significant reputational damage to the directors as well. It is not considered necessary to impose additional sanctions on Listed Corporations and the directors/officers of Listed Corporations.

Question 2

(a) Yes. It was suggested that:

- in regard to Safe Harbour A, orders made by the courts of other jurisdictions should be included;

- in regard to Safe Harbour B, the part on "the outcome of which may be prejudiced if the information is disclosed prematurely" should be deleted;

- in regard to Safe Harbour C, definition of "trade secret" should be included;

- in regard to the "reasonable precautions" that the Listed Corporations have to take for preserving the confidentiality of the inside information, definition of "reasonable precautions" should be included.

(b) Yes. It is preferred to have general waivers and the waivers granted can be publicized in order to ensure that no particular Listed Corporations have been favoured.

(c) Yes. Additional safe harbours may include any delay of disclosure or non-disclosure caused by error of judgment of the directors/officers.

(d) Yes. SFC should prescribe further safe harbours before the enactments in order to avoid chaotic situations afterwards.

Question 3

(a) It is agreed that the jurisdiction of the MMT be extended to handle breaches of the statutory disclosure requirements if the Proposal is enacted.

(b) (i) Remedies set out in 2.31 (a) to (f) are too harsh for the penalty of error of judgment.

Regarding 2.31(a), the regulatory fine of up to HK$8 million on the listed corporation and/or the director is particularly harsh for a director on an individual basis for the penalty of an error of judgment. It may make it more difficult and costly for the Listed Corporations to arrange for directors' and officers' liability insurance.

Also, for small-scale Listed Corporations, these penalties are detrimental.

It is proposed in the Proposal 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. This will increase the claims to be filed against the Listed Corporations and/or the directors/officers and the legal cost will be increased accordingly.

(ii) Remedies in 2.35 and 2.36 are unwarranted since it is inevitable for people to make judgmental mistakes. For example, an experienced and educated director with solid knowledge may also make a wrong business decision. While it may be considered fair for the investors to file a civil claim against the directors, it should be considered if it is fair for the directors as well.

(c) If the enactment is pushed through, it is natural for SFC to be an enforcement agency but any institution of proceedings should also be endorsed by the Secretary for Justice of the Department of Justice.

Question 4

SFC should provide informal consultation for the Listed Corporations with regard to the statutory disclosure requirements without a time limit. As for the interpretation of the Listing Rules, Listed Corporations have the right to consult the Stock Exchange to ensure the interpretation is in line and all requirements are complied with.

Question 5

The Company is of a view that the existing Listing Rules are adequate to regulate the disclosure of PSI.

CONCLUSION

The Government's objective to cultivate a continuous disclosure culture amongst Listed Corporations is noted in the Proposal. However, the stringent drafting of the proposed statutory requirements not only unable to achieve this objective but will also burden the Listed Corporations and the directors/officers.

The Company is of a view that the existing Listing Rules are adequate to regulate the disclosure of PSI. If it is insisted that such requirements be enacted, further consultation should be conducted together with a revised drafting to be considered.

Yours faithfully,

XU Minjie
Vice Chairman & Managing Director
COSCO Pacific Limited

港 通 控 股 有 限 公 司
THE CROSS-HARBOUR (HOLDINGS) LIMITED

June 23, 2010

To Whom it May Concern:

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

The Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations is not well thought out and is flawed in many areas.

I object on the grounds that the Codification will not contribute to greater transparency of listed companies, but will create greater confusion as "announcements" become a means for companies to drive up their stock prices by "disclosing" achievements/partnerships/deals that are in the works but not yet completed. This will reduce the trust in listed companies' disclosures and flood the financial community with frivolous announcements, all made in the name of "greater transparency". This will have the exact opposite effect of the making more information open, but inundate the market with so much frivolous information that everyday investors will be blinded to what is really important.

Once again, the Hong Kong Government is overreacting to populist overtures and creating legislation without looking at the big picture. By looking to ameliorate short-term "noise" from parties with vested-interests, Hong Kong is fundamentally changing how listed companies operate.

Listed companies like us want to play by the rules because it's in our best interest to do so. With good corporate governance, we can more easily raise funds, reward investors with dividends and endear ourselves to our customers.

However, the proposal by the Government is not creating a referee for a fair game, but a referee who creates the rules depending on how the fans/audience reacts. This is unfair to the game participants and unfair to fans who want a fair match.

Yours faithfully,
The Cross Harbour (Holdings) Limited

John Yeung
Managing Director

香港灣仔港灣道26號華潤大廈33樓
33/F., China Resources Building, 26 Harbour Road, Wanchai, Hong Kong
電話 Tel: (852) 2161 1888 傳真 Fax: (852) 2802 2080

港 通 控 股 有 限 公 司
THE CROSS-HARBOUR (HOLDINGS) LIMITED

June 23, 2010

To Whom it May Concern:

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

I, the director of The Cross-Harbour (Holdings) Limited would like to voice my OBJECTION to the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations..

At the onset, we were given the impression that Codification would help ease the restrictions set upon us by HKEx and provide greater clarity as to what information we need to provide in order to meet our obligations as listed companies. We ARE responsible companies who want to maximize returns to our investors as well as compete on a level playing field.

However, after reading through your consultation as well as the subsequent "Guidelines on Disclosure of Inside Information" published by the SFC, I am of the opinion that this Codification not only creates an additional burden to listed companies, it does not add transparency to our investors. In fact, it will create greater market turbulence because of a myriad of half-baked information that will be submitted to the market by the companies afraid of running afoul of the law. This Codification, in effect, will make Hong Kong the laughing stock of the financial community world wide.

Yours faithfully,
The Cross-Harbour (Holdings) Limited

Leung Wai Fai
Executive Director

香港銅鑼灣港灣道26號華潤大廈3205室
3205, China Resources Building, 26 Harbour Road, Wanchai, Hong Kong
電話 Tel: (852) 2161 1888 傳真 Fax: (852) 2802 2080

Deacons
的近律師行

Lawyers

5th Floor
Alexandra House
18 Chater Road
Central
Hong Kong
DX-009010 Central 1
Tel +852 2825 9211
Fax +852 2810 0431
www.deacons.com.hk

Representative Offices In China
Beijing
Guangzhou
Shanghai

Independent Affiliated Firms
Malaysia
Taiwan
Thailand

Partners
Lilian Chiang*❖
Lam Wing-Wo*
Simon Deane
Christina Hung*
Keith Cole
Franki Cheung❖
Alex Lai
Lindsay Esler
Daisy Tong*
Geoffrey Shaw
Michael Turnbull
Christopher Britton
Susan Gordon
Gavin Nesbitt
Rory Gallaher
Jeremy Lam
Toh Guat Kim
Cheung Kwok Kit
Ronny Chow
Eugina Chan
Cynthia Chung
Linda Lee
Robert Clark
Annie Tsoi
Edwarde Webre
Joseph Kwan
Alfred Tam
Esther Lai
Charmaine Koo
Prudence Mak
Taylor Hui
Katherine Chu
Rodney Goh
Philip Gilligan
Gary Lui
Alexander Que
Rhoda Yung
Patsy Lau
Karen Kaur
Myles Seto
Richard Hudson
Paul Kwan
Karen Chan
Wallace Wong
Alwyn Li
Greg Heaton
Jane McBride
Declan McDaid
Zhang Wei Min
Sally Ip

Consultants
Wai-Pat Wong*
James Bertram*
John Rose*
John Richardson*
William Mackesy
Winnie Lai
Vivian Poon
Catherine Zheng
David Lawrence*

* Notary Public
❖ China-Appointed Attesting Officer

By email (psi_consultation@fstb.gov.hk) and By hand

Our Ref JSMK:TTAN:85241

Partner Joseph Kwan
Contact Joseph Kwan/Tammy Tan
Tel +852 2825 9324/9306
Fax +852 2841 3222
E-mail joseph.kwan@deacons.com.hk/
tammy.tan@deacons.com.hk

28 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs,

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

We refer to the Consultation Paper and set out our comments on the questions below.

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?

1. Whilst we note the reasons for adopting the existing definition of "relevant information" under s. 245 of the SFO to define from the insider dealing regime under the SFO as the definition of "inside information", there could be uncertainties and difficulties created by such adoption.

2. Although it is proposed that the definition will be called "inside information" under Part IIIA and the insider dealing provisions, the term might have different meaning or it might require a different test under Part IIIA and the insider dealing provisions.

3. For insider dealing cases, the question of what is or what is not "relevant information" would usually be determined by the tribunal or court with the help of expert evidence. Those expert, in

preparing their evidence, would have the benefit of hindsight by looking at, inter alia, the movement in the price and turnover of the listed securities in arriving at an opinion on whether the information in question "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." In that case, the test is an "objective" one and the determination is done with hindsight of the movement in price and turnover of the listed securities.

4. However, under the present proposal, directors are required to decide whether certain information is "inside information" and it is unlikely that they would have the opportunity and time to consult an expert. Also, the directors do not have the benefit of hindsight in looking at the movement of share price and sales turnover. The relevant test would be the subjective assessment of the directors, which is very different from the approach of assessment in insider dealing cases.

5. Accordingly, it is questionable how much assistance the directors and officers of listed companies can draw from the decided insider dealing cases. Also, little assistance can be drawn from the consultation service offered by the SFC as the SFC has said they are not in a position to judge whether certain information, in a particular case, is likely to materially affect the price of a listed corporation's shares and they would not comment on whether certain information is inside information.

6. Also, the two different approaches may cause difficulty in the adjudication of insider dealing cases and "non-disclosure of insider information" cases in future." Whilst it is difficult to list out all such difficulty, one possible scenario is whether Defendant in insider dealing cases can argue that the information is not relevant information as the directors of the listed corporation in question has not made a disclosure under Part IIIA; and whether the subsequent prosecution of the said listed corporation and directors in the MMT for failing to make a disclosure can be relied on to show that the information is "inside information" for the purpose of insider dealing prosecution?

7. On the other hand, if the market reacts to the announcement made by a listed corporation under Part IIIA that there is inside information, can the prosecution in a criminal insider dealing case or their expert relies on the increase in the share price arising out of the announcement to prove that the information is relevant information and therefore any connected person who was in possession of such information and traded in the shares would be convicted of insider dealing? This might be unsafe as market sometime (if not often) reacts to a piece of news identified by the listed corporation as "inside information" (and thus being considered as price sensitive).

Question 2(d)
Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?

8. We agree that the SFC should be empowered to prescribe further safe harbours so that proper safe harbour events could be given effect promptly without going through the legislative process.

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

9. No detail reason was given as to why the current safeguard of having Financial Secretary approving the institution of MMT proceedings should not be retained. In paragraph 2.34 of the Consultation Paper, it says that the proposal is line with international practice but no details have been provided.

Question 3(b)
Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

10. The proposed sanction of disqualification order should not be made against individual directors or officers if only the listed corporation has been found to be in breach of the disclosure requirements under Part IIIA. If the Government agrees with this, this should be expressly stated in the proposed legislation.

11. Apart from the regulatory fine, the list of proposed sanctions is adopted from part of the sanctions that MMT can impose in market misconduct cases. However, we do not see the justification of a 'cease and desist order" in the context of the disclosure of inside information. Different from a case where MMT gives a cease and desist order against a person from engaging in market misconduct, the disclosure of inside information arises at any time out of the business of a listed corporation and the directors simply reacts to the relevant event and make an assessment whether or not to make a disclosure. Since the obligation to make disclosure is clear under Part IIIA, it make little purpose to require the directors to "cease and desist" from breaching Part IIIA.

12. Further, we do not see why the SFC should be given power to apply for a disqualification order under section 214 of the SFO against a director or officer if the MMT already has power to make this sanction. In other words, where the MMT does not impose disqualification sanction and the SFC does not agree with this decision, the SFC may in principle apply for a disqualification order. However, we see no justification in allowing the SFC to do that under the proposed legislation.

13. In paragraph 2.35 of the Consultation Paper, it is proposed that persons suffering pecuniary loss as a result of the 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. This might allow investors who have sold the shares of a listed corporation between the time when the company should have made a disclosure and the subsequent but late disclosure of inside information to recover the price difference between the actual sale price and the higher share price had there been an announcement prior to his sale. If compensation is allowed to be sought, the potential exposure of a listed corporation and its directors and officers could be significantly more than the regulatory fine of HK$8 million. This would be unreasonable and the proposal should not be adopted.

Others
Proposed section 101G

Section 101G(2) provides that "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."

14. Given that the officer will be treated as in breach of the disclosure requirement if he has not taken all reasonable measures to prevent that breach, there is no justification to impose an additional obligation on the officers under section 101G (1), which provides 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" (emphasis added). The argument against s 101G (1) is stronger if what is proposed here is similar to the operation of s 279 and s. 258 of the SFO which will subject a person in breach of the obligation under s.101G to be sanctioned (Note : a person might be sanctioned under s.258 by the MMT in the event of a breach of duty imposed under s.279 of the SFO).

Yours faithfully,

Joseph Kwan
Deacons

民主黨對有關將上市法團披露股價敏感資料的若干規定納入法例意見

民主黨立法會議員涂謹申 **2010** 年 **7** 月 **10** 日

1. 披露責任

a) 贊成根據《證券及期貨條例》打擊內幕交易所用的〝有關消息〞的定義，因爲這個標準已經被市場和公眾人士廣泛接納。

b) 贊成上市法團有責任在可行的情況下，盡快向公眾披露任何已獲悉的〝內幕消息〞。因爲內幕消息只有小部份人知悉，有可能被擁有消息的人濫用來圖利，對其他投資者不公平。我們亦同意上市法團的董事或高級人員在執行職能時知悉〝內幕消息〞等於法團知悉內幕消息，因爲董事及高級人員是法團的領導人，並且有權爲法團作任何決定，及代表法團對外處理一切事務，可比喻爲一個人的大腦。

c) 贊成法團必須以一個使公眾平等、適時和有效地取得資料的方式來披露，因爲投資者不論大小都應該獲得公平對待。除了投資者之外其他人士也可能受到法團的業務影響，例如法團的客戶或供應商，和提供融資的金融機構等，都有權在合理的時間內知悉法團的消息。除了在認可交易所的登載系統發放資料，亦應該把資料向新聞機構和通訊社發放，確保有足夠渠道讓公眾知道實際情況。有關的通告應該盡量以淺白和簡單的字句撰寫，使公眾人士

容易在合理時間內了解事實。

2. 安全港

a)

i) 安全港 A：同意，因爲如果爲了遵守法律而違反其他法例並不合理。

ii) 安全港 B：同意，因爲披露未完成的磋商或建議可能對有關潛在交易的一方造成不公平。

iii) 安全港 C：同意，因爲洩露商業秘密可能會對上市法團造成嚴重傷害，最終小股東亦會受害。

iv) 安全港 D：同意，因爲披露政府外匯基金或中央銀行提供流動資金支援的消息，可能會對該上市法團造成嚴重打擊，削弱了外匯基金或中央銀行協助的效用，最終小股東亦會受到損失。

b) 贊成賦權證監會負責審核豁免申請，和給予豁免及在豁免中施加條件。因爲這是最有效和符合經濟效益的處理方法。

c) 不同意，因爲上述 4 個安全港已經足夠。

d) 不同意，因爲上述 4 個安全港已經足夠。

3. 制裁

a) 贊成擴大市場失當行爲審裁處的管轄權，以處理違反法定披露要求的個案。因爲市場失當行爲審裁處在處理內幕消息案件有豐富經驗，而且不需要再花時間成立新機構去做這工作及具成本效

益。

b) 贊成諮詢文件第 2.31、2.35 及 2.36 段建議的民事補救措施。因爲民事補救措施比刑事程序簡單和容易執行，能更有效地懲處觸犯法例的人士，和向受害人作出賠償。

c) 贊成賦權證監會就違反法定披露要求的個案，直接提起在市場失當行爲審裁處席前進行研訊程序，並且接受按國際做法將簡化安排適用於市場失當行爲審裁處席前進行其他失當行爲的研訊。其他失當行爲包括內幕交易、虛假交易、操控價格、披露關於受禁交易的資料、披露虛假或具誤導性的資料以誘使進行交易及操控證券市場。

4. 證監會非正式諮詢

a) 由於披露要求由上市規則層面提升至法定層面，上市公司需要時間去適應，因此贊成證監會就法定披露要求，爲上市公司提供初步爲期 12 個月的非正式諮詢服務。

5. 證監會和聯交所監管及執法

a) 諮詢文件第 3.8 至 3.9 段建議證監會和聯交所的管理和執法安排合適。證監會和聯交所應簽訂諒解備忘錄，清楚分工和避免出現兩個機構都不規管的漏洞。

6. 中信泰富個案

a) 上市公司中信泰富於 2008 年 10 月公布，集團的槓桿式外匯合約預計令集團虧損逾 150 億元，頓時影響公司股價暴跌五成半。不過集團董事其實早於同年 9 月初已知悉槓桿式外匯合約所帶來的虧損風險，而集團於 9 月中公布的一份公開通函中，卻仍表示集團的財務或交易狀況無出現任何重大不利變動。令市場人士無從得悉公司會有巨額虧損，還以爲集團的財務狀況良好。財經分析員亦於報章上推介，投資者遭誤導而作出錯誤投資決定。

b) 有三名投資者於中信泰富復牌後斬倉，損失 3 萬多元。他們不滿董事及公司高層早知有龐大虧損仍發出誤導性的通函內容，亦沒有適時作出公布，令他們作出錯誤的投資決定，蒙受金錢損失。他們曾入稟小額錢債審裁處，申請索償，但因案件須轉介往高等法院，無力應付訟費而被迫撤回申索，可謂有冤無路訴。

c) 小額錢債審裁處審裁官曾於庭上指出，根據證券及期貨條例 281 條，該宗案件屬民事侵權申索，小額錢債審裁處有司法管轄權去審理。

d) 不過審裁官指出，這宗案件涉及市場失當行爲。證券及期貨條例列明若財政司司長認爲發生市場失當行爲，可提出在市場失當行爲審裁處審理。市場失當行爲審裁處是專責審裁處，研訊是否有人違反證券及期貨條例、上市規則、公司法和涉及董事責任的法

則。案件很可能會牽涉複雜的事實和法律爭拗。市場失當行爲審裁處裁斷對當事人有嚴重後果。例如，任何人士被識別爲犯下市場失當行爲，可能會被刑事檢控。由於市場失當行爲案件法律後果嚴重，被告人有權在市場失當行爲審裁處的審訊中有法律代表，但在被告人在小額錢債審裁處無權選擇有律師代表。

e) 由於當時沒有成立市場失當行爲審裁處研訊，小額錢債審裁處便需履行市場失當行爲審裁處的工作。

f) 審裁官又說，審理市場失當行爲案件涉及處理大量文件和人士，小額錢債審裁處未必是合適的法院去審理。小額錢債審裁處在特殊情況下才適合處理市場失當行爲案件。例如，市場失當行爲審裁處已研訊和裁定被告人曾作出市場失當行爲，其後的民事申索可以在小額錢債審裁處審理。因此審裁官決定將案件轉介到高等法院。

7. 總結

a) 由於目前在上市公司披露股價敏感資料的課題上，本港法律制度不能對小投資者提供足夠保障，將有關披露敏感資料規定納入法例的工作需盡快進行，以保障小投資者的權益。

—完—

Date: 2 July 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs

Re: Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

This letter states our views towards the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

We have the following overall comments:

1) We support the introduction of civil remedies, not criminal, for this legislation.

2) Both elements of the *mens rea* (the "guilty mind") and *actus reus* (the "guilty act") must be present if a disclosure obligation is deemed to be breached, hence the strict liability concept must not be applied here. A corporation and its directors that could show they had duly and carefully considered a piece of information and made a non-disclose decision based on prevailing circumstances and information should not be held liable even if the information had eventually caused material effect to share price.

Our response to specific questions listed in the Consultation Paper as follows:

Q.1a 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?

We agree.

Q.1b 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?

We agree a listed corporation should disclose inside information promptly but feel that the SFC should provide more guidance on how long is "practicable" in its view and their definition of "immediate". A corporation needs to verify the information, make necessary internal review, and assess its impact and this may take time.

For a large corporation with a large number of officers, it is difficult for the corporation to ensure all directors or officers would report inside information instantly that has come to their knowledge. It is our view that if a corporation has

established and maintained appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable.

Further, the existing definition of "officer" which includes directors, secretaries and managers is too wide. Under the UK regime, only directors who *knowingly* breach the disclosure requirement would be held liable. We concur with this and recommend Hong Kong follows the UK approach. The definition of "officer" should include only "director" throughout this draft legislation.

The phrase "ought reasonably to have" in s.101B(2) of the "draft legislation" should be taken out. This phrase suggests that it is possible that the information may not have been actually known by the officers and thus it is impossible for the corporation to disclose information on this basis.

Q.1c 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?

We agree.

Q.2a Do you agree to the provision of the four proposed Safe Harbours?

We agree.

Q.2b Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?

We agree.

Q.2c Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?

We recommend an additional safe harbour which provides that if a corporation and its directors have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change -- due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show clear and proper records of board deliberations leading to a reasonable conclusion that the information needed not to be disclosed at the time.

Q.2d Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?

We agree. We also think that other market participants should also be given the opportunity to suggest Safe Harbours to match with market developments.

Question 3

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

We do not object.

Q.3b Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

We agree and would want to add that the proposed range of civil remedies is highly deterrent already.

Q.3c Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

Allowing SFC direct access to the MMT lacks the checks-and-balances under the existing arrangement of having the cases referred to the Financial Secretary first. While we support a more efficient process, some checks-and-balances controls are important. Moreover, under the proposed legislation, the other proceedings that cover the six types of market misconduct would be referred to the MMT directly by the SFC. This is a major change. The Government must consider this with a view to balance the market's need for checks-and-balances and whether the resources of MMT can cope with the possible increase in the number of cases referred to it.

Q.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?

We agree and add that this should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new Safe Harbours that may be prescribed from time to time.

Q.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?

The lines of authorities and responsibilities between the SFC and SEHK must be clearly defined without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by Listing Committee.

We thank you for your attention.

Yours sincerely,
For and on behalf of
Emperor Capital Group Limited
英皇證券集團有限公司

Authorized Signature(s)

For and on behalf of
Emperor Capital Group Limited (Stock code: 717)

Date: 2 July 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs

Re: Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

This letter states our views towards the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

We have the following overall comments:

1) We support the introduction of civil remedies, not criminal, for this legislation.

2) Both elements of the *mens rea* (the "guilty mind") and *actus reus* (the "guilty act") must be present if a disclosure obligation is deemed to be breached, hence the strict liability concept must not be applied here. A corporation and its directors that could show they had duly and carefully considered a piece of information and made a non-disclose decision based on prevailing circumstances and information should not be held liable even if the information had eventually caused material effect to share price.

Our response to specific questions listed in the Consultation Paper as follows:

Q.1a 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?

We agree.

Q.1b 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?

We agree a listed corporation should disclose inside information promptly but feel that the SFC should provide more guidance on how long is "practicable" in its view and their definition of "immediate". A corporation needs to verify the information, make necessary internal review, and assess its impact and this may take time.

For a large corporation with a large number of officers, it is difficult for the corporation to ensure all directors or officers would report inside information instantly that has come to their knowledge. It is our view that if a corporation has

established and maintained appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable.

Further, the existing definition of "officer" which includes directors, secretaries and managers is too wide. Under the UK regime, only directors who *knowingly* breach the disclosure requirement would be held liable. We concur with this and recommend Hong Kong follows the UK approach. The definition of "officer" should include only "director" throughout this draft legislation.

The phrase "ought reasonably to have" in s.101B(2) of the "draft legislation" should be taken out. This phrase suggests that it is possible that the information may not have been actually known by the officers and thus it is impossible for the corporation to disclose information on this basis.

Q.1c 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?

We agree.

Q.2a Do you agree to the provision of the four proposed Safe Harbours?

We agree.

Q.2b Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?

We agree.

Q.2c Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?

We recommend an additional safe harbour which provides that if a corporation and its directors have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change -- due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show clear and proper records of board deliberations leading to a reasonable conclusion that the information needed not to be disclosed at the time.

Q.2d Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?

We agree. We also think that other market participants should also be given the opportunity to suggest Safe Harbours to match with market developments.

Question 3

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

We do not object.

Q.3b Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

We agree and would want to add that the proposed range of civil remedies is highly deterrent already.

Q.3c Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

Allowing SFC direct access to the MMT lacks the checks-and-balances under the existing arrangement of having the cases referred to the Financial Secretary first. While we support a more efficient process, some checks-and-balances controls are important. Moreover, under the proposed legislation, the other proceedings that cover the six types of market misconduct would be referred to the MMT directly by the SFC. This is a major change. The Government must consider this with a view to balance the market's need for checks-and-balances and whether the resources of MMT can cope with the possible increase in the number of cases referred to it.

Q.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?

We agree and add that this should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new Safe Harbours that may be prescribed from time to time.

Q.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?

The lines of authorities and responsibilities between the SFC and SEHK must be clearly defined without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by Listing Committee.

We thank you for your attention.

Yours sincerely,
For and on behalf of
Emperor Entertainment Hotel Limited

Authorized Signature(s)

For and on behalf of
Emperor Entertainment Hotel Limited (Stock code: 296)

Date: 2 July 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs

Re: Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

This letter states our views towards the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

We have the following overall comments:

1) We support the introduction of civil remedies, not criminal, for this legislation.

2) Both elements of the *mens rea* (the "guilty mind") and *actus reus* (the "guilty act") must be present if a disclosure obligation is deemed to be breached, hence the strict liability concept must not be applied here. A corporation and its directors that could show they had duly and carefully considered a piece of information and made a non-disclose decision based on prevailing circumstances and information should not be held liable even if the information had eventually caused material effect to share price.

Our response to specific questions listed in the Consultation Paper as follows:

Q.1a 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?

We agree.

Q.1b 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?

We agree a listed corporation should disclose inside information promptly but feel that the SFC should provide more guidance on how long is "practicable" in its view and their definition of "immediate". A corporation needs to verify the information, make necessary internal review, and assess its impact and this may take time.

For a large corporation with a large number of officers, it is difficult for the corporation to ensure all directors or officers would report inside information instantly that has come to their knowledge. It is our view that if a corporation has

established and maintained appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable.

Further, the existing definition of "officer" which includes directors, secretaries and managers is too wide. Under the UK regime, only directors who *knowingly* breach the disclosure requirement would be held liable. We concur with this and recommend Hong Kong follows the UK approach. The definition of "officer" should include only "director" throughout this draft legislation.

The phrase "ought reasonably to have" in s.101B(2) of the "draft legislation" should be taken out. This phrase suggests that it is possible that the information may not have been actually known by the officers and thus it is impossible for the corporation to disclose information on this basis.

Q.1c 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?

We agree.

Q.2a Do you agree to the provision of the four proposed Safe Harbours?

We agree.

Q.2b Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?

We agree.

Q.2c Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?

We recommend an additional safe harbour which provides that if a corporation and its directors have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change -- due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show clear and proper records of board deliberations leading to a reasonable conclusion that the information needed not to be disclosed at the time.

Q.2d Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?

We agree. We also think that other market participants should also be given the opportunity to suggest Safe Harbours to match with market developments.

Question 3

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

We do not object.

Q.3b Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

We agree and would want to add that the proposed range of civil remedies is highly deterrent already.

Q.3c Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

Allowing SFC direct access to the MMT lacks the checks-and-balances under the existing arrangement of having the cases referred to the Financial Secretary first. While we support a more efficient process, some checks-and-balances controls are important. Moreover, under the proposed legislation, the other proceedings that cover the six types of market misconduct would be referred to the MMT directly by the SFC. This is a major change. The Government must consider this with a view to balance the market's need for checks-and-balances and whether the resources of MMT can cope with the possible increase in the number of cases referred to it.

Q.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?

We agree and add that this should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new Safe Harbours that may be prescribed from time to time.

Q.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?

The lines of authorities and responsibilities between the SFC and SEHK must be clearly defined without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by Listing Committee.

We thank you for your attention.

Yours sincerely,
For and on behalf of
EMPEROR INTERNATIONAL HOLDINGS LIMITED

Authorised Signature(s)

For and on behalf of
Emperor International Holdings Limited (Stock code: 163)

Date: 2 July 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs

Re: Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

This letter states our views towards the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

We have the following overall comments:

1) We support the introduction of civil remedies, not criminal, for this legislation.

2) Both elements of the *mens rea* (the "guilty mind") and *actus reus* (the "guilty act") must be present if a disclosure obligation is deemed to be breached, hence the strict liability concept must not be applied here. A corporation and its directors that could show they had duly and carefully considered a piece of information and made a non-disclose decision based on prevailing circumstances and information should not be held liable even if the information had eventually caused material effect to share price.

Our response to specific questions listed in the Consultation Paper as follows:

Q.1a 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?

We agree.

Q.1b 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?

We agree a listed corporation should disclose inside information promptly but feel that the SFC should provide more guidance on how long is "practicable" in its view and their definition of "immediate". A corporation needs to verify the information, make necessary internal review, and assess its impact and this may take time.

For a large corporation with a large number of officers, it is difficult for the corporation to ensure all directors or officers would report inside information instantly that has come to their knowledge. It is our view that if a corporation has

established and maintained appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable.

Further, the existing definition of "officer" which includes directors, secretaries and managers is too wide. Under the UK regime, only directors who *knowingly* breach the disclosure requirement would be held liable. We concur with this and recommend Hong Kong follows the UK approach. The definition of "officer" should include only "director" throughout this draft legislation.

The phrase "ought reasonably to have" in s.101B(2) of the "draft legislation" should be taken out. This phrase suggests that it is possible that the information may not have been actually known by the officers and thus it is impossible for the corporation to disclose information on this basis.

Q.1c *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?*

We agree.

Q.2a *Do you agree to the provision of the four proposed Safe Harbours?*

We agree.

Q.2b *Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?*

We agree.

Q.2c *Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?*

We recommend an additional safe harbour which provides that if a corporation and its directors have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change -- due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show clear and proper records of board deliberations leading to a reasonable conclusion that the information needed not to be disclosed at the time.

Q.2d *Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?*

We agree. We also think that other market participants should also be given the opportunity to suggest Safe Harbours to match with market developments.

Question 3

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

We do not object.

Q.3b Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

We agree and would want to add that the proposed range of civil remedies is highly deterrent already.

Q.3c Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

Allowing SFC direct access to the MMT lacks the checks-and-balances under the existing arrangement of having the cases referred to the Financial Secretary first. While we support a more efficient process, some checks-and-balances controls are important. Moreover, under the proposed legislation, the other proceedings that cover the six types of market misconduct would be referred to the MMT directly by the SFC. This is a major change. The Government must consider this with a view to balance the market's need for checks-and-balances and whether the resources of MMT can cope with the possible increase in the number of cases referred to it.

Q.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?

We agree and add that this should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new Safe Harbours that may be prescribed from time to time.

Q.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?

The lines of authorities and responsibilities between the SFC and SEHK must be clearly defined without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by Listing Committee.

We thank you for your attention.

Yours sincerely,
For and on behalf of
Emperor Watch & Jewellery Limited
英皇鐘錶珠寶有限公司

.....
Authorised Signature(s)

For and on behalf of
Emperor Watch & Jewellery Limited (Stock code: 887)

Esprit Holdings Ltd.

29 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs,

Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Companies ("Consultation Paper")

The Company would like to respond to the proposals set out in the Consultation Paper. While the Company is generally supportive of the introduction of measures to promote a continuous disclosure environment among the listed issuers, the Company has a number of concerns in relation to the specific proposals as set out in this letter.

Question 1

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 price sensitive information ("PSI")?**

Yes, we agree with the concept of having one definition on PSI since the definition of "relevant information" from the insider dealing regime under the SFO has been used for two decades.

However, we noted that the scope of duty to disclose under SFC's proposed statutory codification and the Listing Rules may be considered as having the same effect, the two sets of provisions are nonetheless worded differently. It would buy some comfort for listed corporations to have an official confirmation from the SFC and the Stock Exchange that their requirements are the same to avoid any uncertainties among listed corporations.

1(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 his duties.**

No.

Previously, under the SFC regulations, listed corporations should ensure that insider should not trade where they are in possession of "relevant information". The act is passive in nature and listed corporations may be more willing to restrict trading promptly disregarding all other factors, for the apparent reason that such passive act would not have any adverse impact on share price.

Where "relevant information" is used to govern a proactive act of disclosure, the timing of the disclosure is a very relevant factor as any decision in disclosure without careful and due consideration on the timing of disclosure may be detrimental to the existing shareholders or detrimental to the interest of the company as a whole, especially on the volatility and trading of share price.

The decision when disclosure would be made is the subject of decision of the board of the directors of the company at present under the Listing Rules.

It is not uncommon that executive directors of the board and the independent directors may have different judgments in the timing of disclosure.

Independent directors may adopt a more conservative and prudent approach in the timing of disclosure to safeguard minority shareholders' interest.

On the other hand, executive directors may likely adopt a more pragmatic approach to delay the timing of disclosure to ensure that the interests of the company and the existing shareholders as a whole are protected.

Instances that this may occur is where a company is in financial difficulties and where there is an opportunity to salvage the company with resources from outside strategic investors or financial institutions or from internal restructuring or that the visibility of the financial position is still unclear pending the successful implementation of certain measures. Premature disclosure will spark off adverse market trading activities which would make any implementation of measures or negotiations difficult, if not impossible.

In our view, rather than requiring disclosure of PSI as soon as practicable, the Board should be given certain authority to determine and satisfied itself by exercising its reasonable judgment on the timing of such disclosure taking into consideration all relevant factors. SFC should set out in more specific terms as to when and how the Board can exercise such authority.

One may argue that these circumstances are likely to be covered by paragraph (b) in the Safe Harbour provisions where the Board can delay or not make disclosures on PSI.

However, paragraph (b) may not be wide enough to cover all situations faced by listed corporations which comes from different industries and faced with different issues from time to time.

Having said that any unpublished PSI should be kept confidential during the interim pending the disclosure by way of a formal announcement. The overriding principle remains that once the PSI can no longer be contained and kept confidential, the Board should ensure that the PSI is disclosed promptly and trading of shares shall be suspended pending any formal announcement to be made.

On the issue where a listed corporation 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.

The timing of possession of information by executive directors and independent directors and the details of information they possess respectively may be different. We propose that if the company can demonstrate that it has set up reasonable safeguards and measures to ensure that the directors receive the PSI and that there has been no intentional, reckless or negligent or omission on the part of any individual directors or officers, this could be a defense for directors not coming into possession of the PSI on the course of the performance of his duties.

1(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?

Yes. It should be made by way of announcement through the Stock Exchange to provide for equal, timely and effective access by the public to the information disclosed.

Question 2

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

Yes. We agree with the concept of the provision of safe harbours as it allows listed issuers to delay disclosure or non-disclosure. However, we believe that the four proposed safe harbours may not be sufficient in covering all situations faced by listed corporations and more safe harbours be provided. For example, corporate restructuring, cost cutting initiatives, sizeable layoff or expansion plans may not fall squarely under Safe Harbour B.

As the safe harbours are very general and are subject to interpretations by the listed corporations, the result is that it would require subjective judgment on the part of the directors whether the safe harbours would applied to situations faced by the listed corporations.

The risk of requiring the directors to make subjective decisions to interpret what would fall under the safe harbours may not be in the best interest of the company or the existing shareholders. The approaches adopted by the executive directors and non-executive directors may be different as their primary goals may not be identical.

For instance, the executive directors may be more results driven and they would try to avoid any premature announcements of any impending plans or initiatives that would cause any market overreactions and affecting the share price performance unnecessarily.

On the other hand, the non-executive directors who may be focusing more on the interest of the minority shareholders and the investing community may favour to overdisclose and not to risk facing liability of delayed or non-disclosures.

The considerations that the directors may need to consider is best to be specifically spelt out notwithstanding the list may not be exhaustive.

Hence, it would be best if more specific guidelines would be made available illustrating the applications of safe harbours in details.

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

Yes.

Clarification is required on whether listed corporations need to simultaneously approach the Stock Exchange as well.

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

Yes.

An additional safe harbour should be created which allows the directors/officers to exercise their own business judgment when deciding the timing of disclosure and whether or not to disclose information. The rationale is that any premature or excessive disclosures may not be in the best interest of the listed issuers or its existing shareholders. Considerations that could be taken out by the board should be set out in detail.

Nonetheless, certain conditions could also be added to this safe harbour so as not to prejudice the listed issuers' legitimate interests: -

(i) such omission would not be likely to mislead the public thereby creating a false market;
(ii) any person receiving the information owes the listed corporation a duty of confidentiality; regardless of whether such duty is based on law, regulations, articles of association or contract; and
(iii) the listed corporations is able to or is reasonably satisfied that there is sufficient system in place to ensure the confidentiality of that information.

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

Yes. We agree that the SFC should empower to prescribe further safe harbours. Any further safe harbours in the form of rules should carry the same weight as the existing safe harbours.

Question 3

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

Yes, since they have much experience in handling insider dealing cases.

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

Clarification is needed as to whether the monetary fine can be levied upon each individual director and the listed issuer as well and whether or not the $8 million is an aggregate sum.

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

No.

We disagree with empowering the SFC to institute proceedings on breaches before the MMT, without first submitting their case to the Financial Secretary. Considering that the proposed changes fundamentally shift the responsibilities regarding PSI disclosure from a passive to proactive manner, there is now a lot of subjectivity/grey area as to what information qualifies as PSI and the timing of disclosure of the PSI. By requiring the SFC to first submit their cases to the Financial Secretary will able to further serve as a guardian of public interest by being able to protect the markets as he sees fit.

Question 4

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?**

Yes.

The SFC should be available for providing informal consultation for at least 12 months after the commencement of the statutory disclosure requirements as the listed issuers may or may be facing any relevant issues in such 12 month period.

It should be further extended for another 12 month period as deemed necessary until the market is generally comfortable in the application of the statutory disclosure requirements.

SFC should also ensure that all submissions are answered in a timely manner.

Question 5

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 the SEHK to further enhance clarity?**

We agree that the SFC should be empowered to conduct investigation where it has reasonable cause to believe that a breach of the disclosure requirement may have taken place. However, such investigation should be kept on a confidential basis and should not be regarded as PSI. This will prevent the market from overreacting on investigation which may cause detriment to the investors.

Any proceeding should be instituted by the Financial Secretary to further serve as a guardian of public interest by being able to protect the markets as he sees fit.

Yours faithfully,

Bella Chhoa
Company Secretary

FEH
遠東控股

23 June, 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs

Re: Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

We are writing to express our views towards the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

We have the following overall comments:

1) We support the introduction of civil remedies but not criminal for codification of this legislation.

2) Both elements of the *mens rea* (the "guilty mind") and *actus reus* (the "guilty act") must be present if a disclosure obligation is deemed to be breached, hence the strict liability concept must not be applied here. A corporation and its directors that could show they had duly and carefully considered a piece of information and made a non-disclosure decision based on prevailing circumstances and information should not be held liable even if the information had eventually caused material fluctuation of share price.

In response to your specific questions listed in the Consultation Paper are discussed as follows:

Q.1a 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?

We accept with the proposal.

Q.1b 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?

We consent a listed corporation should disclose inside information promptly and intact but it is preferable that the SFC should provide more guidance on how long is "practicable" in its view and their definition of "immediate". It is advisable to state clearly the time bar. A corporation needs to verify the information, make necessary internal review, and assess its impact and all this may take plenty of time for composition.

For a large corporation with a large number of officers, it is difficult for the corporation to ensure all directors or officers would report inside information instantly that has come to their knowledge especially when they are traveling overseas on business trip. From our point of views that if a corporation has established and maintained appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable for breaching of non-disclosure.

Further, the existing definition of "officer" which includes directors, company secretaries and managers is too wide. Under the UK regime, only directors who *knowingly* breach the disclosure requirement would be held liable. We concur with this and recommend Hong Kong follows the UK approach. The definition of "officer" should include only "director" throughout this draft legislation.

The phrase "ought reasonably to have" in s.101B(2) of the "draft legislation" should be deleted. This phrase suggests that it is possible that the information may not have been actually known by the officers and thus the corporation has found difficulty in disclosing information on this basis.

Q.1c *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?*

We consent.

Q.2a *Do you agree to the provision of the four proposed Safe Harbours?*

We accept.

Q.2b *Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?*

We agree.

Q.2c *Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?*

We suggest an additional safe harbour which provides that if a corporation and its directors have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change -- due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show clear and proper records of board deliberations leading to a reasonable conclusion that the price-sensitive information needed not to be disclosed at the time.

Q.2d *Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?*

We consent. We also think that other market participants should also be given the opportunity to suggest Safe Harbours in order to match with future market developments.

Question 3

Q 3a *Do you agree to extend the jurisdiction of the MMT to handle breaches of the statutory disclosure requirements?*

We disagree the deferral.

Q.3b *Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?*

We consent and would like to advocate that the proposed range of civil remedies have already been highly deterrent.

Q.3c *Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?*

To let SFC direct access to the MMT lacks the checks-and-balances under the

existing arrangement of having the cases referred to the Financial Secretary first. While we support a more efficient process, some checks-and-balances controls are important. Moreover, under the proposed legislation, the other proceedings that cover the six types of market misconduct would be referred to the MMT directly by the SFC. This is a major change. The Government must consider this with a view to balance the market's need for checks-and-balances and whether the resources of MMT can deal with the possible raise in the number of cases referred to it.

Q.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?*

We consent and propose that this should be provided on a continual basis rather than just in the first 12 months so as to deal with changing market developments and new Safe Harbours that may be prescribed occasionally.

Q.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?*

The lines of authorities and responsibilities between the SFC and SEHK must be clearly defined and segregated without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by Listing Committee.

We would be much appreciated if you could seriously consider our suggestions.

Yours faithfully
For and on behalf of
Far East Holdings International Limited

Duncan Chiu
Managing Director

福方集團有限公司
HKSE Code: 885

FOREFRONT GROUP LIMITED
(incorporated in Cayman Islands with limited liability)

28 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F., Tower I
Admiralty Centre
18, Harcourt Road
Hong Kong

To Whom It May Concern:

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

Forefront Group Ltd (stock code 885) would like to express its opinion and object to the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations(the "Codification").

Our opinion and objections, to the proposal and the Codification are as follows:-

- The current regime under the Hong Kong Stock Exchange is already sufficient enough to properly maintain the transparency of the listed companies and an orderly market, especially in relation to price sensitive information
- The Codification will inevitably increase the volume of public announcements by listed companies, some of which may be premature, frivolous and may be used by others to manipulate share prices.
- It will increase the burden of medium and smaller listed companies as resources will be allocated to ensure compliance with the Codification. An unnecessary increase in costs for seeking professional and legal advice are foreseeable.
- Increase in directors' time to be spent on compliance rather than focused on business and operational development to maximize shareholders value will occur.
- Due to the implementation of the Codification, highly skilled and talented

香港北角馬寶道 28 號華領中心 11 樓 1103 室
Room 1103 11/F China United Centre
28 Marble Road North Point Hong Kong
電話 Tel: (852)34228787
傳真 Fax: (852) 25625512

福方集團有限公司
HKSE Code: 885

FOREFRONT GROUP LIMITED

(incorporated in Cayman Islands with limited liability)

people may choose not to be directors of listed companies, a loss to the financial industry in Hong Kong. Furthermore, the cost of insurance for directors liabilities will inevitably increase as well.

Yours Sincerely,

For and on behalf of
Forefront Group Ltd

Yeung Ming Kwong
Acting Chairman

香港北角馬寶道 28 號華匯中心 11 樓 1103 室
Room 1103 11/F China United Centre
28 Marble Road North Point Hong Kong
電話 Tel: (852)34228787
傳真 Fax: (852) 25625512

福田實業(集團)有限公司
Fountain Set (Holdings) Limited

香港新界葵涌葵昌路29-39號
東海工業大廈6字樓A座
Block A, 6/F, Eastern Sea Industrial Building
29-39 Kwai Cheong Road, Kwai Chung, NT
Hong Kong

電話 Tel +852 2485 1881
傳真 Fax +852 2418 1139
網址 Website www.fshl.com

22 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs

Re: Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

This letter states our views towards the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

We have the following overall comments:

1) We support the introduction of civil remedies, not criminal, for this legislation.

2) Both elements of the *mens rea* (the "guilty mind") and *actus reus* (the "guilty act") must be present if a disclosure obligation is deemed to be breached, hence the strict liability concept must not be applied here. A corporation and its directors that could show they had duly and carefully considered a piece of information and made a non-disclose decision based on prevailing circumstances and information should not be held liable even if the information had eventually caused material effect to share price.

Our response to specific questions listed in the Consultation Paper as follows:

Q.1a 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?

We agree.

Q.1b 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?

We agree a listed corporation should disclose inside information promptly but feel that the SFC should provide more guidance on how long is "practicable" in its view and their definition of "immediate". A corporation needs to verify the information, make necessary internal review, and assess its impact and this may take time.

For a large corporation with a large number of officers, it is difficult for the corporation to ensure all directors or officers would report inside information instantly that has come to their knowledge. It is our view that if a corporation has

福田實業(集團)有限公司
Fountain Set (Holdings) Limited

香港新界葵涌葵昌路29-39號
東海工業大廈6字樓A座
Block A, 6/F, Eastern Sea Industrial Building
29-39 Kwai Cheong Road, Kwai Chung, NT
Hong Kong

電話 Tel +852 2485 1881
傳真 Fax +852 2418 1139
網址 Website www.fshl.com

established and maintained appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable.

Further, the existing definition of "officer" which includes directors, secretaries and managers is too wide. Under the UK regime, only directors who *knowingly* breach the disclosure requirement would be held liable. We concur with this and recommend Hong Kong follows the UK approach. The definition of "officer" should include only "director" throughout this draft legislation.

The phrase "ought reasonably to have" in s.101B(2) of the "draft legislation" should be taken out. This phrase suggests that it is possible that the information may not have been actually known by the officers and thus it is impossible for the corporation to disclose information on this basis.

Q.1c 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?

We agree.

Q.2a Do you agree to the provision of the four proposed Safe Harbours?

We agree.

Q.2b Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?

We agree.

Q.2c Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?

We recommend an additional safe harbour which provides that if a corporation and its directors have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change -- due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show clear and proper records of board deliberations leading to a reasonable conclusion that the information needed not to be disclosed at the time.

Q.2d Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?

We agree. We also think that other market participants should also be given the opportunity to suggest Safe Harbours to match with market developments.

福田實業(集團)有限公司
Fountain Set (Holdings) Limited

香港新界葵涌葵昌路29-39號
東海工業大廈6字樓A座
Block A, 6/F, Eastern Sea Industrial Building
29-39 Kwai Cheong Road, Kwai Chung, NT
Hong Kong

電話 Tel +852 2485 1881
傳真 Fax +852 2418 1139
網址 Website www.fshl.com

Q.3a Do you agree to extend the jurisdiction of the MMT to handle breaches of the statutory disclosure requirements?

We do not object.

Q.3b Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

We agree and would want to add that the proposed range of civil remedies is highly deterrent already.

Q.3c Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

Allowing SFC direct access to the MMT lacks the checks-and-balances under the existing arrangement of having the cases referred to the Financial Secretary first. While we support a more efficient process, some checks-and-balances controls are important. Moreover, under the proposed legislation, the other proceedings that cover the six types of market misconduct would be referred to the MMT directly by the SFC. This is a major change. The Government must consider this with a view to balance the market's need for checks-and-balances and whether the resources of MMT can cope with the possible increase in the number of cases referred to it.

Q.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?

We agree and add that this should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new Safe Harbours that may be prescribed from time to time.

Q.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?

The lines of authorities and responsibilities between the SFC and SEHK must be clearly defined without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by Listing Committee.

We thank you for your attention.

Yours faithfully
For and on behalf of
Fountain Set (Holdings) Limited (stock code: 420)

Executive Director

Golden Resorts
黃金集團

Golden Resorts Group Limited
Suite 2809, 28/F, One IFC, 1 Harbour View Street, Central, Hong Kong
Tel: (852) 3607 1031 Fax: (852) 2295 1031

Date: 28 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs

Re: Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

This letter states our views towards the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

We have the following overall comments:

1) We support the introduction of civil remedies, not criminal, for this legislation.

2) Both elements of the *mens rea* (the "guilty mind") and *actus reus* (the "guilty act") must be present if a disclosure obligation is deemed to be breached, hence the strict liability concept must not be applied here. A corporation and its directors that could show they had duly and carefully considered a piece of information and made a non-disclose decision based on prevailing circumstances and information should not be held liable even if the information had eventually caused material effect to share price.

Our response to specific questions listed in the Consultation Paper as follows:

Q.1a 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?

We agree.

Q.1b 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?

We agree a listed corporation should disclose inside information promptly but feel that the SFC should provide more guidance on how long is "practicable" in its view and their definition of "immediate". A corporation needs to verify the information, make necessary internal review, and assess its impact and this may take time.

For a large corporation with a large number of officers, it is difficult for the corporation to ensure all directors or officers would report inside information instantly that has come to their knowledge. It is our view that if a corporation has established and maintained appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable.

Further, the existing definition of "officer" which includes directors, secretaries and managers is too wide. Under the UK regime, only directors who *knowingly* breach the disclosure requirement would be held liable. We concur with this and recommend Hong Kong follows the UK approach. The definition of "officer" should include only "director" throughout this draft legislation.

The phrase "ought reasonably to have" in s.101B(2) of the "draft legislation" should be taken out. This phrase suggests that it is possible that the information may not have been actually known by the officers and thus it is impossible for the corporation to disclose information on this basis.

Q.1c *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?*

We agree.

Q.2a *Do you agree to the provision of the four proposed Safe Harbours?*

We agree.

Q.2b *Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?*

We agree.

Q.2c *Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?*

We recommend an additional safe harbour which provides that if a corporation and its directors have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change -- due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show clear and proper records of board deliberations leading to a reasonable conclusion that the information needed not to be disclosed at the time.

Q.2d Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?

We agree. We also think that other market participants should also be given the opportunity to suggest Safe Harbours to match with market developments.

Question 3

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

We do not object.

Q.3b Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

We agree and would want to add that the proposed range of civil remedies is highly deterrent already.

Q.3c Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

Allowing SFC direct access to the MMT lacks the checks-and-balances under the existing arrangement of having the cases referred to the Financial Secretary first. While we support a more efficient process, some checks-and-balances controls are important. Moreover, under the proposed legislation, the other proceedings that cover the six types of market misconduct would be referred to the MMT directly by the SFC. This is a major change. The Government must consider this with a view to balance the market's need for checks-and-balances and whether the resources of MMT can cope with the possible increase in the number of cases referred to it.

Q.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?

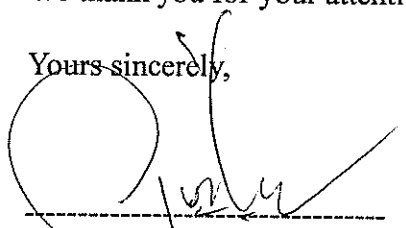
We agree and add that this should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new Safe Harbours that may be prescribed from time to time.

Q.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?*

The lines of authorities and responsibilities between the SFC and SEHK must be clearly defined without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by Listing Committee.

We thank you for your attention.

Yours sincerely,



For and on behalf of
Golden Resorts Group Limited (Stock code: 1031)

Great Eagle
Holdings Limited
鷹君集團有限公司
(Incorporated in Bermuda with limited liability)

33rd Floor · Great Eagle Centre
23 Harbour Road · Wanchai · Hong Kong
香港灣仔港灣道23號鷹君中心33樓
電話 Tel · (852) 2827 3668 傳真 Fax · (852) 2827 5799

Our Ref: GE/CS/10

24 June 2010

BY FAX (2529 2075) AND BY POST

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18th Floor, Tower I
Admiralty Centre
18, Harcourt Road
Hong Kong

Dear Sirs,

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

We refer to the Consultation Paper ("Consultation Paper") on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information ("PSI") by Listed Corporations published by the Financial Services and the Treasury Bureau (the "Bureau") on 29 March 2010.

We welcome the introduction of civil remedies (as opposed to criminal sanctions) for the proposed legislation although in general we consider a new offence of non-disclosure unnecessary as there are sufficient laws and regulations currently in place in this respect, including the Securities and Futures Ordinance ("SFO"), Companies Ordinance and the Listing Rules.

We would like to share our views and comments on some of the issues raised in the Consultation Paper as follows:

1. **A breach of the statutory obligations should not be determined by the market reaction to a particular piece of information**

   We note that the existing definition of "relevant information" borrowing from SFO is no clear cut matter itself. However, we agree that the adoption of the same to define PSI could avoid introducing a new definition which may be even more problematic.

   What constitutes PSI and when to disclose it often involves fine judgment calls on which reasonable views may differ. It is not just and equitable to hold the corporation and its officers liable simply because the magnitude of the event assessed by the market is different from directors' assessment which is formed in good faith with reasonable care. The standard of care of the corporation and the Board of Directors is the crux to determine whether they are in breach of their statutory obligations, not the

market reaction to a particular piece of information. A company and its directors should not be liable if (i) the company has effective and appropriate monitoring systems and internal procedures to ensure that any material information which comes to the knowledge of its officers is promptly identified and assessed; and (ii) the Board has promptly and carefully reviewed the circumstances and has reached a considered and reasonable decision in good faith that disclosure is not required, regardless of any subsequent material price movement which might arguably be caused by the information.

2. **Safe Harbour provisions should be widened otherwise they would become factually meaningless**

It should be noted that all safe harbours would only be applicable if there are reasonable precautions for preserving the confidentiality of the inside information, and that the inside information has not been leaked. If Safe Harbour provisions are too restrictive, they would become factually meaningless.

In general, we consider the four proposed safe harbours to be too restrictive. In particular, Safe Harbour B allows non-disclosure of information only if it is relating to impending negotiations or incomplete proposals the outcome of which may be prejudiced if the information is disclosed prematurely. No consideration has been given to non-deal circumstances.

In fact, we note that according to the Disclosure Rules and Transparency Rules in UK, a similar safe harbour provides that an issuer may delay the public disclosure of inside information such as to not prejudice its "legitimate interests" provided that confidentiality can be kept and non-disclosure would not likely mislead the public. Under the UK regime, situations similar to Safe Harbour B are cited as only one of the non-exhaustive examples of "legitimate interests". In other words, the proposed Safe Harbour B is more restrictive than its UK equivalent. We recommend an adaptation of the UK approach to safe harbour.

In addition, Safe Harbour D should be widened to include the provision of liquidity support by government and regulatory authorities / bodies.

3. **The Corporation shall not be held liable for compliance failure on the part of its Officers**

The corporation is subject to strict liability under the proposed legislation. However, we take the view that if a corporation has put in place proper and effective systems and control procedures requiring its officers or employees of all levels to report inside information, the corporation shall have a good defence and shall not be liable for employees who have failed to report according to the said systems and control procedures.

Furthermore, under the proposed legislation, the corporation is deemed to have knowledge of inside information if its officer has or "ought reasonably to have" come into possession of the information in the course of performing functions as an officer of the corporation. To regard a corporation as having knowledge of information that may or may not have actually been known to its officers or employees of any level is erroneous. We suggest that the phrase "ought reasonably to have" be taken out from the proposed legislation.

4. The definition of "officer" is too wide

As stated in the Consultation Paper, an officer means a director, manager or secretary of, or any other person involved in the management of, the corporation. We consider it is not appropriate for individual employees such as managers to be held liable for the company's breach. We suggest that the definition of "officer" shall be narrowed down to include only the directors and the senior management of the corporation. "Senior management" should refer to the same category of persons as referred to in the corporation's annual report.

5. Informal consultation of 12 months is too short

If the SFC is to be the enforcement entity going forward, we suggest the SFC shall provide informal consultation without any limitation of time, similar to the Stock Exchange's practice of encouraging listed issuers to seek early consultation. In any event, the informal consultation period should not be shorter than 24 months.

To increase transparency of how the SFC interprets and enforces the new PSI requirements, the SFC should, in addition to the Guidelines, issue FAQ from time to time to keep the market informed.

6. The ability to rely on the MMT findings to take civil actions to seek compensation shall be subject to consultation at a later stage

We have no objection to the extension of the jurisdiction of the MMT to handle breaches of the statutory disclosure requirements and the proposed range of civil remedies as set out in paragraphs 2.31 and 2.36 of the Consultation Papers. However, we have reservation on the proposal to allow persons suffering pecuniary loss to take civil actions to seek compensation from those who have breached the disclosure requirements based on MMT findings as mentioned in paragraph 2.35 of the Consultation Paper since this proposal may have significant financial implication to those who have breached the disclosure requirement. As the disclosure requirement of PSI is new to the market, we consider it more appropriate to postpone this proposal to a later stage when the new legislation is running smoothly and when the market is more familiar with the new law.

7. **The proposal to empower the SFC to institute proceedings before the MMT has failed to address the market's need for checks-and-balances**

   Although the proposal to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements as well as the other six types of market misconduct can offer the benefit of streamlining the process, it has failed to address the market's need for checks-and-balances.

   The existing system of having the cases referred to the Financial Secretary first can avoid the undesirable situation of having both powers of investigation and instituting proceedings vested with the same organization. We are, however, supportive of an efficient process, but with some checks-and-balances control put in place.

   In addition, we agree that the SFC should be empowered to prescribe additional safe harbours that would further balance the need of disclosure and commercial confidentiality of listed corporations. Likewise, other market participants should also be given the opportunity to make suggestions for additional safe harbours. These additional safe harbours need to be introduced fairly expeditiously without lengthy legislative process to avoid causing prolonged unintended or inappropriate disclosure requirements which may be discerned as the new legislation evolves.

8. **The relationship between the PSI requirements under the SFO and other disclosure requirements should be clearly defined**

   In addition, it is important to explain and define the relationship between the PSI requirements under the SFO and other disclosure requirements. A breach of chapters 14 and/or 14A of the Listing Rules shall in no event mean and imply a breach of the PSI disclosure requirement under the SFO. Otherwise, those chapters of the Listing Rules would have indirect statutory backing as if they were also codified under the proposed PSI regime.

We hope that the above comments have been of assistance to the Bureau in its efforts to refine the SFO disclosure requirements relating to Listed Corporations. In the meanwhile, our submission on the consultation paper on the Draft Guidelines on Disclosure of Inside Information is enclosed herewith for your reference. If you require any clarifications on our comments, please do not hesitate to contact us. Thank you for your kind attention.

Yours faithfully,
For and on behalf of
GREAT EAGLE HOLDINGS LIMITED

Dr. K.S. Lo
Chairman and Managing Director

國浩集團
GuocoGroup
A Member of the Hong Leong Group

Our Ref: GGL/sl/zp/L110

28 June 2010

By Email

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs,

Re: Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

This letter states our views towards the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

Our responses to specific questions listed in the Consultation Paper are as follows:

Q.1a 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?

Agree in principle. However, if the same definition under the insider dealing regime is used, it is necessary to clarify whether future interpretation of "relevant information" under the insider dealing regime by the Market Misconduct Tribunal ("MMT") will apply to "inside information" under the PSI regime. It is possible that interpretation drawn from case law on insider dealing which behaviour is different from PSI disclosure in terms of severity as well as frequency would impose unduly onerous obligation on the listed issuers and their directors.

Q.1b 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?

Agree in principle, subject to the following:

Timing

Agree that a listed corporation should disclose inside information as soon as practicable, but consider that the SFC should provide more guidance on how long is "practicable" in its view and their definition of "immediate" as it takes time for the listed corporation to verify the information, make necessary internal review and assess its impact.

Our Ref: GGL/sl/zp/L110
Date: 28 June 2010

Listed companies may face practical difficulties in determining at what point of time inside information should be disclosed in order to comply with the legislative requirement on one hand and avoid pre-empting events or prejudicing the course and outcome of the relevant negotiations / proposals on the other. Also, there may be uncertainty regarding the timing of disclosure of significant changes in the profitability of the listed companies arising from fair value accounting.

Besides, owing to the adoption of fair value accounting, listed issuers with core business in securities investment may anticipate significant daily fluctuations in mark-to-market gains/losses when the market is volatile. The PSI proposal will impose onerous reporting burden on such listed issuers for reporting significant daily changes in its profitability as the case may be.

Therefore, it is important that there are clear guidelines on the timing of disclosure, in addition to adequate and effective "safe harbour" provisions to cater for legitimate circumstances where disclosure of inside information may be delayed or withheld. In this regard, the existing draft Guidelines do not seem to go far enough in dealing with the concerns about timing.

Directors' & Officers

There is no clear definition of the term "officer". Further, the existing definition of "officer" which includes directors, secretaries and managers is too wide. Officers other than directors would not generally be delegated the responsibility of determining whether or not information is discloseable. It is suggested that only directors who *knowingly* breach the disclosure requirement would be held liable. We recommend Hong Kong to follow the UK approach and hence the definition of "officer" should include only "director" throughout this draft legislation.

For a large corporation with a large number of officers, it is difficult for the corporation to ensure all directors or officers would report inside information instantly that has come to their knowledge. It is our view that if a corporation has established and maintains appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable.

Liabilities

The phrase "ought reasonably to have" in s.101B(2) of the draft legislation should be taken out. This phrase suggests that it is possible that the information may not have been actually known by the officers and thus it is impossible for the corporation to disclose information on this basis.

Our Ref: GGL/sl/zp/L110
Date: 28 June 2010

In addition, the legislation must allow for the exercise of reasonable business judgment, given the difficulties of making disclosure decisions, and the severity of the remedies proposed. The legislation should therefore adopt the "business judgment rule" and provide (in the form of an additional safe harbour or otherwise) that there should be no liability for non-disclosure (on the part of the company or any individual officer) where the non-disclosure decision is made in good faith and each officer making the decision: (1) is not interested in the subject of his judgment; (2) is informed with respect to the subject of the judgment to the extent the officer reasonably believes to be appropriate under the circumstances; (3) rationally believes that there is no obligation to disclose the information.

Q.1c 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?

We agree.

Q.2a Do you agree to the provision of the four proposed Safe Harbours?

We agree in principle, subject to the following:

Safe Harbour B is different from the current Stock Exchange rules which clearly spell out that no disclosure is needed until a "decision" is made. In respect of the Canadian requirements, it clearly distinguishes "insider trading" requirement against "disclosure" requirement under the statute. Under the statute, no disclosure needs to be made until it is the subject of a "decision". Kindly note that in practice, the U.K. has directives to the effect that "incomplete negotiations short of a decision" is not caught. The emphasis is on the decision part so long as confidentiality is preserved. We think it is a sensible course. We also consider it is worth seeking the Government's clarification on the above.

Also suggest additional safe harbours in our response to question 2 (c) below.

Q.2b Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?

We agree.

Q.2c Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?

Safe Harbour A provides that the disclosure requirements do not apply when the disclosure is prohibited under the law or a court order. The listed issuers should not be required to obtain a separate waiver from the SFC for a foreign law in order to avail themselves to this safe habour. We see no reason why foreign law (or foreign court) prohibitions on disclosure should not be within Safe Harbour A. It is the directors' responsibility to ensure that the foreign law is of similar intent of Safe Harbour A, including but not limited to obtaining a legal opinion issued by a law firm practising in the relevant jurisdiction to the effect. Otherwise, it would be time consuming and would increase the administrative burden of both the listed issuers and the SFC. There is a similar safe harbour in other countries, e.g. under the Singapore listing requirements but no separate wavier is required for foreign law.

Our Ref: GGL/sl/zp/L110
Date: 28 June 2010

The Singapore listing rules also include two exceptions to the disclosure requirement: (i) the information comprises matters of supposition or is insufficiently definite to warrant disclosure; (ii) the information is generated for the internal management purposes of the entity. The above should be included in the safe habours.

The proposed PSI disclosure regime adds an objective test element. However, it is important to strike a reasonable balance between ensuring market transparency and safeguarding the legitimate interests of listed corporations in preserving their business interests. In this case, the safe harbours should include exemption that: 1) a reasonable person would not expect information to be disclosed if such disclosure would prejudice the ability of the listed corporation to pursue its corporate objective; and 2) a reasonable person would not expect the disclosure of an inordinate amount of details.

We recommend additional safe harbours as below:

- if a listed corporation and its directors had duly and carefully considered a piece of inside information and came to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information was found to be causing material price change -- due to unexpected market reaction or change in market circumstances that was unforeseeable at the time the non-disclosure decision was made, the listed corporation and its directors would not be held liable as long as it could show clear and proper records of board deliberations leading to a reasonable conclusion that the information needed not to be disclosed at the time; and

- financial results are price sensitive information and any substantial profits or losses need to be quantified and reported within a proper financial reporting framework before coming up with a comprehensive and true and fair view. Therefore, a safe harbour should be provided to exempt financial information that is subject to routine reporting under the Listing Rules.

Q.2d Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?

We agree but suggest the SFC to provide detailed guidelines and practical cases for illustrations. We also think that other market participants should also be given the opportunity to suggest safe harbours to match with market developments.

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

We do not object.

Our Ref: GGL/sl/zp/L110
Date: 28 June 2010

Q.3b Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

No objection provided comments under Questions (1)(b), (2)(a) and 2(c) are taken into account.

Q.3c Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

No. The separation of the investigation and prosecution functions seems essential to the rule of law. Allowing SFC direct access to the MMT lacks the checks-and-balances under the existing arrangement of having the cases referred to the Financial Secretary first. Moreover, under the proposed legislation, the other proceedings that cover the six types of market misconduct would be referred to the MMT directly by the SFC. This is a major change. The Government must also consider whether the resources of MMT can cope with the possible increase in the number of cases referred to it.

Q.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?

We agree. However, this should not be just for the initial 12 months period but should be on a continuing basis. The draft Guidelines are somewhat generic and seem to impose more onerous obligations on the listed issuers and its officers. We would suggest the SFC to meet with listed issuer representatives and other market participants in order to listen to their concerns and, where possible, try to address them through more specific examples in the final guidelines.

The informal consultation should allow enquires be submitted on a "no name basis". Information collected during the consultation should not be used by the SFC to initiate any actions again the listed issuers and the officers.

Guidelines

It is important that listed issuers should have a clear understanding of their obligations under the law and for this purpose, reasonably detailed guidelines on what constitutes PSI under the statutory disclosure requirements should be developed. The Guidelines do not seem to provide help to listed issuers but impose more onerous obligations instead, for examples:

1) Paragraph 26 of the draft Guidelines makes the point that it is necessary to distinguish between information about the "day-to-day activities" of a corporation, on the one hand, and "significant events and matters which are likely to change a corporation's course or indicate that there has been a change in its course". However, this brings about the question of what is regarded as "day-to-day". There are many transactions that may fall short of being able to change a corporation's course, but it is not entirely clear whether they would be regarded as day-to-day activities.

Our Ref: GGL/sl/zp/L110
Date: 28 June 2010

2) A company may engage in securities investment on a regular basis and, due to fluctuations in volatile market conditions, which are common knowledge, the value of the relevant investments may vary significantly and potentially affect the profit or loss of the company. Should disclosures be made with each significant fluctuation? A company may anticipate mark-to-market losses, but subsequent general business pick-ups may result in the overall losses being not significant. Do circumstances like these give rise to a disclosure obligation and, if so, at what point in time. The issue of timing is also covered in our response to question 1(b).

3) Paragraph 27 says "knowledge of substantial losses or profits made by a corporation even though 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 ..." Read in conjunction with first bullet point of paragraph 29, it will effectively impose a new requirement to issue profit announcements ahead of, or during the process of preparation of, the regular periodic financial reports. Our concern is such piece-meal and premature release of unquantified substantial changes in profits or losses will not only give rise to undue burden to report in advance "exceptional items" (which appear regularly in different shapes or forms year on year), but, more importantly, creating unnecessary confusion, speculation and hence volatility in the market. Financial results are always price sensitive and that is why the Listing Rules have set the frequency and content of financial reporting. Any substantial profits or losses have to be quantified and reported within a proper financial reporting framework under HKFRS/IFRS and the Listing Rules in order to show a comprehensive and true and fair view. We would therefore suggest an elaboration on the "day-to-day activities" and provide a safe harbour to exempt financial information that is subject to routine reporting under the Listing Rules.

4) Paragraph 27 also requires an assessment of market prediction. It is not always possible for the directors to ascertain what the market is predicting, especially for stocks that are not covered by any analysts.

5) In addition, under paragraph 68, a company is not only required to correct factual errors but also to "correct a fundamental misconception in the (analysts) report". Potentially this could mean the company having to respond to any reports made by analysts in the market. For example, if an analyst uses projected cash flows and / or discount rate that differ significantly from those used by the company for asset valuation / impairment, the company is required to come out and clarify. Moreover, such (analysts) reports may or may not be immediately known to the company. In such case, it is not fair to hold the company liable for any late action to correct a fundamental misconception in the analysts report. Companies should not be forced to make a hasty response to analyst reports that may be based on wild guess.

國浩集團
GuocoGroup
A Member of the Hong Leong Group

Our Ref: GGL/sl/zp/L110
Date: 28 June 2010

Q.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?

The lines of authorities and responsibilities between the SFC and SEHK must be clearly defined without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by Listing Committee.

Overall speaking,

1) we support in general the introduction of civil remedies, not criminal, for this legislation; and

2) we understood the proposed legislation is similar to the UK and EU jurisdictions whereas the relevant requirements in Canada distinguish "insider trading" requirement against "disclosure" requirement under the statute. The consultation paper lacks information on whether these laws in the UK and EU are effective and whether the listed issuers / markets encounter any practical difficulties in the compliance and implementation of such requirements to assist our analysis. Government should provide more information in this respect.

We thank you for your attention.

Yours faithfully,
For and on behalf of
Guoco Group Limited (Stock Code: 53)

Ding Wai Chuen
Executive Director

HAITONG

海通(香港)金融控股有限公司
HAI TONG (HK) FINANCIAL HOLDINGS LTD.
香港中環德輔道中189號李寶椿大廈22樓
22/F., Li Po Chun Chambers, 189 Des Voeux Road Central, Hong Kong
電話(Tel) (852)3926 6888 傳真(Fax) (852)3926 8923 網址(Web Site) www.htsec.com.hk

关于对“股价敏感资料披露立法”的反馈意见

香港中国企业协会：

根据贵会《关于征求对“股价敏感资料披露立法”意见和建议的通知》，现对香港政府财经事务及库务局就“上市法团披露股价敏感资料的若干规定纳入法例”有关咨询文件中法律条文参考草拟本反馈意见如下：

一、关于第 101E 豁免

本条规定“证监会如信纳披露任何内幕消息是被香港以外某地方的法例所禁止，或被在香港以外某地方行使司法管辖权的法庭作出的命令所禁止，或构成违反香港以外某地方的法例所施加的限制，或构成违反在香港以外某地方行使司法管辖权的法庭作出的命令所施加的限制，则可应上市法团的申请给予豁免，使其无需根据第 101B 条的规定披露该信息。根据本条规定，只有在香港以外地方的法例或法庭有禁止或限制时，证监会才可应上市法团的申请给予豁免。

由于香港以外各地的法律体系及架构不同，各国的法例及法庭命令所起的作用亦不相同，如内地法院的判决/命令仅对相关案件的处理产生法律效力，并不当然地成为人们遵循的法律依据，这与归属普

通法系的香港法律体系不同，所以，内地除有权机关制定的法律（即本条提及的“法例”）对社会具有普遍约束力外，行政机关制定的规章对相关行为甚至具有更明确的指导作用，由于相关法律的规定较为原则和概括，可能出现法律无禁止或限制但相关规章作出限制或禁止的情况，若仅赋予证监会凭借法例的禁止或限制审批豁免申请的权力，则可能出现应该豁免而证监会无权同意豁免的情况，建议对本条中的法例做进一步扩大解释，使其不仅包括立法机关制定的法律，还包括行政机关或其它机构制定的规章，以便证监会在审批豁免申请时作出更全面的评估。

二、关于第 101B.上市法团披露内幕消息的规定

本条第（2）款规定“如上市法团的高级人员在以该法团的高级人员身份执行职能时，知道或理应知道某内幕消息，则就第（1）款而言，该法团即属已知悉该消息”。

内地企业作为香港上市法团的股东通常推荐其内部具有一定职务的员工担任该上市法团董事，部分被推荐董事的主要工作仍在内地，该部分董事工作角色具有双重性（即兼任上市法团董事的同时在股东单位承担对上市法团的管理等相关工作），其以双重身份了解的股东对上市法团的相关信息在特定时期须对上市法团其他高级人员保密，此时认为该董事知道某内幕消息则该法团即属已知悉该消息显然欠

妥。建议将本款调整为“如上市法团的高级人员在以该法团的高级人员身份执行该法团授予的职能时，知道或理应知道某内幕消息，则就第（1）款而言，该法团即属已知悉该消息”。

特此意见

海通（香港）金融控股有限公司

二〇一〇年六月十五日

恒基兆業發展有限公司
HENDERSON INVESTMENT LIMITED

28 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I
Admiralty Centre
18, Harcourt Road
Hong Kong

Dear Sirs,

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

Reference is made to the captioned consultation paper issued by the Financial Services and the Treasury Bureau in March 2010.

We would like to submit for your kind consideration our comments as more particularly described in the schedule attached hereto. The said schedule adopts the same numberings of your list of questions for consultation. Unless otherwise defined, terms used in the said schedule have the same meanings of those contained in the captioned consultation paper.

Yours faithfully,
For and on behalf of
HENDERSON INVESTMENT LIMITED

Timon LIU Cheung Yuen
Company Secretary

Encl.

香港中環金融街八號國際金融中心二期七十一至七十六樓
71-76/F, Two International Finance Centre, 8 Finance Street, Central, Hong Kong
電話 Tel: (852) 2908 8888 • 傳真 Fax: (852) 2908 8838 • 網址 Website: www.hld.com

SCHEDULE

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?	We agree adopting the existing definition of "relevant information" under the SFO to define PSI. This avoids introducing a new definition. However, such definition has the following drawbacks: a) The material effect of "relevant information" on the price of the listed securities under the insider dealing regime may be easily assessed by the litigants and MMT because such price fluctuation has already taken place resulting from the "relevant information" while decisions on disclosure of price sensitive information involve difficult and subjective judgements and directors and officers of a listed corporation may have difficulties to assess the effect of "relevant information" on the price of the listed securities which has not occurred before such disclosure of the "relevant information".

	b) In addition, the draft Guidelines on Disclosure of Inside Information do not address the degree of likelihood which would be required and just refer to determining how the "general investor" would behave if in possession of the "relevant information". It would be helpful if such Guidelines give more elaboration on the degree of such likelihood in terms of effect on the price of the listed securities. c) SFC's Guidelines on Disclosure of Inside Information under SFO and SEHK's Guide on Disclosure of Price-sensitive Information under the Listing Rules may, in certain extent, be inconsistent with the interpretation of such price-sensitive information. Under the proposed codification, the three key elements in the concept of "inside information" are: "specific", "not generally known" and "likely to have material effect on the price of the corporation's securities" whilst the definition of "price-sensitive information" under the Listing Rules and the relevant guide comprises "necessary to enable the public to appraise the position of the group", "necessary to avoid the establishment of a false market in its securities" and "**reasonably** expected materially to affect market activity in and the price of its securities". In the course of determining whether a piece of information will trigger a disclosure obligation, the criteria of "inside

	information" involves a subjective view whereas that of "price-sensitive information" includes an objective view of a reasonable man. In addition, the different reliefs/exceptions available under the respective concepts of "inside information" and "price-sensitive information" may also cause uncertainty as to whether disclosure should be made. For example, a proposed fundraising exercise may fall within the meaning of both an "inside information" and a "price-sensitive information". In SEHK's letter dated 31 October 2008 in relation to disclosure obligations of listed issuers, a conditional relief from immediate disclosure in the course of development of fundraising is provided. However, there is no corresponding specific exception for disclosure of such "inside information". Safe Harbours A, C and D are not applicable and the corporation may not necessarily be able to rely on Safe Harbour B because it may not be possible to ascertain whether the outcome of the proposed fundraising may be prejudiced if the information is disclosed prematurely.
(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	In relation to a listed corporation's obligations to disclose to the public "as soon as practicable", we are concerned about how long is practicable to the SFC. The SFC guidelines further state that "the corporation should *immediately* take all necessary steps that are reasonable in the circumstances to disclose the

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?	information to the public" (paragraph 32). What is "immediate" is also problematic. The SFC's stance on what is "immediate" and how long is "practicable" is crucial. More guidance and clarification need to be provided. We also have reservations on the second part of this question: - a) The definition of "officer" which includes directors, secretaries and managers is too wide. A large corporation may hire many managers and many such managers may not actually have any role in the management of the corporation. Further, under the UK regime for PSI disclosure, only the directors, and not even the company secretaries, who *knowingly* breach the disclosure requirement would be held liable. We concur with this since it is the directors who would make decisions for the corporation. We therefore suggest following the UK approach of requiring only directors to be subjected to the proposed legislation. References to "officers" should either be deleted or be replaced by references to "directors" throughout the proposed legislation. b) The phrase "ought reasonably to have" as contained in s.101B(2) of the "draft legislation" suggests that it is possible that the information may not

	have been actually known by the directors/officers. To require the corporation to disclose information on this basis is to require the impossible. We suggest that this phrase be taken out. c) If a corporation establishes and maintains appropriate and effective proper systems and procedures requiring its directors or officers to report relevant information, but they fail to follow, the corporation should not be at fault and be held liable. Therefore, there would be a need for a defence from liability for a corporation to cover the situation where a director or officer deliberately fails to comply with the corporation's disclosure procedures to disclose relevant information. This could take the form of a due diligence defence in circumstances where reasonable steps have been taken to ensure compliance with the disclosure obligation.
(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?	We agree.

Question 2	
(a) Do you agree to the provision of the four proposed safe harbours?	We agree to the provisions of the proposed Safe Harbours A, C and D. In relation to the proposed Safe Harbour B, we consider that it should not be subject to the condition that the outcome may be prejudiced if the information is prematurely disclosed and it should also be extended to expressly cover negotiations in relation to litigation and fair value accounting issues under review.
(b) Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?	We agree. In addition to the power to grant waivers relating to disclosures prohibited by a foreign law or court order, we consider that the SFC should also have the power to grant waivers, with or without conditions, in any circumstances in which it considers appropriate.
(c) Do you think that the legislation should provide for additional safe harbours? If so, what are these additional safe harbours?	We agree and we suggest additional safe harbours should be provided in the following circumstances: a) where directors of a listed corporation have, after due and careful consideration, come to a conclusion in good faith that a piece of inside information would not materially affect the corporation's share price. Under

	this safe harbour, if subsequently the information is found to have caused material price change due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors should not be held liable as long as they can show clear and proper records of board deliberations leading to a reasonable conclusion that the relevant information need not to be disclosed at the material time; b) where the information is of a defamatory nature as the disclosure of which may subject the corporation to claims by the concerned parties for defamation resulting in a potential liability to be incurred by the corporation; c) where the information comprises matters of supposition or is insufficiently definite to warrant disclosure; d) where the information is generated only for the internal management purposes of the corporation; or e) during intervals in which dealings of the listed securities are suspended by

	SEHK pending further enquiries.
(d) Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?	We agree that the SFC should be empowered to prescribe additional safe harbours. Other market participants should also be given the opportunity to suggest additional safe harbours. Any such additional safe harbours should be introduced expeditiously without a lengthy legislation-making process.
Question 3	
(a) Do you agree to extend the jurisdiction of the MMT to handle breaches of the statutory disclosure requirements?	We agree.
(b) Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?	We disagree on the following grounds: a) The proposed maximum fine of HK$8 million, which is only slightly below the maximum fine which can be imposed for a criminal offence under the SFO's market misconduct regime, is excessive for civil liability. It should also be provided that any fine to be imposed would be proportional to the seriousness of the breach, the extent to which the

	contravention was deliberate or reckless and whether the penalty is to be imposed on a corporation or an individual. b) We consider that "disqualification orders" and "cold shoulder orders", which could effectively end a person's career, are inappropriate for breach of disclosure rules. In the limited circumstances in which these orders might be justified, it is more than likely that the individual would also face charges and be punished under one of the market misconduct offences. c) We disagree with the proposal to let persons suffering pecuniary loss as result of others breaching the disclosure requirements rely on the MMT findings to take civil actions to seek compensation from those having breached the disclosure requirements, as it would place an onerous obligation on a corporation and its directors and officers in making disclosure decision of such inside information. In addition, we consider the proposal unjustified because such reliance effectively reduces the duty of the claimants to prove the causation between his loss associated with his dealing in such listed securities and non-disclosure of the relevant inside information. It may also cause a flood of litigations of such nature which may be unduly burdensome on our civil courts.

	d) One particular shortcoming of the proposed civil sanctions is that they do not provide for a timely rectification of the non-disclosure. Cases of suspected non-disclosure can often be dealt with and remedied informally. Consideration should be given to the use of private warnings in cases of less serious breaches of the statutory continuous disclosure requirements.
(c) Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?	We disagree. The existing system of having the cases referred to the Financial Secretary first has the merit of providing stronger checks-and-balances and would avoid potential abuses of hasty decisions, although we recognize that this might slow down the process. More importantly, under the proposed legislation, not only PSI-related breaches will be referred to MMT directly by the SFC but the other proceedings that cover the six types of market misconduct as well. This is a major deviation from existing market practices and arrangements. MMT may not cope with the potentially increased number of cases under the direct access arrangement. The Government should therefore reconsider the whole issue of allowing SFC direct access to MMT balancing the market's need for checks-and-balances and the resources consideration against the "streamlined process" requirement suggested in the consultation document. We are, however, supportive of an efficient process, provided that appropriate

	checks-and-balances controls are put in place.
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?	It is important that SFC provides informal consultation, through a help desk or hotline services, to listed corporations to help them interpret the guidelines and understand what constitutes inside information and when it is necessary to disclose on a case-by-case basis. This should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new safe harbours that may be prescribed from time to time. Alternatively, given the many years of experience of SEHK in interpreting and giving guidance on the continuous disclosure obligations of the Listing Rules, the consultation process could continue to be provided by SEHK instead.
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	It is important that under the new statutory regime, the lines of authorities and responsibilities between the SFC and SEHK are clearly defined without duplication, and listed corporations and their directors and officers will not be subject to dual regulation and duplicate investigation, and will not potentially

SEHK to further enhance clarity?	face both MMT proceedings and disciplinary hearings by Listing Committee. While we agree that the proposed statutory disclosure obligations coupled with the ability of the MMT to impose fines would serve to underpin the Listing Rules' disclosure obligations, we nevertheless feel that SEHK's role as the frontline regulator puts it in the best position to regulate these obligations on a day-to-day basis. SEHK's proximity to the market facilitates the pragmatic application of the continuous disclosure obligations with regard to the particular circumstances of individual corporations. Accordingly, we suggest that the day-to-day discussions with listed corporations regarding compliance of the PSI disclosure rules could be made the responsibility of SEHK, while enforcement of the statutory provisions could be vested with the SFC.
Overall comment: The difficulty of determining what constitutes discloseable inside information coupled with the severity of the proposed sanctions for non-compliance of the relevant disclosure rules would put directors and officers of listed corporations in an extremely undesirable position. It is very likely that listed corporations and their directors and officers will tend to err on the side of caution and this could result in a large amount of superfluous disclosure. The strategy is also not without risk: the premature disclosure of incomplete or indefinite matters risks creating a false market and could well constitute an offence under the market misconduct regime of SFO.	

恒基兆業地產有限公司
HENDERSON LAND DEVELOPMENT COMPANY LIMITED

28 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I
Admiralty Centre
18, Harcourt Road
Hong Kong

Dear Sirs,

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

Reference is made to the captioned consultation paper issued by the Financial Services and the Treasury Bureau in March 2010.

We would like to submit for your kind consideration our comments as more particularly described in the schedule attached hereto. The said schedule adopts the same numberings of your list of questions for consultation. Unless otherwise defined, terms used in the said schedule have the same meanings of those contained in the captioned consultation paper.

Yours faithfully,
For and on behalf of
HENDERSON LAND DEVELOPMENT CO. LTD.

Timon LIU Cheung Yuen
Company Secretary

Encl.

香港中環金融街八號國際金融中心二期七十一至七十六樓
71-76/F, Two International Finance Centre, 8 Finance Street, Central, Hong Kong
電話 Tel: (852) 2908 8888 • 傳真 Fax: (852) 2908 8838 • 網址 Website: www.hld.com

SCHEDULE

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?	We agree adopting the existing definition of "relevant information" under the SFO to define PSI. This avoids introducing a new definition. However, such definition has the following drawbacks: a) The material effect of "relevant information" on the price of the listed securities under the insider dealing regime may be easily assessed by the litigants and MMT because such price fluctuation has already taken place resulting from the "relevant information" while decisions on disclosure of price sensitive information involve difficult and subjective judgements and directors and officers of a listed corporation may have difficulties to assess the effect of "relevant information" on the price of the listed securities which has not occurred before such disclosure of the "relevant information".

	b) In addition, the draft Guidelines on Disclosure of Inside Information do not address the degree of likelihood which would be required and just refer to determining how the "general investor" would behave if in possession of the "relevant information". It would be helpful if such Guidelines give more elaboration on the degree of such likelihood in terms of effect on the price of the listed securities. c) SFC's Guidelines on Disclosure of Inside Information under SFO and SEHK's Guide on Disclosure of Price-sensitive Information under the Listing Rules may, in certain extent, be inconsistent with the interpretation of such price-sensitive information. Under the proposed codification, the three key elements in the concept of "inside information" are: "specific", "not generally known" and "likely to have material effect on the price of the corporation's securities" whilst the definition of "price-sensitive information" under the Listing Rules and the relevant guide comprises "necessary to enable the public to appraise the position of the group", "necessary to avoid the establishment of a false market in its securities" and "**reasonably** expected materially to affect market activity in and the price of its securities". In the course of determining whether a piece of information will trigger a disclosure obligation, the criteria of "inside

	information" involves a subjective view whereas that of "price-sensitive information" includes an objective view of a reasonable man. In addition, the different reliefs/exceptions available under the respective concepts of "inside information" and "price-sensitive information" may also cause uncertainty as to whether disclosure should be made. For example, a proposed fundraising exercise may fall within the meaning of both an "inside information" and a "price-sensitive information". In SEHK's letter dated 31 October 2008 in relation to disclosure obligations of listed issuers, a conditional relief from immediate disclosure in the course of development of fundraising is provided. However, there is no corresponding specific exception for disclosure of such "inside information". Safe Harbours A, C and D are not applicable and the corporation may not necessarily be able to rely on Safe Harbour B because it may not be possible to ascertain whether the outcome of the proposed fundraising may be prejudiced if the information is disclosed prematurely.
(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	In relation to a listed corporation's obligations to disclose to the public "as soon as practicable", we are concerned about how long is practicable to the SFC. The SFC guidelines further state that "the corporation should *immediately* take all necessary steps that are reasonable in the circumstances to disclose the

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?	information to the public" (paragraph 32). What is "immediate" is also problematic. The SFC's stance on what is "immediate" and how long is "practicable" is crucial. More guidance and clarification need to be provided. We also have reservations on the second part of this question: - a) The definition of "officer" which includes directors, secretaries and managers is too wide. A large corporation may hire many managers and many such managers may not actually have any role in the management of the corporation. Further, under the UK regime for PSI disclosure, only the directors, and not even the company secretaries, who *knowingly* breach the disclosure requirement would be held liable. We concur with this since it is the directors who would make decisions for the corporation. We therefore suggest following the UK approach of requiring only directors to be subjected to the proposed legislation. References to "officers" should either be deleted or be replaced by references to "directors" throughout the proposed legislation. b) The phrase "ought reasonably to have" as contained in s.101B(2) of the "draft legislation" suggests that it is possible that the information may not

	have been actually known by the directors/officers. To require the corporation to disclose information on this basis is to require the impossible. We suggest that this phrase be taken out. c) If a corporation establishes and maintains appropriate and effective proper systems and procedures requiring its directors or officers to report relevant information, but they fail to follow, the corporation should not be at fault and be held liable. Therefore, there would be a need for a defence from liability for a corporation to cover the situation where a director or officer deliberately fails to comply with the corporation's disclosure procedures to disclose relevant information. This could take the form of a due diligence defence in circumstances where reasonable steps have been taken to ensure compliance with the disclosure obligation.
(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?	We agree.

Question 2	
(a) Do you agree to the provision of the four proposed safe harbours?	We agree to the provisions of the proposed Safe Harbours A, C and D. In relation to the proposed Safe Harbour B, we consider that it should not be subject to the condition that the outcome may be prejudiced if the information is prematurely disclosed and it should also be extended to expressly cover negotiations in relation to litigation and fair value accounting issues under review.
(b) Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?	We agree. In addition to the power to grant waivers relating to disclosures prohibited by a foreign law or court order, we consider that the SFC should also have the power to grant waivers, with or without conditions, in any circumstances in which it considers appropriate.
(c) Do you think that the legislation should provide for additional safe harbours? If so, what are these additional safe harbours?	We agree and we suggest additional safe harbours should be provided in the following circumstances: a) where directors of a listed corporation have, after due and careful consideration, come to a conclusion in good faith that a piece of inside information would not materially affect the corporation's share price. Under

	this safe harbour, if subsequently the information is found to have caused material price change due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors should not be held liable as long as they can show clear and proper records of board deliberations leading to a reasonable conclusion that the relevant information need not to be disclosed at the material time; b) where the information is of a defamatory nature as the disclosure of which may subject the corporation to claims by the concerned parties for defamation resulting in a potential liability to be incurred by the corporation; c) where the information comprises matters of supposition or is insufficiently definite to warrant disclosure; d) where the information is generated only for the internal management purposes of the corporation; or e) during intervals in which dealings of the listed securities are suspended by

	SEHK pending further enquiries.
(d) Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?	We agree that the SFC should be empowered to prescribe additional safe harbours. Other market participants should also be given the opportunity to suggest additional safe harbours. Any such additional safe harbours should be introduced expeditiously without a lengthy legislation-making process.
Question 3	
(a) Do you agree to extend the jurisdiction of the MMT to handle breaches of the statutory disclosure requirements?	We agree.
(b) Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?	We disagree on the following grounds: a) The proposed maximum fine of HK$8 million, which is only slightly below the maximum fine which can be imposed for a criminal offence under the SFO's market misconduct regime, is excessive for civil liability. It should also be provided that any fine to be imposed would be proportional to the seriousness of the breach, the extent to which the

	contravention was deliberate or reckless and whether the penalty is to be imposed on a corporation or an individual. b) We consider that "disqualification orders" and "cold shoulder orders", which could effectively end a person's career, are inappropriate for breach of disclosure rules. In the limited circumstances in which these orders might be justified, it is more than likely that the individual would also face charges and be punished under one of the market misconduct offences. c) We disagree with the proposal to let persons suffering pecuniary loss as result of others breaching the disclosure requirements rely on the MMT findings to take civil actions to seek compensation from those having breached the disclosure requirements, as it would place an onerous obligation on a corporation and its directors and officers in making disclosure decision of such inside information. In addition, we consider the proposal unjustified because such reliance effectively reduces the duty of the claimants to prove the causation between his loss associated with his dealing in such listed securities and non-disclosure of the relevant inside information. It may also cause a flood of litigations of such nature which may be unduly burdensome on our civil courts.

	d) One particular shortcoming of the proposed civil sanctions is that they do not provide for a timely rectification of the non-disclosure. Cases of suspected non-disclosure can often be dealt with and remedied informally. Consideration should be given to the use of private warnings in cases of less serious breaches of the statutory continuous disclosure requirements.
(c) Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?	We disagree. The existing system of having the cases referred to the Financial Secretary first has the merit of providing stronger checks-and-balances and would avoid potential abuses of hasty decisions, although we recognize that this might slow down the process. More importantly, under the proposed legislation, not only PSI-related breaches will be referred to MMT directly by the SFC but the other proceedings that cover the six types of market misconduct as well. This is a major deviation from existing market practices and arrangements. MMT may not cope with the potentially increased number of cases under the direct access arrangement. The Government should therefore reconsider the whole issue of allowing SFC direct access to MMT balancing the market's need for checks-and-balances and the resources consideration against the "streamlined process" requirement suggested in the consultation document. We are, however, supportive of an efficient process, provided that appropriate

	checks-and-balances controls are put in place.
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?	It is important that SFC provides informal consultation, through a help desk or hotline services, to listed corporations to help them interpret the guidelines and understand what constitutes inside information and when it is necessary to disclose on a case-by-case basis. This should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new safe harbours that may be prescribed from time to time. Alternatively, given the many years of experience of SEHK in interpreting and giving guidance on the continuous disclosure obligations of the Listing Rules, the consultation process could continue to be provided by SEHK instead.
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	It is important that under the new statutory regime, the lines of authorities and responsibilities between the SFC and SEHK are clearly defined without duplication, and listed corporations and their directors and officers will not be subject to dual regulation and duplicate investigation, and will not potentially

SEHK to further enhance clarity?	face both MMT proceedings and disciplinary hearings by Listing Committee. While we agree that the proposed statutory disclosure obligations coupled with the ability of the MMT to impose fines would serve to underpin the Listing Rules' disclosure obligations, we nevertheless feel that SEHK's role as the frontline regulator puts it in the best position to regulate these obligations on a day-to-day basis. SEHK's proximity to the market facilitates the pragmatic application of the continuous disclosure obligations with regard to the particular circumstances of individual corporations. Accordingly, we suggest that the day-to-day discussions with listed corporations regarding compliance of the PSI disclosure rules could be made the responsibility of SEHK, while enforcement of the statutory provisions could be vested with the SFC.

Overall comment: The difficulty of determining what constitutes discloseable inside information coupled with the severity of the proposed sanctions for non-compliance of the relevant disclosure rules would put directors and officers of listed corporations in an extremely undesirable position. It is very likely that listed corporations and their directors and officers will tend to err on the side of caution and this could result in a large amount of superfluous disclosure. The strategy is also not without risk: the premature disclosure of incomplete or indefinite matters risks creating a false market and could well constitute an offence under the market misconduct regime of SFO.

漢基控股有限公司
HERITAGE INTERNATIONAL HOLDINGS LIMITED
A company listed on The Stock Exchange of Hong Kong 香港聯合交易所上市公司

Date: 25 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I
Admiralty Centre,
18 Harcourt Road
Hong Kong

To Whom It May Concern:

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

I, the representative of Heritage International Holdings Limited, would like to voice my objection to the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

To certain extend, the Codification of Certain Requirement to Disclose Price Sensitive Information by Listed Companies would help lessen the restrictions set upon us by the Hong Kong Stock Exchange and provide greater clarity as to what information we need to provide in order to fulfill our statutory obligations under the listing rules in Hong Kong. We are responsible companies who want to maximize returns to our investors as well as compile with the laws of Hong Kong.

However, after reading through your consultation as well as the subsequent "Guidelines on Disclosure of Inside Information" published by the SFC, we are of the opinion that this Codification not only creates an additional burden to listed companies, it does not add transparency to our investors. It will create greater confusion as "announcements" become a means for listed issuers to drive up their stock prices by disclosing transactions that are in process and not yet completed or even mature. This will reduce the trust in listed companies' disclosure and flood the financial market with non-informative announcements, all made for the sake of the name of "greater transparency". In fact, it will create greater market turbulence because of non-informative information that will be submitted to the market by the companies that are afraid of breaching the new rules. This Codification, in effect, will make Hong Kong a non-competitive financial market worldwide.

Yours sincerely,

For and on behalf of
Heritage International Holdings Limited

Chairman

香港北角馬寶道28號華匯中心29字樓
29th Floor China United Centre 28 Marble Road North Point Hong Kong.
電話 Tel: (852) 3198 0668 傳真 Fax: (852) 3521 1833 網址 Website: www.heritage.com.hk

Hermes Equity Ownership Services

Hermes Equity
Ownership Services Limited
1 Portsoken Street
London E1 8HZ
United Kingdom

Tel: +44 (0)20 7702 0888
Fax: +44 (0)20 7702 9452

www.hermes.co.uk

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I
Admiralty Centre
18, Harcourt Road
Hong Kong

By email: psi_consultation@fstb.gov.hk

28 June 2010

Dear Sir/Madam,

Response to the FSTB's Consultation on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

We welcome the opportunity to respond to the consultation of the Hong Kong Financial Services and the Treasury Bureau ("FSTB") on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information ("PSI") by Listed Corporations.

By way of background, Hermes is one of the largest fund managers in the City of London. Through our Equity Ownership Service (EOS) we also represent a number of large pension funds from around the world, assisting them in being active owners of companies in which they invest and in being active participants in public policy consultation such as this.

We applaud the FSTB's continuous efforts to ensure market transparency and fairness in the provision of information to all investor in the region. We are broadly supportive of the proposed legislation contained within the consultation paper. We believe that the requirements to disclose PSI are most important for cultivating a continuous disclosure culture among listed corporations and improving market quality in the region. We agree with the FSTB that borrowing the concept of "relevant information" currently used in section 245 of the Securities and Futures Ordinance ("SFO") in relation to prohibiting any person from dealing in securities using "inside information" under the "insider dealing" regime is sensible in defining PSI instead of replicating the detailed Listing Rules in the law. We also agree with the proposals that PSI will be the same set of information currently prohibited from being used for

dealing in the securities of the listed corporation concerned and that listed corporations will be required to disclose PSI to the public in a timely manner. We therefore believe that codifying requirements for listed corporations to disclose PSI in the statute is the most effective measure to enhance market transparency. As a result, we have not answered the individual questions in the consultation paper.

We would welcome further dialogue on this important topic if that would be helpful to you.

Yours faithfully

June Choi
Manager

Submitted by: Hong Kong Aircraft Engineering Company Limited
Stock Code: 44
Date: 18th June 2010

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

Responses to Questions for Consultation

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?*

Yes.

(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?*

Yes, subject to the company secretary being substituted for an officer. Given the serious consequences of non-disclosure, the knowledge of those who are not responsible for the governance of the listed corporation should not be attributed to those who are.

(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?*

Yes.

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

Yes, subject to two points. First, safe harbour A should not be lost by disclosure by a third party, if the legislation still prohibits disclosure by the listed corporation notwithstanding the disclosure by the third party (see paragraphs 47 and 48 of the draft SFC Guidelines). Second, we see no reason why foreign law (or foreign court) prohibitions on disclosure should not be within safe harbour A. If the concern is that the SFC will not have the knowledge of the relevant foreign law in order to check whether the prohibition is genuine, the listed corporation could be required (if so requested by the SFC) to provide a legal opinion issued by a law firm practising in the relevant jurisdiction to the effect that the prohibition is genuine.

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

Yes, but (see answer to 2(a) above) a waiver should not be necessary where disclosure is prohibited by a foreign law or court order.

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

Yes.

Additional safe harbours include:

(i) when trading of the securities of the listed corporation on the Hong Kong Stock Exchange is suspended.

(ii) when the listed corporation has responded to enquiries from the Stock Exchange under Rule 13.10 of the Listing Rules, following which the Stock Exchange does not exercise its power to suspend trading of the securities of that listed corporation.

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

Yes.

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

Yes.

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

We have no comment on this question.

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

We think that the decision to institute proceedings should be taken by the Department of Justice, in order to provide an independent review of the case by a party which has not investigated it. We think that the safeguard of an independent review is desirable in view of the lower burden of proof required in civil matters and the possibility of civil claims being made by third parties.

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?*

   Yes.

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?*

   The division of work and responsibilities between the SFC and SEHK should be set out clearly in order to avoid duplication and gaps and particularly to enable listed corporations to promptly respond to any enquiries in relation to unusual movements in share price or share trading volume.

   It is submitted that the SEHK should issue enquiries, on behalf of itself and the SFC (under the dual filing regime), to listed corporations in relation to unusual movements in share price or share trading volume and that the listed corporations only need to respond to such enquiries to the SEHK (and therefore the SFC under the dual filing regime).

- END -

THE
HONG KONG
ASSOCIATION
OF
BANKS
香港銀行公會

Room 525, 5/F., Prince's Building, Central, Hong Kong
Telephone: 2521 1160, 2521 1169 Facsimile: 2868 5035
Email: info@hkab.org.hk Web: www.hkab.org.hk

香港中環太子大廈5樓525室
電話：2521 1160, 2521 1169 圖文傳真：2868 5035
電郵：info@hkab.org.hk 網址：www.hkab.org.hk

9 July 2010

By post & By Email: psi_consultation@fstb.gov.hk

Ms. Jane Lee
Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18th Floor, Admiralty Centre Tower 1,
18 Harcourt Road,
Hong Kong

Dear Ms. Lee

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

Thank you for your letter dated 29 March 2010.

We would like to enclose our submission to share our thoughts on the matters discussed in the Consultation Paper. Please feel free to contact our Senior Manager, Ms Grace Law, for any questions or additional information you may require.

Yours sincerely,

Rita Liu
Secretary

Enc.

Submission of Hong Kong Association of Banks (HKAB)

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

General comments

We appreciate the policy intent of the proposed legislation to require listed corporations to make timely disclosure of Price Sensitive Information (PSI). In that regard, we would like to provide our detailed comments for the consideration of the Financial Services and the Treasury Bureau (FSTB) in refining the statutory disclosure regime to ensure effective and practicable compliance having regard to the relevant experience of other jurisdictions while enhancing market transparency and quality in Hong Kong to provide greater investor protection.

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?

We generally agree with the proposal.

To promote effective and practicable compliance, we consider that the law should make it clear that determination of whether the disclosure should have been made should not be measured with the benefit of hindsight. Specifically, the corporation should not be held liable if a reasonable board of directors, after taking into account the guidelines issued by the SFC and by reference to the facts and circumstances existing at the relevant time of making the determination, concluded that the specific information did not amount to "inside information" and hence no public disclosure was required, even if another reasonable board of directors might have come to a different conclusion.

(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?

In relation to the first part of this question, yes, but this obligation should (as proposed) be subject to the availability of one or more "safe harbours" (discussed later in this submission) and the discretion of listed corporations to delay disclosure whilst verifying the facts or clarifying the situation in order to avoid a premature disclosure which may mislead rather than inform the investing public This discretion is particularly important where sudden, unexpected events have occurred and it takes time to find out all the facts and assess the implications. In such circumstances, the listed corporation may

even find it difficult to issue a "holding" announcement when it is unclear whether the situation is of such a magnitude that requires a disclosure in the first place.

With regard to the second part of this question, we believe that the provisions should not apply to an "officer" which is defined widely in the SFO and may include staff in the middle or even junior level of the management. These members of staff may not have the skills or knowledge to assess whether an event is discloseable or the power to make the decision to disclose. In line with the practice of the U.K., we suggest that the provisions should only apply to directors and senior executives who have regular access to inside information and can make decisions whether to make disclosures.

(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?

In addition to our comments in 1(b) above, we consider that the objective should be to ensure that the disclosures made through the electronic publication system (such as envisaged under s101C(2)) and any alternative means (such as the website of the listed corporation) are uniform across the market for ease of investors' reference. If this approach were taken, the SFO would also have to provide for what action should be taken in the case that disclosure by means of an electronic publication system is not possible.

Question 2

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

Yes.

FSTB might consider whether it should be specified that safe Harbour D, as set out in s101D(1)(c)(iv), should apply only if the listed corporation in question is an "authorized financial institution" (as defined in s2(1) of the Banking Ordinance), a "licensed corporation" under s116 or 117 of the SFO or an insurance company, or if it has a subsidiary company or a parent company that is an "authorised institution", a "licensed corporation" or an insurance company and that subsidiary or parent (as the case may be) has received such liquidity support.

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

Yes.

The current proposal to empower the SFC to grant such waivers only when the disclosure of PSI "would mean a contravention against a court order or

legislation in other jurisdictions" (s101E and paragraph 2.12) may be insufficient. Other situations might arise in which the obligation to disclose PSI should be waived on a one-off basis (in circumstances in which s101F could not be relied upon) to allow the Commission to respond to rapidly developing situations in which the requirements of s101B should be waived in relation to a particular set of circumstances faced by a particular corporation. We therefore consider that it would be beneficial to provide that the Commission may, in addition, grant specific one-off waivers from the requirements of s101B:

1. **on the application of a listed corporation and subject to such conditions as the Commission may choose to impose (as currently provided for in s101E); and**

2. **subject to the public interest test (as currently imposed under s101F).**

Note, too, that s101E(1) empowers the Commission to provide a permanent waiver from the requirements of s101B, whereas s101D(1)(c)(i) (which s101E(1) appears to be designed to mirror) provides only a temporary (albeit indefinite) exemption from the requirements of s101B. It would be preferable for s101E(1) to mirror the "if and for so long as" language of s101D(1), both in relation to the circumstances in which s101E currently provides for the possibility of a waiver, and in relation to such further circumstances as proposed above.

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

We believe the FSTB should consider additional safe harbours along the lines of the two additional safe harbours in Australia and New Zealand: (1) where the information comprises matters of supposition or is insufficiently definite to warrant disclosure; and (2) where the information is generated for the internal management purposes of the entity. Note that the relevant requirements in Australia and New Zealand also include a "reasonableness test" as one of the tests for disclosure, whereby information does not need to be disclosed if "[a] reasonable person would not expect the information to be disclosed"; the relevant guidance note states that "[a] reasonable person would not expect information to be disclosed if the result would be unreasonably prejudicial to the entity".

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

Yes.

Note that s101F – which appears to contain the power described in this question – goes further than creating additional safe harbours. The proposed s101F provides an absolute exemption from the requirements of s101B by

stating, in s101F(2), that s101B does not apply in circumstances prescribed by the Commission under s101F(1). This goes further than s101D which, in s101D(1), provides only a temporary, albeit indefinite, exemption from the requirements of s101B. It may be preferable for s101F to be drafted such that instead of empowering the Commission to prescribe circumstances in which s101B does not apply, it empowers the Commission to prescribe further circumstances in which s101D(1) does apply.

It may be doubtful whether this power would, in practice, achieve the result it appears to be designed to achieve, namely "[T]o allow for flexibility and to cater for unforeseen circumstances as a result of rapid market development in the financial services industry" (paragraph 2.20). Situations in which it would be beneficial rapidly to introduce an additional safe harbour (such as in the hours before the run on Northern Rock in the United Kingdom, to avoid a repeat of which situation the rule in DTR 2.5.5A(R) was introduced (the provision analogous to s101D(1)(c)(iv))) often develop so quickly that the damage would be done before a new safe harbour could be introduced.

However, if s101E were amended as suggested above, so that it empowers the Commission to grant waivers in a wide variety of situations, the new s101E would achieve the "rapid response" function contemplated by paragraph 2.20. s101F, by contrast, would empower the Commission to introduce new safe harbours that it intends to remain in place on a long-term basis and to be available to all listed corporations.

Question 3

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

Yes.

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

Yes.

It is important that the MMT retains discretion in the type and level of civil remedy that it may impose, while taking into account guidelines such as those set out in paragraph 2.33. FSTB might, in addition, consider whether there should be provisions to deal with additional financial penalties if the listed corporation and/or a director or officer has profited from its failure to disclose PSI.

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

No, we do not see a clear case for changing the current system.

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?

Yes. Since the market will continue to evolve, the SFC should provide the consultation service on a continuous basis.

Furthermore, careful thought should be given to making sure the right staff are available to provide this consultation service. Currently, the general disclosure obligation under the HK Listing Rules (Rule 13.09) is regulated by the Compliance & Monitoring Team at the SEHK, rather than the SFC.

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?

The respective roles of the SFC and SEHK should be more clearly defined under the new regime to facilitate effective enforcement and compliance.

Clearly the SEHK will need to modify the existing general obligations of disclosure in the Listing Rules to dovetail them with the statutory provisions (as described in paragraphs 3.4 and 3.9).

Other comments:

1. **FSTB might consider whether it would be appropriate to include provisions for making a "holding announcement" as under DTR 2.2.9(G)(2) of the UK disclosure regime. This would entail a brief announcement being made while the corporation gathered further detailed information in order to make a detailed announcement.**

2. **It might be helpful if the SFC Guidelines included an indicative timeframe or a performance commitment for responding to requests for a waiver under s101E.**

The DTC Association

(The Hong Kong Association of Restricted Licence Banks and Deposit-taking Companies)

存款公司公會（香港有限制牌照銀行及接受存款公司公會）

Unit 1704, 17/F., Bonham Trade Centre,
50 Bonham Strand East, Sheung Wan, Hong Kong.
Tel: 2526 4079 Fax: 2523 0180
E-mail: dtca@dtca.org.hk HomePage: http://www.dtca.org.hk

香港上環文咸東街 50 號
寶恒商業中心 17 樓 1704 室
電話：2526 4079 傳真：2523 0180
電子郵件：dtca@dtca.org.hk 網頁：http://www.dtca.org.hk

Your Ref.: SUB/12/2/2/2(2010)
Our Ref.: 20/02/05

25th June, 2010 (Fri)

Ms. Jane Lee
for Secretary for Financial Services and the Treasury
Financial Services Branch,
Financial Services and The Treasury Bureau,
Government of The Hong Kong Special Administrative Region
18th Floor, Admiralty Centre Tower 1, 18 Harcourt Road
Hong Kong
(Fax No. 2529 2075; Page Faxed: 1)

Dear Ms. Lee,

Financial Services Branch (FSB) Consultation Paper for the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

Thank you for your letter of Monday the 29th March, 2010 (Mon) consulting us on the captioned subject of "*Consultation Paper for the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations*".

While our Association members have not written about specific problems arising from proposals at the consultation paper, and while your proposals seem in general to be codification of existing requirements under Listing Rules, our members have noted that codification would intensify problems arising from any uncertainties in what should or need not be disclosed. In other words while our Association members have not offered particular suggestions at this stage, they are attuned to keep in view potential problems that could emerge more clearly in the future,

Thank you for your kind attention,

Yours sincerely

Pui-Chong LUND
Association Secretary

HONG KONG BAR ASSOCIATION

Secretariat: LG2 Floor, High Court, 38 Queensway, Hong Kong
DX-180053 Queensway 1 E-mail: info@hkba.org Website: www.hkba.org
Telephone: 2869 0210 Fax: 2869 0189

27th August 2010

Ms. Jane Lee
for Secretary for Financial Services and the Treasury
Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I, Admiralty Centre
18 Harcourt Road, Hong Kong.

Dear Ms. Lee,

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

I refer to your letter of 29th March 2010.

Please find enclosed a copy of the response of the Hong Kong Bar Association on the Consultation Paper on "Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations", which has been endorsed by the Bar Council at its meeting held on 26th August 2010, for your consideration.

Yours sincerely,

Russell Coleman SC
Chairman

Encl.

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

---

Response of the Hong Kong Bar Association

---

1. Summary

1.1 The Hong Kong Bar Association ("**HKBA**") welcomes the Government's policy proposals to:

(1) Codify into statutory provisions in the Securities and Futures Ordinance (Cap. 571) (the "**SFO**") the requirement on listed companies to disclose to the public any price sensitive information ("**PSI**") in a timely, equal, and effective manner;

(2) Entrust the Securities and Futures Commission ("**SFC**") with the responsibility of administering the new statutory provisions (including to give waivers) and investigating and prosecuting cases of non-disclosure or false or misleading disclosure; and

(3) Empower the Market Misconduct Tribunal ("**MMT**") to hear and decide such cases.

1.2 In making the comments below, the HKBA has considered the available proposal details, the existing statutory as well as non-statutory rules applicable to the matter, certain relevant judicial decisions, and the types of non-disclosure or false or misleading disclosure that have led to public disciplinary actions in recent years. The overarching consideration is how the new proposals would fit within and impact the overall regulatory regime.

1.3 Details of the HKBA's response are as follows.

2. Codification of the Requirement

2.1 The requirement on listed companies to disclose PSI is presently in Rule 13.09 of the Listing Rules of the Stock Exchange of Hong Kong Ltd ("**Listing Rules**" and "**SEHK**").

2.2 As the Government pointed out in its Consultation Paper, the lack of "teeth" for the Listing Rules has been an issue of public concern. Reliance on non-statutory regulation raises doubt about enforcement ability and effectiveness. It also puts Hong Kong "out of sync" with other financial markets.

2.3 The HKBA agrees with the Government that the present proposal is appropriate for addressing these issues.

2.4 As the Government also noted in its Consultation Paper, some market participants have queried whether statutory regulation would become inflexible. There is also concern that a legal requirement might not adapt to the ever-changing commercial world. The HKBA, however, believes that such concerns should be alleviated for a number of reasons.

2.5 First, the proposed statutory provision states a principle: A listed company must, as soon as practicable, disclose inside information to the public. This principle is expressed clearly and also flexibly. It is well capable of application to different facts in different cases.

2.6 Second, the law is, by nature, concerned with the application of general principles to particular facts. Commercial and financial law routinely deals with the diverse business world. The codification of a non-statutory rule into a statutory provision should not cause any concern about its applicability to different facts.

2.7 Third, existing section 214(1)(c) of the SFO already empowers the SFC to apply to the High Court for remedies (usually the disqualification of directors but also potentially the compensation of investors) where shareholders of a listed company "have not been given all the information that they may reasonably expect". In *Re Warderly International Holdings Ltd*, HCMP No. 1742 of 2009, 9 April 2010, per Harris J, the Court accepted that non-disclosure in breach of the Listing Rules amounts to such a situation. The SFC already has wide powers to hold company management responsible for non-disclosure of PSI. The new statutory provisions only bring this matter squarely to the fore and, moreover, to provide for a specific adjudicatory process.

2.8 Fourth, the proposed statutory provision is narrower than the present Listing Rule 13.09. It covers only information about a listed company or the company's shareholders, officers, listed securities or their derivatives, and which "would be likely to materially affect the price of the listed securities". Rule 13.09, in comparison, covers "information on any major new developments in [the company's] sphere of activity" and any information that is "necessary to avoid the establishment of a false market in [the company's] securities". The more tightly worded statutory provision facilitates application.

2.9 Fifth, the proposed provision adopts the concept as well as definition of "inside information" (currently labeled "relevant information" and to be renamed), which has long existed in statutes in underpinning the prohibition against insider dealing. Experience has proven this to be a comprehensible, workable expression. Moreover, listed companies and directors should be already familiar with it.

2.10 Sixth, the concept and definition of "inside information" are very similar across most leading jurisdictions. Market participants, their advisers, the SFC, and (if necessary) the MMT can draw on a wealth of decided cases to aid in dealing with any particular set of facts.

2.11 Seventh, under the new regime the SFC would issue (and is currently consulting upon) a set of Guidelines on Disclosure of Insider Information. It may also issue further guidance from time to time. This follows the regulatory practice in other jurisdictions.

2.12 Eighth, there would be (as proposed) a mechanism for informal consultation with the SFC regarding disclosure requirements. To any extent market participants and their advisers might still have doubts in a particular situation even after careful consideration of the statutory provision, case law, regulatory guidance, and the particular facts, they could "play safe" and disclose more rather than less.

2.13 For the above reasons, the HKBA supports the codification of the requirement on listed companies to disclose PSI into statutory provisions with the force of law.

3. Liabilities of Directors and Officers

3.1 A company makes decision and acts (or fails to decide or act) through its officers. For the new statutory requirement to achieve its proper effect, it should place the burden of compliance not only on listed companies, but also on their officers. This is also the approach in other areas of corporate or securities regulation, e.g., making directors liable for false or misleading statements in prospectuses, subject to the defence of having taken all reasonable steps to ensure accuracy.

3.2 The HKBA supports the Government's proposals expressly to require officers of listed companies to take all reasonable measures from time to time to ensure that proper safeguards exist for the proper disclosure of PSI.

3.3 The HKBA notes that the proposed draft statutory provision (section 101G(2) of the SFO) would make an officer (a) whose intentional, reckless or negligent act or omission has resulted in a breach by the company of the disclosure requirement, or (b) who has not taken all reasonable measure to prevent the breach, to be also personally in breach of the requirement.

3.4 Situation (a) appears sensible. Alternative (b) may be problematic. As currently drafted, it might require officers to take all reasonable measures to prevent each and every conceivable breach. This raises a conceptual issue.

3.5 How are the sufficiency and reasonableness of measures (i.e., whether an officer has take all reasonable measures) judged? Surely the standard of care should not be determined with the benefit of hindsight. The sensible answer probably turns both on the general (e.g., the internal management system that the company has in place) and the specific (e.g., any particular situation the company is in). In some situations, e.g., surprise discovery of financial troubles, a company and its officers may need to put in place additional measures above the usual safeguards.

3.6 It may be that the proposed draft section 101G(2)(b), in speaking of "the breach", is aimed to include both the general and the specific. Provided it does so without meaning to invoke hindsight, the HKBA would support such a requirement.

4. The SFC to Administer the New Statutory Provisions

4.1 The SFC is the statutory regulator of the securities market in Hong Kong. It vets, in parallel with the SEHK, disclosure by listing applicants. It investigates market

misconduct, insider dealing, false or misleading disclosure by listed companies (pursuant to the Securities and Futures (Stock Market Listing) Rules (Cap. 571V)), and management misconduct (under section 214 of the SFO).

4.2 The HKBA agrees with the Government that the SFC is the natural public agency to be tasked with the administration of the new statutory provisions. As part of this, it must be reasonable for the SFC to have the power to grant waivers, including conditional waivers. This would follow the usual practice; the SFC is given such powers in its other regulatory responsibilities, e.g., prospectuses and other disclosure vetting, licensing, takeovers and mergers.

4.3 As mentioned above, existing section 214 of the SFO already empowers the SFC to bring cases of non-disclosure of PSI to court and the present proposals would serve to bring the SFC's role and responsibility to the fore. This is potentially a sea change. Although the proposals strike expressly only at disclosure of PSI and the Government has stated a deliberate policy decision not to cover other aspects of the Listing Rules (e.g., financial reporting, other periodic disclosures, notifiable transactions), problems in those other situations could also constitute or involve non-disclosure of PSI.

4.4 A review of the SEHK's disciplinary cases illustrates this point. For example, in mid and late 2009, the SEHK took actions against 2 companies and their directors for not disclosing in a timely manner certain transactions or changes to the terms of transactions and also for not seeking shareholders' approval or re-approval in breach of Listing Rules 14.34, 14A.47, 14A.45, and 14A.52. As another example, earlier in the same year, the SEHK took action against a company and its directors for failure to disclose a loan exceeding 8% of its assets in breach of Rule 13.13 and failure to disclose the same as a "discloseable transaction" in breach of Rules 14.34 and 14.38. Indeed, a substantial majority of recent cases involved one or more elements of non-disclosure of important information.

4.5 If and after the proposed statutory regulation comes into effect, such cases would raise an issue of which of the SFC and SEHK should lead in taking action. Since the SFC has more statutory "teeth" and the consequences of breach of statutory provisions would be more serious, it should be the first port of call. The HKBA agrees with the intended arrangement, stated in paragraph 3.9 of the Consultation Paper, that the SFC's investigation and enforcement should take precedence.

4.6 The Consultation Paper, however, did not highlight that the SFC, in investigating potential non-disclosure of PSI or false or misleading disclosure of information, will, to significant extent in practice, be investigating breaches of specific Listing Rules. The administrative implications should not be underestimated. The HKBA urges both the Government and the SFC to ensure that the regulator has proper resources, internal processes, and liaison with the SEHK to discharge the probable workload.

5. <u>The Market Misconduct Tribunal</u>

5.1 The Consultation Paper proposes for the MMT to decide cases of alleged breach of the new statutory requirement. Insofar as this follows from the policy decision not to criminalize the matter, the MMT would be a natural avenue. But it is not the only choice.

5.2 There are at present two key tribunals of securities regulation in Hong Kong. The MMT has general jurisdiction in that any member of the public might be alleged to have engaged in market misconduct or insider dealing and hence have to come before the tribunal. The Securities and Futures Appeals Tribunal ("**SFAT**") has a more specialized jurisdiction. The SFAT hears cases where the SFC has decided to discipline an intermediary or its staff and the person seeks a review.

5.3 Since listed companies and their officers belong to a regulated class, cases against them for non-disclosure of PSI could be disciplinary actions by the SFC with a right of appeal to the SFAT. The process might be more expedient. But it would also invite challenges about fairness and independence.

5.4 The MMT, unlike the SFAT, makes first-instance decisions. This may add to the length of hearings; indeed experience has been that MMT cases tend to take some time. But the process protects the SFC from accusations of being simultaneously "cop, prosecutor, judge, and jury".

5.5 Furthermore, the MMT is the tribunal with jurisdiction over insider dealing. The future statutory requirement on disclosure of PSI would be founded on the same concept of "inside information". It makes sense for the MMT to hear and decide both types of cases.

5.6 The HKBA supports the proposal to empower the MMT to hear and decide cases of alleged failure to disclose PSI in a timely, equal, and effective manner.

6. SFC's Direct Access to Institute Proceedings

6.1 At present, the SFC cannot institute MMT proceedings. It must refer the case to the Financial Secretary, who would consult the Department of Justice, after which step he/she shall decide whether to institute proceedings. The procedures require three arms of government (and countless staff) to review the same papers, viz., the SFC's investigatory report and underlying materials.

6.2 This appears rather unnecessary. The SFC is the agency with the most direct and expert knowledge of the securities market, securities law, and the particular case. Its judgment (reached internally at a sufficiently senior level) on whether to bring proceedings before the MMT ought to suffice.

6.3 To any extent there may be concern about the SFC's zealousness, the MMT itself provides the best check and balance.

6.4 The HKBA supports the Government's proposal that the SFC be empowered with direct access to institute proceedings before the MMT for suspected breach of the new statutory requirement. The HKBA further suggests the Government to review the existing arrangement and consider giving the SFC direct access in relation to all MMT cases.

7. Concluding Views

7.1 The Government's present proposals to codify in statute the requirement on listed companies to disclose PSI are a significant step towards addressing a long-known concern about the existing generally non-statutory regulatory regime.

7.2 Moreover, as explained earlier, the proposed statutory regulation of PSI would in effect strengthen the non-statutory requirements on other disclosures.

7.3 The proposals would also put the SFC at the fore as responsible for investigating and taking enforcement actions against disclosure failures. This greatly heightens accountability. It also correspondingly increases the regulator's workload.

7.4 The HKBA welcomes the proposals, but urges both the Government and the SFC to ensure that the regulator has proper resources, internal processes, and liaison with the SEHK to discharge its responsibilities.

The Hong Kong Bar Association
27th August 2010

香港女律師協會
HONG KONG FEDERATION OF WOMEN LAWYERS

Financial Services Branch
Financial Services and the Treasury Bureau
Government to the Hong Kong SAR
Attn: Ms. Jane Lee, Secretary for Financial Services
and the Treasury

June 28, 2010

Dear Sirs,

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

On behalf of the Hong Kong Federation of Women Lawyers, I attach our comments on the above mentioned Consultation Paper for your reference.

Thank you for your attention and please do not hesitate to contact us if we can be of further assistance.

Yours faithfully,

Anne Chen
President
Hong Kong Federation of Women Lawyers
Tel: 2537 8939
Fax: 2537 8206
Email: annechen.fida@gmail.com

c.c. Ms. Benita Yu, Vice-President
Ms. Elizabeth Mo, Vice-President
Ms. Angela Ho, Past President
Ms. Julianne Doe, Council member

香港女律師協會
HONG KONG FEDERATION OF WOMEN LAWYERS

Comments on the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations – March 2010
(the "Consultation Paper")

We refer to the Consultation Paper issued by the Financial Services and the Treasury Bureau.

As an overall comment, we do not agree with the proposal to codify the obligations of a listed issuer to disclose price sensitive information, as the concept of price sensitive information is difficult to define in the context of disclosure, and there are already sufficient provisions in the Securities and Futures Ordinance, other statutes and common law which deal with misstatements and omissions in relation to information disclosed by listed issuers. If the proposal were nevertheless to proceed, set out below are our comments (subject to our position above).

Questions	FIDA's comments
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?	**Question 1** (a) Agreed, provided that the listed issuer and practitioners would be given the ability to consult the SFC on a continuous basis as to what would constitute "relevant information" for disclosure purposes in particular circumstances, given that the gravity of the consequences of a mis-interpretation of the term (being an offence of the law). This would preserve the current position under which The Stock Exchange of Hong Kong Limited (the "**HKSE**") provides guidance and allows consultation on what constitutes information falling under rule 13.09(1) of the Listing Rules.

(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?	(b)The expression "as soon as practicable" should be amended to "as soon as reasonably practicable" to allow the issuer a reasonable amount of time to provide the necessary disclosures, and to be in line with the current approach of the HKSE. We do not agree that the issuer should be regarded to have the knowledge of any officer given the wide meaning this has under the Securities and Futures Ordinance (as the term includes a director, manager or secretary of, or any other person involved in the management of, the issuer). In practice, managers at the operating level and the company secretary may not be part of senior management, or decision making, of a listed company. We suggest that this should be limited to the senior management who is involved in executive decision making, such as the chief executive office, chief financial officer, the chief administrative office and the chief operation offer.
(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?	(c) Agreed.
Question 2 (a) Do you agree to the provision of the four proposed safe harbours?	**Question 2** (a) We agree with Safe Harbours A and B. We welcome Safe Harbour C, but its scope should be clarified to extend to commercially sensitive information contained in agreements or terms of business, in addition to proprietary information or intellectual property rights. Furthermore, information which if disclosed may prejudice the issuer in

	arbitration or litigation proceedings or otherwise subject to legal privilege should be covered in this safe harbour. As for Safe Harbour D, while we agree in principle that there will public policy reasons for not disclosing certain price sensitive information, however, this should not be merely limited to the provision of liquidity support by the Government or central bank. On the other hand, there could be situations where market transparency is more important such that shareholders of a certain bank should be informed of material liquidity issues for a bank. The question of whether this should be disclosed should be assessed on a case by case basis based on considerations of public policy. The UK Disclosure and Transparency Rules (DTRs) in fact provide that this safe harbour is applicable only if the delay would not be likely to mislead the public. Moreover, the UK Listing Authority (UKLA) has stated that keeping the market properly informed is the prime consideration and that bad news and the steps taken to mitigate it should be treated as two separate events. We understand that the UKLA considers that the purpose of the guidance in the DTRs is to make it clear that issuers cannot simply rely on the fact that negotiations are under way to address financial difficulties to justify not disclosing those underlying financial difficulties to the public. These points should be reflected in Safe Harbour D.
(b) Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?	(b) Agreed.
(c) Do you think that the legislation should provide for additional safe harbours? If so, what are these additional safe harbours?	(c) No comment.
(d) Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?	(d) Agreed.
Question 3	**Question 3**

(a) Do you agree to extend the jurisdiction of the MMT to handle breaches of the statutory disclosure requirements?	(a) Agreed, especially the proposal that a breach should only be subject to civil sanctions. However, a breach by a director should only arise out of an intentional or reckless act of omission on the part of any individual director or officer. Mere negligence should not result in an offence relating to this being committed, especially given the fact that the concept of price sensitive information is not necessarily a black and white one.
(b) Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?	(b) We query whether the listed corporation (as opposed to its directors) should be subject to a monetary fine as this would be further prejudicial to the interests of the shareholders of the listed issuer, who have already suffered from a breach of disclosure obligations by the listed issuer. In any event, the fine of up to HK$8 million is too high, especially for small to medium cap issuers. Please reconsider whether this should be the subject to a scale relating to the market capitalisation of the issuer. We refer to our comment on the term "officer" above, which would also apply in the context of persons who may be sanctioned.
(c) Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?	(c) Agreed.
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 4** We believe that it is paramount for listed issuers and practitioners to be able to consult the SFC continuously under the new regime and that this should not be limited to a 12-month period. Under the current regime, listed issuers benefit significantly from the ability to consult the HKSE in relation to the obligation to

	disclose price sensitive information. Given that any codification of the requirements carries far more serious legal consequences for any breach of the requirements, it would be unduly cumbersome and grossly unfair for listed issuers if they would be left on their own to determine whether and how such disclosure obligations could be fulfilled without having the opportunity to seek the views and guidance of the SFC. Currently the market can consult and seek formal rulings from the SFC on matters under the Takeover Code. Such consultation should be extended to the SFC Guidelines on Disclosure of Inside Information.
	Miscellaneous Paragraph 2.22 of the Consultation Paper states that the 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." It may at times be difficult to ascertain whether a rumour actually results from a leak, in which case the listed issuer would be placed in a difficult position as to whether it is expected to make an announcement. This requirement should be clarified such that the announcement obligation would only arise if there is objective evidence that there has been a leak by the issuer itself.

HKGCC

Hong Kong General Chamber of Commerce
香港總商會1861

香港總商會
香港金鐘道95號統一中心22樓
Hong Kong General Chamber of Commerce
22/F United Centre,
95 Queensway, Hong Kong
Tel (852) 2529 9229
Fax (852) 2527 9843
email: chamber@chamber.org.hk
www.chamber.org.hk

Helping Business since 1861

18 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I, Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs,

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

The Hong Kong General Chamber of Commerce is pleased to offer its considered opinion on the proposed statutory codification of certain requirements to disclose price sensitive information by listed companies.

While the Chamber supports the cultivation of a continuous disclosure culture among listed corporations and, in principle, has no objection to the proposed statutory codification, there are a number of issues in relation to which we would like to provide comments, as follows.

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?*

Yes.

Question 1(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 or performance of his duties?*

No. In relation to the second part of this question, the most important objective is to ensure that the inside information is appropriately escalated within a corporation in a timely manner, so that the corporation can make the information available to the public. This is borne out by paragraph 44 of the SFC *Consultation Paper on the Draft Guidelines on Disclosure of Inside Information* (issued by the SFC in March 2010) which states that "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".

Additionally, we note that the SFC draft guidelines also recognise that *external* consultation with e.g. lawyers may also need to take place - see para 2). In other words the phrase 'as soon as practicable'- which the SFC says means 'immediately' - in s101B(1) needs to be qualified.

A more fundamental problem is the proposal with s101B(1), which would make a Company's liability absolute unlike 'officers' who would only be liable if they had acted intentionally, recklessly or negligently (see s.101G(2)). In other words, the proposal takes no account of the critical fact that decisions whether to disclose (including the assessment of whether information is likely to be price-sensitive or not) are often marginal, subjective and involve fine judgment. (The SFC draft guidelines themselves recognise this - see for example para 23). Absolute liability is not appropriate for matters of this kind, and decisions not to disclose which are made in good faith and on reasonable grounds should be protected from liability. (Again, the SFC guidelines recognise implicitly the need to defer to the company's judgment - see para 10).

We suggest that the best way to deal with both of these concerns - the timing concern and the need to accommodate reasonable, good faith decisions - is through the creation of an additional safe harbour, which is dealt with in our answer to Question 2(c). A listed corporation would not be required to disclose if it has followed proper internal processes to ensure that decisions whether to disclose information are made by one or more directors as soon as reasonably practicable, and such director or directors have decided in good faith and on reasonable grounds that the information is not inside information.

***Question 1(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?*

Yes. However, in relation to the proposed s.101C, we have two comments:

1. It would be preferable for s.101C(1) to provide that disclosure must initially be made by means of an electronic publication system such as envisaged under s.101C(2), and thereafter, should the listed corporation so choose, by any alternative means. This would have the advantages of making such disclosures uniform across the market and providing a single source of information for ease of investors' reference. It would also follow the practice of the UK. If this approach were taken, the SFO would also have to provide for what action should be taken in the case that disclosure by means of an electronic publication system is not possible.

2. Should there not be an obligation for the listed corporation to make this information easily available on its website as well (as is the case in the UK)?

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

We agree with these safe harbours in themselves, subject to the following:

- The effect of s.101D(1)(b) would be that the benefit of a safe harbour would be lost, and the disclosure obligation triggered, even if the company was unaware that the information had leaked. This seems unreasonable, and does not seem to

be intended: the SFC draft guidelines state that the benefit of the safe harbour will be lost if the company 'becomes aware' that the information has leaked (see para 48, last sentence). S.101D(1)(b) should therefore be deleted.

- We suggest that a definition of 'trade secrets' be included.
- Since decisions whether to disclose are often marginal, subjective, and involve fine judgment, the absolute liability on the part of the company under s.101B(1) (in contrast to 'officers' under s.101G(2)) is inappropriate. We therefore recommend the inclusion of an additional safe harbour (see response to Question 2(c) under) to the effect that a listed corporation would not be required to disclose if it has followed proper internal processes to ensure that decisions whether to disclose information are made by one or more directors as soon as reasonably practicable, and such director or directors have decided in good faith and on reasonable grounds that the information is not inside information.

***Question 2(b)** – Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?*

Yes. The current proposal is that the SFC will be empowered to grant such waivers only when the disclosure of inside information "would mean a contravention against a court order or legislation in other jurisdictions" (s.101E and paragraph 2.12). However, it is conceivable that other situations might arise in which the obligation to disclose inside information should be waived on a one-off basis (in circumstances in which s.101F could not be relied upon). This would allow the SFC to respond to rapidly developing situations in which the requirements of s.101B should be waived in relation to a particular set of circumstances faced by a particular corporation - such as in the hours before the run on Northern Rock in the United Kingdom, in response to which the rule in DTR2.5.5A(R) had to be introduced.

The Chamber therefore considers that it would be beneficial to provide that the SFC may, in addition, grant specific one-off waivers to the requirements of s.101B:

1. on the application of a listed corporation and subject to such conditions as the SFC may choose to impose (as currently provided for in s.101E); and

2. subject to the public interest test (as currently imposed under s.101F).

***Question 2(c)** – Do you think that the legislation should provide for additional safe harbours? If so, what are these additional safe harbours?*

Yes. The Chamber considers that further consideration should be given to the appropriateness of including additional safe harbours along the lines of the two additional safe harbours in Australia and New Zealand: (1) where the information comprises matters of supposition or is insufficiently definite to warrant disclosure; and (2) where the information is generated for the internal management purposes of the entity. Both Australia and New Zealand also include a "reasonableness test" as one of the tests for disclosure, whereby information does not need to be disclosed if "[a] reasonable person would not expect the information to be disclosed"; the relevant guidance note states that "[a] reasonable person would not expect information to be disclosed if the result would be unreasonably prejudicial to the entity".

Question 2(d) *- Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?*

Yes.

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

Yes.

Question 3(b) *- Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?*

Yes. However, given the difficulty in many cases in making disclosure decisions (see answer to Question 1(b) above), and the fact that breach of a cease and desist order is a criminal offence, the power to issue such an order should only be available in cases of deliberate and persistent breach.

Question 3(c) *- Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?*

No. We believe that an incremental approach should be taken to the introduction of the new legislation, given the significance of the changes that would be introduced. The initial priority should to allow listed issuers to time to understand and gain experience of working with the new rules, so that they can make any necessary changes to their internal processes, and achieve the primary objective of compliance. We are also concerned about the resource implications for the MMT in providing for direct access, not just for the statutory disclosure requirements, but also for the existing market abuse provisions. We suggested that this issue be re-visited at a later stage in the light of experience of the new 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?*

Yes, but listed companies will need this guidance on an ongoing basis, not just 12 months, given the multiplicity of different disclosure situations.

Question 5 *- Do you think the administration and enforcement arrangements proposed by the SFC and SEHK in paragraphs 3.8 – 3.9 are appropriate?*

No- see below.

Do you have any comments on the respective roles of the SFC and SEHK to further enhance clarity?

Yes. The Consultation Paper states that HKEx should remain as the 'frontline regulator' and as the 'point of contact at the frontline' (para 3.5). We agree. Consistent with this approach, HKEx's existing role of monitoring unusual or unexpected price movements and stock transactions should be preserved, and HKEx given the power to refer to the SFC cases which may merit further investigation. From the point of view of public

resources, this would be a more effective and efficient system than allowing both the SFC and HKEx to perform this initial monitoring role. It would also be consistent with the incremental approach we recommend.

Other comments

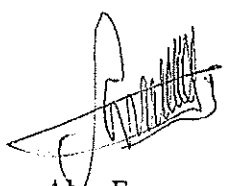
1. The reference to 'officers' should be replaced by 'directors' throughout. This is because:
   - under section 101B(1) it is not appropriate for the disclosure obligation to be triggered by the possession of an 'officer' of the information, since the matter needs to be escalated to a director and the decision made at that level. The word 'officer' is defined in the SFO very widely and includes managers at any level.
   - it is not appropriate and as far as we know unprecedented, for managers (as opposed to directors) to be subject to individual liability for the companies' non-disclosure (under section 101G(2)). Only directors should be subject to this risk, as in the UK.

2. Section 101G(1) - the obligation to put in place 'proper' safeguards to ensure compliance with the 'main' disclosure obligation - is unnecessary, unduly intrusive, and should be deleted. The potential sanctions for non-compliance with the main obligation are a sufficient incentive to ensure proper safeguards are in place, and no such obligation to put in place safeguards is contained elsewhere in the SFO. Breach of the main obligation would also by definition involve breach of the secondary obligation, resulting in a 'double jeopardy' effect.

3. FSTB might consider whether it would be appropriate to include provisions for making a "holding announcement" as under DTR2.2.9(G)(2) of the UK disclosure regime. This would entail a brief announcement being made while the corporation gathered further detailed information in order to make a detailed announcement.

I hope you find our comments useful.

Yours faithfully



Alex Fong
CEO

Hong Kong Institute of
Certified Public Accountants
香港會計師公會

By email < psi_consultation@fstb.gov.hk > and by post

20 July 2010

Our Ref.: C/CFC, M71621

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F Tower 1 Admiralty Centres
18 Harcourt Road
Hong Kong

Dear Sirs,

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

--- Please find attached in the Appendix the views of the Hong Kong Institute of Certified Public Accountants ("the Institute") on the proposals contained in the above-referenced consultation paper.

We support, in principle, measures to encourage more timely disclosure of price sensitive information ("PSI"). We consider that the ready availability of information about very significant transactions and developments affecting specific listed companies, promulgated in an expeditious and even-handed way, is essential to maintaining the integrity and transparency of the Hong Kong market.

Since proposals for statutory codification or backing of certain elements of the listing rules were first put forward several years ago, difficulties have primarily revolved around the detailed implementation of the proposals. In the case of price sensitive information disclosures, there is a concern that decisions as to whether certain information would be likely to be seen by investors as price sensitive, in any given circumstances, may be quite subjective and judgmental in nature. While the current proposals have clearly sought to address some of the reservations expressed about previous proposals for statutory codification of the PSI framework, the Institute has a number of remaining concerns, which are explained in the attached responses to the questions raised in the consultation paper.

We note that very serious breaches of the requirement relating to information disclosure can already be dealt with under section 384 of the Securities and Future Ordinance ("SFO") (in relation to the provision of false or misleading information) and, in a recent case, section 214 of the SFO (in relation to, inter alia, non disclosure of information that members might reasonably expect). The penalties under these provisions may be severe.

Under the circumstances, we believe that a fairly cautious approach should be adopted in implementing a statutory PSI disclosure regime for the first time in Hong Kong. Once the market has become accustomed to the way in which the framework operates and the expectations of all interested parties, if considered desirable, further changes can be considered in future.

37th Floor, Wu Chung House,
213 Queen's Road East, Wanchai, Hong Kong
香港灣仔皇后大道東213號胡忠大廈三十七樓

Tel 電話 : (852) 2287 7228
Fax 傳真 : (852) 2865 6776
(852) 2865 6603

Web 網址 : www.hkicpa.org.hk
E-mail 電郵 : hkicpa@hkicpa.org.hk

Given that decisions regarding PSI can be quite subjective and potentially contentious, we would emphasise the need for more specific guidance to be issued and for the existence of effective ongoing channels of communication between listed companies and regulators.

Any remedial action taken by the regulators and the market misconduct tribunal ("MMT"), where breaches are alleged, should adopt the principle of proportionality. The aim should be to help companies and directors to understand their disclosure obligations and encourage them to comply, rather than seek to impose the most stringent penalties, which could ultimately act as a disincentive to suitable candidates to take up directorships. In this regard, we also suggest that there is scope for removing some of the harsher proposed penalties or reducing their severity.

The safe harbour provisions, which set out circumstances in which disclosure may be delayed or withheld, are a key part of the PSI framework and, in our view, they need to be extended. The proposed legislation should not target companies or directors who have considered a particular situation and have, in good faith, come to the conclusion that certain information is not price sensitive, even though subsequently, with the benefit of hindsight (which will be available to the MMT) that judgment may turn out to be incorrect. In this regard, we suggest that there should be a safe harbour, akin to the "business judgment rule", to accommodate such situations.

If you have any questions on our submission or wish to discuss it further, please contact me at the Institute on 2287 7084 or by email at < peter@hkicpa.org.hk >.

Yours faithfully,

Peter Tisman
Director, Specialist Practices

PMT/ML/ay
Encl.

c.c. The Securities and Futures Commission < cfdconsult@sfc.hk >

Appendix

Comments from Hong Kong Institute of CPAs in response to the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

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?

Given that the market already has some familiarity with the concept of "relevant information" under the insider dealing regime in the Securities and Futures Ordinance ("SFO"), adopting the definition of "relevant information" from the insider dealing regime to define price sensitive information ("PSI") under the PSI disclosure regime should, in principle, facilitate understanding of the scope of the latter.

However, we have some reservations about how this will work in practice. It is proposed to use the new term "inside information" for the PSI and the insider dealing regimes. The draft "Guidelines on the Disclosure of Inside Information" ("draft Guidelines") (Annex 2 of the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations ('the Paper")) quote past decisions of insider dealing tribunals in Hong Kong with regard to "relevant information". This would seem to suggest that future interpretations of "inside information" by insider dealing tribunals and, potentially, the court, in the context of insider dealing cases could have an immediate impact on the disclosure requirements under the PSI regime. This could create uncertainty.

It is important that listed corporations should have a clear understanding of their obligations under the law and, therefore, that reasonably detailed guidelines on what constitutes PSI under the statutory disclosure requirements should be developed. While the draft Guidelines are helpful so far as they go, they are also quite generic. We would suggest that the Securities and Futures Commission ("SFC") discuss them with listed company representatives and other market participants, and seek to address any concerns by the inclusion of more specific examples in the final version of the guidelines.

For example, paragraph 26 of the draft Guidelines makes the point that it is necessary to distinguish between information about the "day-to-day activities" of a corporation, on the one hand, and "significant events and matters which are likely to change a corporation's course or indicate that there has been a change in its course", on the other hand. However, this begs the question of what is regarded as "day-to-day". There are many transactions that may fall well short of changing a corporation's course, but it is not entirely clear whether they would be regarded as day-to-day activities. For example, a company may engage in hedging on a very regular basis and, due to market volatility, which is widely reported in the media, the value of the relevant hedges may vary significantly and potentially affect the profit or loss of the company. Should disclosures be made with each significant fluctuation? In another case, a company may anticipate mark-to-market losses but, because its general business picks up, the overall losses will not be great. Do circumstances such as these give rise to a disclosure obligation and, if so, at what point in time. The issue of timing is also covered in our response to question 1(b).

(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?

We suggest that a listed corporation should be obliged to disclose to the public as soon as reasonably practicable any "inside information" that has come to its knowledge. However, from the perspective of listed corporations, there may be practical difficulties in determining at what point of time inside information should be disclosed, so as to comply with the disclosure requirements, without pre-empting events or prejudicing the outcome of negotiations/proposals. There are other uncertainties about the appropriate timing, such as when to disclose (aside from the question of whether to disclose) significant changes arising from fair value accounting. We would emphasise again, therefore, the importance of having clear guidelines on the timing of disclosure, in addition to adequate and effective "safe harbour" provisions to cater for legitimate circumstances where disclosure of inside information may be delayed or withheld. In this regard, the existing draft Guidelines do not seem to go far enough in dealing with the concerns about timing.

Under the existing listing rules, it is the responsibility of directors to ensure timely disclosure of price sensitive information, and to take all reasonable measures to ensure that proper safeguards exist to prevent a corporation from breaching the listing rules. We have reservations about going beyond the existing listing rule standard and consider that defining the trigger point (i.e., inside information coming to the knowledge of a company) as a director or officer coming into possession of that information in the course of the performance of his duties, may exceed the current requirement. In particular, there is no precise definition of the term "officer". If it is the intention to use the existing definition of "officer" specified in Part 1 of Schedule 1 to the Securities and Futures Ordinance ("SFO") (as footnote 6 on page 8 of the Paper indicates) in our view, the scope would be too wide in the context of PSI disclosure. This would be wider, for example, than the equivalent provisions under the UK regime.

It is likely that an officer will have to report possible inside information to the directors, who would then decide whether or not to disclose such information. Officers other than directors would not generally be delegated the responsibility of determining whether or not information is disclosable and deciding on the issuing of press releases relating to PSI.

In view of the above, we suggest that the trigger for the PSI disclosure obligation to arise in a particular case be defined with reference to knowledge in the hands of a director, and that this should not be extended to officers.

Furthermore, we note that the indicative legislative provisions at Annex 1 of the Paper extend the definition of when inside information has come to the knowledge of a company to include the situation in which an officer "...ought reasonably to have, come into possession of the information..." This is, in part, an objective test and there is nothing in the draft Guidelines to indicate how it will be applied. The concept of "coming into possession of certain information" is not entirely self-explanatory and the proposed objective element will make it even less clear. While the aim of this provision may be, not unreasonably, to deal with the situation in which a director deliberately turns a blind eye to certain information, in practice the implications may be much wider. For example, is information received in an email, which a director may have overlooked, information that "has come into his possession" or information that "ought reasonably to have come into his possession"? The phrase "ought reasonably to have"

is so wide that it would include a situation where a director does not in fact know the relevant information. It seems inappropriate to require a corporation or director to disclose possible inside information in circumstances where that corporation or director is in practice not aware of that information. Dropping the objective test, would also be in line with the offence of insider dealing, which requires actual knowledge that information is inside information.

We would also suggest that there be a defence from liability for other directors, where a director who has come into possession of inside information has willfully failed to disclose the information to the board.

(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?

We agree.

Question 2

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

We agree, in principle, with the provision of the four proposed safe harbours, except that Safe Harbour B may not be sufficiently clear. We note that the wording at paragraph 2.10 of the Paper differs from the indicative legislation at Annex 1 (section 101D(c)(ii)) and, in referring to an "incomplete negotiation", the indicative legislation is clearer than paragraph 2.10 of the Paper, which refers to "impending negotiations". However, the term "incomplete proposal", which is in both places, is not a clear term in this context.

In addition, while there may be circumstances in which disclosing the information could prejudice the outcome of negotiations, a belief that the outcome could be prejudiced by disclosure should not, in our view, be a necessary condition for invoking this particular safe harbour. It is noted that under the existing Listing Rules (note 4 of the main board rule 13.09(1)), "the overriding principle is that information which is expected to be price-sensitive should be announced immediately if it is a subject of a decision". Under the UK Disclosure and Transparency Rules ("DTR") 2.5, a listed issuer may delay the public disclosure of inside information so as not to prejudice its legitimate interests and "legitimate interests", under DTR 2.5.3, may include "negotiations in course, or related elements, where the outcome or normal pattern of those negotiations would be likely to be affected by public disclosure". In similar situations under the statutory framework in Canada, we understand that no disclosure needs to be made unless a "decision" has been taken.

Given the above, we consider that there should not be a need to establish that disclosure may be prejudicial to an "incomplete proposal" or negotiation. Provided that confidentiality has been maintained and there has been no leak of information, in order to justify delaying or withholding disclosure, it should be enough to be able to say that, as a negotiation or proposal is at an incomplete stage only, it would be premature to disclose information, because the negotiation or proposal may come to nothing, or may be "affected" by public disclosure.

We also consider that the four safe harbours are not sufficient by themselves. We suggest some additional safe harbours in our response to question 2 (c) below.

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

We agree.

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

Yes. We believe that the primary target of the legislation should be those companies/directors who have (a) considered a situation and decided not to disclose information, and that decision is totally unreasonable, or (b) shown reckless indifference as to whether a particular set of circumstances could be regarded as price sensitive. On the other hand, the legislation should not target companies/ directors who have considered the situation and, in good faith, come to the conclusion that certain information is not price sensitive, even though subsequently, with the benefit of hindsight, that judgment may turn out to be incorrect. As the decision on whether a piece of information should be regarded as price sensitive at any given time often requires the exercise of judgment, and may involve a significant element of subjectivity, it would put directors in an invidious position if a judgment made honestly, reasonably and in good faith could render them liable under the proposed statutory disclosure regime.

Therefore, we would suggest that an additional safe harbour be provided, along the lines of the "business judgment rule". This would apply in circumstances where a company has proper PSI procedures in place and, having taken reasonable steps to ensure that the issue is properly considered, the directors have exercised their judgment, with reasonable prudence and in good faith, and have concluded that a disclosure is not required at a particular time.

Further, we understand that, under the Australian Securities Exchange Listing Rules (Rule 3.1A.3), safe harbours are provided for "information that comprises matters of supposition or is insufficiently definite to warrant disclosure" and "information generated for the internal management purposes of the company". We suggest that consideration also be given to including similar provisions as additional safe harbours under the Hong Kong PSI disclosure regime.

We note from paragraph 2.30 of the Paper and section 101G of the indicative draft legislative provisions that, where a listed company is found to be in breach of the PSI requirements, and that breach is a result of any intentional, reckless or negligent act or omission on the part of any individual director or officer, or that director or officer has not taken all reasonable measures to prevent the company from breaching the requirements, that director or officer would also be regarded as having breached the PSI requirements. Further clarification and guidance is needed in relation to what would satisfy the test of "all reasonable measures" since, in terms of an individual's responsibility and liability, a good deal may hang on this.

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

We agree.

Question 3

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

While we do not object to the principle of extending the jurisdiction of the MMT to handle breaches of the statutory disclosure regime, we would suggest that consideration also be given to introducing a settlement arrangement, where this may be more appropriate than referring a case to the MMT. Given that the Paper proposes that persons suffering pecuniary loss as a result of others breaching the PSI requirements will be able to rely on the MMT findings to seek compensation in civil actions, and bearing in mind also that persons appearing before the MMT do not have the right of silence, there would seem to be a case for introducing a settlement procedure for less severe or less clear cut cases. This procedure could include provision for remedying the alleged non-disclosure, where this is appropriate.

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

We understand that the relevant authorities in the UK and Australia cannot issue disqualification or cold shoulder orders for breaches of the equivalent requirements in those jurisdictions. We would suggest, therefore, that the need to include these possible remedies in the initial stages of the Hong Kong statutory PSI regime be reviewed. If they are retained, the proposed maximum durations that may be imposed in respect of these penalties should be reconsidered, with a view to reducing them.

We would also caution against any overuse of "cease and desist" orders, which are defined as orders not to breach the statutory disclosure requirement again. Given that difficult assessments are often involved in disclosure decisions, and that breach of a cease and desist order is a criminal offence, it would seem harsh for a company or a director to be issued with such an order upon a first infringement. We would suggest, therefore, that cease and desist orders be imposed only following a series of intentional or reckless breaches, which would merit potentially more serious consequences.

Where the remedies are applied to directors, the more severe remedies should be imposed only on directors who are directly involved in a particular breach or who knowingly failed to take action to prevent it (in this regard, see also our response to question 2(c) above). In addition, as stated at paragraph 2.33 of the Paper, the MMT should be required to comply with the principle of proportionality, and it should be made clear how this will be monitored and given effect. Our comments above in relation to, e.g., the timing of disclosure, safe harbours, and the need for additional guidance, should also be taken on board in the context of deciding on the appropriate range of remedies.

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

No, we have reservations about the proposals to grant the SFC direct access to MMT to institute proceedings on breaches of the statutory disclosure requirements, without having first to submit the case to the Financial Secretary for his decision to do so.

While we understand the aim of expediting the process of enforcing the statutory disclosure requirements, we consider that the existing safeguards and system of checks and balances should not be compromised in order to achieve this.

As noted in our response to question 3(a) above, persons alleged to have breached the PSI requirements will not have the right of silence before the MMT and, under the proposals in the Paper, the MMT's findings may also be relied upon in civil claims for compensation by persons who have suffered loss as a result of the breach. As such, the existing arrangements for persons accused of breaching the PSI requirements provide them with a reasonable additional safeguard, i.e., an independent assessment of the case/report from the SFC by the Department of Justice to assist the Financial Secretary to decide whether proceedings should be instituted before the MMT. If this process is currently resulting in delays, then other practical steps, which do not involve removing a layer of checks and balances, should be considered to help speed up the process.

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?

We agree, provided that informal consultation can be utilised by listed companies on a "no names" basis. However, we would suggest that no specific time limit be placed on this consultation channel, given that there will continue to be new listings and companies new to the market, whose knowledge and experience of the operation of the PSI regime is limited.

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?

We believe there may be some confusion and uncertainty with regard to the arrangements, depending upon how the interface between the SFC and SEHK actually works in practice. Where, for example, there are any technical issues with the Electronic Publication System, listed companies will presumably need to take these up with SEHK, whereas if there are any content issues, they will need to address these to the SFC.

The respective roles of the SFC and SEHK need to be made very clear to minimise the risk of confusion. As it may not be entirely clear cut at the outset how the division of responsibilities will operate, we would suggest that some allowance be given and a

degree of flexibility applied in the initial period after implementation of these arrangements.

The risk of confusion would be less if the SEHK, as the front line regulator, were to continue its monitoring role, and to refer possible breaches of the PSI disclosure obligation meriting further investigation to the SFC for follow-up action.

If, in future, there are any significant differences between the listing rules relating to disclosure of PSI and the statutory requirements, this will create two overlapping but different regimes, administered by two separate regulators, which would exacerbate any uncertainty. It is important, therefore, that the listing rule and statutory obligations relating to PSI disclosure will dovetail with one another.

CHARTERED
SECRETARIES
特許秘書

April W. Y. Chan
President

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1, Admiralty Centre
18 Harcourt Road
Hong Kong

25 June 2010

Dear Sirs,

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

We are pleased to enclose our submission in response to the above consultation paper.

We have no objection to your disclosing our submission to the public.

Thank you for your attention.

Yours faithfully,

April W. Y. Chan FCIS FCS(PE)
President

Enclosure

The Hong Kong Institute of Chartered Secretaries
Submission on the Consultation Paper on the Proposed Statutory Codification of Certain Requirements
to Disclose Price Sensitive Information by Listed Corporations

List of Questions for Consultation		Comments
Chapter 2	Proposed Legislative Framework	
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?	While acknowledging that this is the approach adopted by EU, some members pointed out that some jurisdiction such as Canada has yet to follow the EU model. Some members also suggested that 'inside information' should be restricted to information that a director or officer has come into possession in the course of the performance of his or her duties. On balance, we agree with the proposal, subject to a listed corporation being able to rely on the business judgment rule (see answer to Question 3(b) below).
Question (1)(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?	We 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.
		Some members suggested that we should follow the UK approach, i.e., only directors should be individually liable and only then if they have acted 'knowingly'. Others are of the view that it should be confined to those responsible for the governance of the listed corporation such as directors and secretaries. On balance, we agree that a listed corporation 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, subject to deleting from the proposed definition of an officer the phrase 'or any other person involved in the management of'.
Question (1)(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	We agree.

	by the public to the information disclosed?	
Question (2)(a)	Do you agree to the provision of the four proposed safe harbours?	Safe Harbour A A listed corporation should still be able to enjoy this safe harbour even though confidentiality of the information is breached, for example through disclosure by a third party. Some members suggested that the proposed safe harbour should cover foreign law prohibition. Safe Harbour B SEHK's current rules seem to provide that no disclosure is needed until 'it is the subject of a decision by the directors or senior management of the issuer'.[1] By making reference to a decision by the directors or senior management, SEHK's rules seem cleaner and easier to understand than the 'prejudice' test as proposed. The Australian Securities Exchange Listing Rule 3.1A.3 exempts disclosure when 'the information concerns an incomplete proposal or negotiation'.[2] It would be helpful if there could be clarifications on how this proposed safe harbour works. Our preference is to follow the SEHK and Australian Securities Exchange rules.
Question (2)(b)	Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?	We agree. In fact, the SFC should be empowered to grant waivers to cover other, and wider, circumstances and attach conditions thereto (instead of restricting to disclosure prohibition arising from court orders or legislation of another jurisdiction).

[1] Hong Kong Exchanges and Clearing Limited, *Guide on disclosure of price-sensitive information*, January 2002, para 15, p 7.
[2] Australian Securities Exchange Listing Rules, Chapter 3 Continuous Disclosure, Rule 3.1A.3. See also Australian Securities Exchange Guidance Note 8 – Continuous Disclosure: Listing Rule 3.1.

Question (2)(c)	Do you think that the legislation should provide for additional safe harbours? If so, what are these additional safe harbours?	Yes and as follows: <u>Additional Safe Harbours</u> (i) To cover information provided to or by the Government of the Hong Kong Special Administrative Region (or any department or authority within Government). (ii) It should be a safe harbour that the individual concerned considered on reasonable grounds that a particular piece of information did not constitute 'inside information'. That is to say, any individual director or officer who has given proper consideration to a decision whether to release 'inside information' and, on reasonable grounds, came to the decision not to disclose that information, should not be found to have breached the statutory disclosure requirements. (iii) Where the information is of a defamatory nature the disclosure of which may subject the listed corporation to claims by the concerned parties for defamation (with potential liability to the listed corporation). (iv) Where the information is generated only for the listed corporation's internal management purposes. (v) During the time when trading of the listed corporation's securities are suspended by SEHK.
Question (2)(d)	Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?	We agree.
Question (3)(a)	Do you agree to extend the jurisdiction of the MMT to handle breaches of the statutory disclosure requirements?	We agree.
Question (3)(b)	Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35	We note that breach of a 'cease and desist' order would be a criminal offence under the SFO. Given the difficulty of making disclosure decisions, the legislation should provide

	and 2.36?	that this power is only exercisable if the breach is intentional and where the same company or director thereof has committed previous intentional infringements within the last one or two years. Given the severity of the remedies against the listed corporation and its directors and officers, consideration should be given to allow directors and officers the benefits of the 'business judgment rule'. This will alleviate some of the concerns expressed in paragraph 2.27 of the consultation paper about directors/officers choosing to 'play it safe' and make disclosure discriminately. Perhaps at paragraph 10 of the Draft SFC Guidelines on Disclosure of Inside Information, the following could be added: '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, and accordingly, *the SFC will not review a listed corporation's decision on whether a particular piece of information is inside information if the decision is made in good faith and the officer making the decision: (1) is not interested in the subject of his judgment; (2) is informed with respect to the subject of the judgment to the extent the officer reasonably believes to be appropriate under the circumstances; (3) rationally believes that the judgment is in the best interests of the listed corporation.*'[3] The regulatory fine of up to HK$8 million on the listed corporation and the director seems excessive for civil liability.
Question (3)(c)	Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?	We prefer the current system under section 252(2) of the SFO, i.e., it is the Financial Secretary who institutes proceedings before the MMT. The separation of the investigation and prosecution functions seems essential to the rule of law. To allow the same institution to investigate a crime and then prosecute it removes a layer of review from the process. We are concerned that granting the SFC direct access to the

[3] American Law Institute, Principles of Corporate Governance, 4.01(c).

		MMT puts prosecution in the hands of the investigator who has already decided on the guilt of the accused.
Chapter 3	Regulatory Structure and Enforcement	
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?	We agree that the SFC should provide informal consultation for listed corporations with regard to the statutory disclosure requirements, but this service should not be restricted to a 12-month period and should continue if it proves appropriate and helpful to do so.
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?	We repeat our comments, as stated in our December 2003 response to the Consultation Paper on Proposals to Enhance the Regulation of Listing, that in the final analysis, listed corporations are not concerned with the identity of the regulator: whether it is the SFC or SEHK matters little to them. However, of paramount importance to listed corporations is impartial, pragmatic and efficient regulation devoid of confusion and capable of being complied with by them. To this end, it would be helpful if there could be clarifications on issues such as how the SFC and SEHK propose to conduct investigations on a particular set of facts with allegations of breaches of the statutory PSI disclosure requirements and other disclosure requirements under the Listing Rules, i.e., concurrent or staged investigation. We welcome and support the initiative set out in paragraph 3.10 of the consultation paper for the SFC and SEHK to consider the need for amending the MOU to minimise possible duplication of regulatory efforts. In this regard, we believe it is a sensible approach for SEHK to continue its current role of monitoring unusual movements in share prices and volumes, and to refer cases warranting investigation to the SFC, rather than having both regulators performing the same monitoring function.

香港董事學會
The Hong Kong Institute of Directors

28 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F Tower I
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs

Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

The Hong Kong Institute of Directors ("HKIoD") is pleased to forward our response to the captioned consultation paper.

HKIoD is Hong Kong's premier body representing professional directors working together to promote good corporate governance. We are committed to contributing towards the formulation of public policies that are conducive to the advancement of Hong Kong's international status.

In developing the response, we have consulted our members and organised focused discussions.

Should you require further information regarding our response, please do not hesitate to contact me on tel no. 2889 9986.

With best regards

Yours sincerely
The Hong Kong Institute of Directors

Dr Carlye Tsui
Chief Executive Officer

Enc

cc: Dr Kelvin Wong, Chairman of Council, HKIoD
Mr Henry Lai, Council Member, HKIoD & Chairman, Corporate Governance Committee

香港董事學會
The Hong Kong Institute of Directors

Issued on: 28 June 2010

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

In relation to the Consultation Paper, The Hong Kong Institute of Directors ("HKIoD") is pleased to present its views and comments.

Capitalized terms used herein but are not otherwise defined shall have the meanings ascribed to them in the Consultation Paper.

General comments

We recognize that the current proposal is one rational means to encourage "the cultivation of a continuous disclosure culture among listed corporations". The HKIoD supports efforts to improve and promote compliance among listed corporations so that we can maintain a capital market that prides itself on transparency and quality. We support the cultivation of a continuous disclosure regime that will enable all investors to make informed decisions.

The proposed rule requires a duty to disclose once the company has come to possession of "inside information", subject to the safe harbours (or waivers, if granted). Under the proposed rule, PSI that requires timely disclosure takes on the existing definition of "relevant information" from the insider dealing regime under the SFO and will be termed "inside information".

It has always not been an easy task to assess what is or is not material, price-sensitive information. Some of our members have concerns about the approach taken in the current proposal. They believe the current proposal would create a tough task on directors of listed companies, adding to their liability exposure but does not give them a clear understanding of how to satisfy that statutory duty. They are concerned that, if they have at one time come to the conclusion that a piece of information need not be disclosed, how would that judgment call be subsequently measured for purpose of whether they have discharged the statutory duty under the current proposal. They believe that to extend statutory punishment on company and its "officers" (which definition includes directors) for an honest, good faith, even reasonable assessment made in this regard which unfortunately turns out to be incorrect does not make good law.

The obligation to disclose material, price-sensitive information about a listed company is already in the Listing Rules (i.e., Listing Rule 13.09). Failure to comply can result in disciplinary actions and suspension, even cancellation, of listing. The Listing Rule 13.09 scheme has been in operation for some years now. It does not appear to us that there has been large-scale abuse of this general obligation of disclosure, or that the current sanctions have not been effective in fostering compliance. There may be an argument to leave the

香港德輔道中 19 號環球大廈 1008 ● 1008 World-wide House, 19 Des Voeux Road Central, Hong Kong
電話 Tel: (852) 2889 9986 傳真 Fax: (852) 2889 9982 電郵 E-mail: executive@hkiod.com 網頁 Web-site: www.hkiod.com

general obligation to disclose material, price-sensitive information under the realm of the Listing Rules.

Nonetheless, the HKIoD is confident that listed company directors who have been following good disclosure practices under the Listing Rule and the SEHK Guide on disclosure of price-sensitive information (January 2002) would be in a better position to prepare themselves for compliance under a statutory regime. The HKIoD does not have an objection in principle to legislate a PSI disclosure regime if the concerns raised in this submission are addressed.

The HKIoD will be glad to provide further comments and assistance towards the implementation of a PSI disclosure regime suitable to the Hong Kong market. We are also planning to produce guidelines, technical notes and practice tools and to organize training for listed companies and their directors and other officers to help them prepare for compliance with the PSI disclosure regime finally adopted. Through these efforts, the HKIoD hopes to contribute towards a healthy disclosure culture among Hong Kong listed companies.

Response to questions for consultation

Subject to our general comments above, we state our responses to specific questions as set out in the Consultation Paper as follows:-

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?

HKIoD response:

- As to 1(a), we think the proposal to adopt the existing definition of "relevant information" from the insider dealing regime under the SFO to define PSI is a reasonable choice.

  However, from the perspective of trying to understand the nature of information that a company ought to disclose so that the market has good information about the company to assess its listed shares, the formulation in Listing Rule 13.09(1) is perhaps more useful and on point. Directors and officers who have to make disclosure

香港德輔道中 19 號環球大廈 1008 ● 1008 World-wide House, 19 Des Voeux Road Central, Hong Kong
電話 Tel: (852) 2889 9986 傳真 Fax: (852) 2889 9982 電郵 E-mail: executive@hkiod.com 網頁 Web-site: www.hkiod.com

decisions are familiar with this definition, which has been in place for some years. For this reason, we ask the Administration to consider the possibility of adopting the Listing Rule 13.09(1) formulation as the definition of PSI.

- As to 1(b):-

  - we support the cultivation of a continuous disclosure regime that will enable all investors to make informed decisions. The proposed rule requires a duty to disclose "as soon as practicable" once the company has come to possession of "inside information", subject to the safe harbours (or waivers, if granted). The difficulty when putting the proposal into practice lies in determining the proper timing of the disclosure (e.g., how soon is "as soon as practicable" in a particular situation), whether any one or more of the safe harbours should apply, and whether a waiver from disclosure should properly have been granted. If there is no clear and consistent guidance on these matters, directors (and officers) of listed companies will indeed be faced with a difficult task.

  - we are concerned that to deem a corporation to have knowledge of inside information if "an officer" has come into possession of that information in the course of the performance of his duties can amount to an extraordinary amount of pressure on many company employees in determining whether information that they come to know could amount to "inside information" requiring disclosure. According to the SFC's draft Guidelines on Disclosure of Inside Information, an "officer" is defined to include "a director, manager or secretary of, or any other person involved in the management of, the corporation". That definition seems too broad for purpose of imputing knowledge of "inside information" to the company.

- As to 1(c):-

  - we agree with the principle that the disclosure of "inside information" must be made in a manner that can provide for equal, timely and effective access by the public. We also agree that the "Electronic Publication System" or the HKEx-EPS is a good medium for purpose of satisfying the "equal, timely and effective access" requirement.

<u>Question 2</u>

(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?

香港德輔道中 19 號環球大廈 1008 ● 1008 World-wide House, 19 Des Voeux Road Central, Hong Kong
電話 Tel: (852) 2889 9986 傳真 Fax: (852) 2889 9982 電郵 E-mail: executive@hkiod.com 網頁 Web-site: www.hkiod.com

HKIoD response:

- As to 2(a):-

  - For Safe Harbour A, we think it is necessary to extend the exception to include court orders or law provisions of all relevant jurisdictions in which the issuer group conducts business or has presence, subject (as currently proposed) to the requirement that the information has been kept confidential.

  - For Safe Harbour B, as a minimum, the latitude and leeway now contemplated by Rule 13.09 (e.g., under Note 1, Note 2 and Note 7) and the SEHK Guide on disclosure of price-sensitive information (January 2002) to be replicated in full here.

  - For Safe Harbour C, it is not exactly clear what would constitute "trade secret" and what would not. There is no uniform definition on what is "trade secret", although the general perception is such relates to some technical know-how or secret formulae or recipes to certain manufacturing or production processes. Many businesses, however, rely on other forms of proprietary information to maintain their competitive advantage. In addition to customer lists (which the SFC draft guidelines mentioned), companies may well be establishing new distribution mechanisms or channels, or entering into new business collaborations or alliances in ways previously unknown to or thought impossible by competitors of the field. The fact of these new business arrangements arguably have to be disclosed, but what about the price and other terms underlying these arrangements? Such information can reasonably be said to be proprietary information important to the competitive strengths of the business. Does it fall under "trade secrets"? More consultation and guidance may be necessary.

  - For Safe Harbour D, we agree in principle.

- As to 2(b), the SFC power to grant waivers and to attach conditions where appropriate should not be limited only to the situations as currently stated in the Consultation Paper. The SFC should have sufficient flexibility and freedom to grant waivers to deal with situations that may arise. Market participants will be eager to know the factors and parameters that would determine whether a waiver is to be granted. In our view, such factors and parameters ought to reflect and respond to commercial and practical needs of listed companies. See also our response to 2(d).

- As to 2(c), if the SFC has broad power to grant waivers and impose conditions as appropriate, as we advocate in our response to 2(b), we do not think there is a need for additional safe harbours in the legislation at this time. When the PSI disclosure regime has come into operation for some time, we may be in a better position to re-visit this issue.

香港德輔道中 19 號環球大廈 1008 ● 1008 World-wide House, 19 Des Voeux Road Central, Hong Kong
電話 Tel: (852) 2889 9986 傳真 Fax: (852) 2889 9982 電郵 E-mail: executive@hkiod.com 網頁 Web-site: www.hkiod.com

- As to 2(d), we think it is appropriate for the SFC to have power to, after consulting the Financial Secretary (or another Principal Official such as the Secretary for Financial Affairs & the Treasury), prescribe further safe harbours in the form of rules under the SFO. Experience gained in granting or rejecting waivers and in prescribing conditions can be useful background when introducing new safe harbours that suit market needs.

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?

HKIoD response:

- As to 3(a), we agree. The MMT deals with insider dealing cases and the familiarity with the concept of "relevant information" for insider trading purposes should make it a suitable forum to adjudicate cases involving disclosure of "inside information" which, under the current proposal, is conceptually same and similar to "relevant information".

- As to 3(b), we agree, provided that the principle of "proportionality and reasonableness in relation to the breaching conduct" is adhered to when determining the amount of fines.

- As to 3(c), we agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements. Although we agree there may not be a need for the Financial Secretary to actually institute such proceedings (as in current practice), we think there is merit to retain a requirement for the SFC to consult the Financial Secretary (or another Principal Official such as the Secretary of Justice or the Secretary for Financial Affairs & the Treasury) before instituting proceedings.

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?

HKIoD response:

- Yes, we agree that the SFC should provide informal consultation. We think the initial period of 12 months is appropriate, but we ask the Administration and the SFC to re-visit the issue in due course and consider whether to extend the informal

香港德輔道中 19 號環球大廈 1008 ● 1008 World-wide House, 19 Des Voeux Road Central, Hong Kong
電話 Tel: (852) 2889 9986 傳真 Fax: (852) 2889 9982 電郵 E-mail: executive@hkiod.com 網頁 Web-site: www.hkiod.com

consultation for a longer time or even to make it permanent. Given that the current proposal would have the effect of requiring "officers" to determine what is "inside information", which can itself be a difficult judgment, there is conceivably a real and significant demand for consultation in this regard. We ask the Administration and the SFC to anticipate, in light of the approach taken by the current proposal, the scope and nature of the consultation inquiries and plan accordingly.

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?

HKIoD response:

- The arrangements involve noticeable overlap between the two regulators. Issuer companies have good reasons to worry how the actual enforcement efforts will be divided or coordinated between the two. For instance, would the decision to investigate or not investigate, or the enforcement actions taken or not taken, by one regulator affect or preclude the decisions or actions of the other? Further elaboration on these aspects would help the market understand the regulatory environment they are faced with. Subject to the above, we think the arrangements proposed in paragraphs 3.8 - 3.9 are generally appropriate.

Other comments

Scope of "officers"under the current proposal

In our response to Question 1(b), we note that the definition of "officers" seems too broad for purpose of imputing knowledge of "inside information" to the company.

We also note that in s.101G(1) of the indicative draft legislation, "[e]very 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". Again, "officer" here includes managers. Although some "managers" may be senior in ranks so as to having responsible charge for devising internal control safeguards and ensuring they are followed, we surmise the broad definition will catch many "managers" who do not have that authority. At most they can only be expected to follow internal procedures that have been properly put in place by the company.

Other disclosure matters that deserve more regulatory "teeth"?

As we consider the merits of the PSI disclosure regime as currently proposed, we invite the Administration and other stakeholders to also consider other areas of concern that may affect our market integrity.

香港德輔道中 19 號環球大廈 1008 ● 1008 World-wide House, 19 Des Voeux Road Central, Hong Kong
電話 Tel: (852) 2889 9986 傳真 Fax: (852) 2889 9982 電郵 E-mail: executive@hkiod.com 網頁 Web-site: www.hkiod.com

The current proposal is not very detailed on what to do once "inside information" has been selectively disclosed, and what is the consequence if an issuer company or its "officers" selectively disclosed "inside information".

If we were to have rules that will have the effect of promoting full and fair disclosure of information to the market, another obvious object of such rules would be to timely redress information asymmetry and to deter the practice of selective disclosure in the first place.

Information asymmetry results from selective disclosure of non-public information to some recipients but not the whole market, and this is clearly detrimental to market integrity. Sometimes, the disclosure is "unintentional". Other times, there may be a deliberate attempt by some corporate insiders to benefit their friends and families. Worse, the controlling minds of the company collectively might be tempted to use corporate inside information as commodity to gain favour from select market participants or investors. In the end, the adverse results are the same: a privileged few gain an informational edge and wield the ability to use that edge to profit. This runs against the principle of a level playing field and seriously erodes investors' confidence in the integrity of the market.

Selective disclosure of material, price-sensitive information can be seen as a form of "tipping" in the context of insider trading. Those who trade on the tip from selective disclosure and benefit therefrom can be dealt with under the insider trading regime. Those who provide that tip through selective disclosure, unless they themselves are engaging in insider trading, are not covered directly by current laws for those acts of selective disclosure that cause much harm and wrong on the market.

The regulatory area that also deserves more "teeth" might be on statutory provisions to deter instances of selective disclosure and if such has happened, to require timely efforts to redress the information asymmetry that results. Selective disclosure, once it happened, is an objective fact that can be more readily ascertained. Punishment on the issuer company and its personnel (appropriately defined in scope) for acts of selective disclosure and for failure to timely redress the information asymmetry that results is reasonable, in that there is a clear connection between the wrongful act and the punishment.

In giving statutory backing to disclosure matters, we ask the Administration to also consider legislation on selective disclosure.

-END-

香港德輔道中 19 號環球大廈 1008 ● 1008 World-wide House, 19 Des Voeux Road Central, Hong Kong
電話 Tel: (852) 2889 9986 傳真 Fax: (852) 2889 9982 電郵 E-mail: executive@hkiod.com 網頁 Web-site: www.hkiod.com

寄件人:	HKIRA [info@hkira.com]	■新增聯絡人
日期:	2010 年 6 月 28 日 16:40	■新增群組
收件人:	<psi_consultation@fstb.gov.hk>	■顯示所有標題
副本抄送:		■列印外觀
標題:	Comments on the PSI consultation paper from HKIRA	■Quick Print ■加到白名單/黑名單 ■報告錯誤分類

Dear Sirs,

This letter is submitted on behalf of the Hong Kong Investor Relations Association ("HKIRA"). HKIRA has organized the workshop for investor relations professionals to promote their understanding of the implications arising from the "Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations" and the "Consultation Paper on the Draft Guidelines on Disclosure of Inside Information" issued by Financial Services and the Treasury Bureau ("FSTB") and the Securities and Futures Commission ("SFC") respectively. The encouraging response demonstrates the concerns from the IR industry over the changes that might be brought forth in the regulatory environment. We would like to take this opportunity to thank Mr. Brian Ho of SFC and Mr. Cheng Yang Chee, JP of FSTB have given a presentation in our workshop.

With an aim to facilitating the communication of the IR practitioners' views to the regulatory bodies, HKIRA has collected the comments from the IR professionals on the current consultation by SFC based on the questionnaire set out in the consultation paper. The questionnaire consists of five questions and below is a summary of the feedback and comments we have received from the industry.

Question 1

- Majority of the respondents agree with the proposal to adopt the existing definition of "relevant information" from the insider dealing regime under the SFO to define PSI.
- However, the respondents have mixed views over the proposal 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. As a general principle, the IR practitioners agree that listed corporation should be obliged to disclose to the public price sensitive information in timely basis. But clearer definition of PSI and safe harbours are required in order to preserve confidential information such that normal operations will not be affected. In addition, clearer guidance on the timing of disclosure is also needed.

- In general, most respondents agree with this 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. In addition to the Electronic Publication System of SEHK, it is suggested that corporate website should also be considered as a proper disclosure channel.

Question 2

- Majority of the respondents agree to the current provision of the four proposed safe harbours.
- And all of the respondents agree with the empowerment of SFC in granting waivers, and to attach conditions thereto; while most of them agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO.
- On the other hand, additional safe harbours are requested to be provided by the legislation. Suggestions include information already disclosed on corporate website, and advisory on disclosure by legal counsel.

Question 3

- While the respondents have mixed views on the proposal to extend the jurisdiction of the MMT to handle breaches of the statutory disclosure requirements, they unanimously disagree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36. All of them also disagree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements.

Question 4

- In view of the regulatory changes that might brought forth from the proposal and the execution details are yet to define in clearer manner, all of the respondents 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

- In regard to the administration and enforcement arrangements proposed by the SFC and SEHK in paragraphs 3.8 – 3.9, the IR practitioners requested the roles of SFC and SEHK should be more clearly defined to avoid overlapping of the enforcement authority from various regulators.
- Most respondents have concerns over the feasibility of the proposed statutory codification as it involves a high degree of judgement to be made by the listed companies as to the timing, content and magnitude of the disclosure.
- One practical issue that a respondent raised out is about quantifying the magnitude of the PSI, which sometimes may take days or up to weeks depending on the complexity of the event. Disclosing PSI without quantifying the magnitude to a reasonable extent may arouse unnecessary confusion to the market. More practical guidance is necessary to help listed companies in making better judgement between timeliness and effectiveness of PSI disclosure.
- Several raised their concerns over the proposed HK$8 million fine, which is considered excessive for civil liabilities charged on listed companies directors, in particular for any unintentional non-compliance. In addition, the arrangement of MMT for the settlement of investors' loss claim is expected to create heavy burden to listed companies as well since investors' loss could be resulted from various factors.
- A respondent suggested more concrete corporate governance requirements should be in place such as qualified accountants, mandatory directors' training, requirement over the experience of compliance officer, in order to achieve effective implementation of the current SFC and FTSB proposals.

Other Comments

- One respondent commented on the difficulty in executing the proposals in relation to results announcement. In his view, listed companies have an official timeline for results announcements which allow sufficient time for proper review and auditing, such that the results can be presented in a comprehensive and transparent manner. In case disclosure

of price sensitive information is required before the announcement date, listed companies would not be ready to make proper and comprehensive disclosure. On the contrary, such a premature release of price sensitive information in relation to results would only cause confusion to the market.

Conclusion

HKIRA hopes these comments and feedbacks we have collected from the IR practitioners in the market will be helpful for SFC in further refining the proposed regulatory changes. Thank you for the time your commission has spent in giving us the overview of the proposals which have fostered better understanding and facilitated constructive discussion among the IR professionals. We look forward to cementing closer communications with your commission and the other respective regulatory authorities in future!

Yours sincerely,

Eva Chan
Chairman
Hong Kong Investor Relations Association

香港證券業協會有限公司
HONG KONG SECURITIES ASSOCIATION LTD.
(Limited by Guarantee)
香港中環永吉街6-12號誠利商業大廈6樓C座 ☎ 2541-8832 2541-0322 FAX: 2541-1368
Flat C, 6/F., Shing Lee Comm. Bldg., 6-12 Wing Kut St., Central, H.K. E-mail: info@hksa.com.hk

RESPONSE TO CONSULTATION PAPER ON THE PROPOSED STATUTORY CODIFICATION OF CERTAIN REQUIREMENTS TO DISCLOSE PRICE SENSITIVE INFORMATION BY LISTED CORPORATIONS

Hong Kong Securities Association

24 June 2010

香港證券業協會有限公司
HONG KONG SECURITIES ASSOCIATION LTD.
(Limited by Guarantee)
香港中環永吉街6-12號誠利商業大廈6樓C座 ☎ 2541-8832 2541-0322 FAX: 2541-1368
Flat C, 6/F., Shing Lee Comm. Bldg., 6-12 Wing Kut St., Central, H.K. E-mail: info@hksa.com.hk

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? **Our response:** **We regard specific information about "a shareholder" of the corporation being PSI is too stringent. We suggest amending it to a shareholder holding at least 5% interest in the corporation.** **We also suggest exclude in the definition of PSI if the derivatives of the listed securities of the corporation are not issued by the corporation or its subsidiaries.**
(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? **Our response:** **Agreed**
(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? **Our response:** **Agreed**
Question 2
(a) Do you agree to the provision of the four proposed safe harbours? **Our response:** **Since majority of the listed issuers on the SEHK have their operation outside of Hong Kong (e.g PRC), such overseas issuers practically will not be able to rely the proposed Safe Harbour A as it only safeguard order made by a Hong Kong court or provisions of the other Hong Kong statutes.** **This is particularly so for PRC state owned enterprises which disclosure of "inside information" may also be restricted by PRC laws.**

香港證券業協會有限公司
HONG KONG SECURITIES ASSOCIATION LTD.
(Limited by Guarantee)
香港中環永吉街6-12號誠利商業大廈6樓C座 ☎ 2541-8832 2541-0322 FAX: 2541-1368
Flat C, 6/F., Shing Lee Comm. Bldg., 6-12 Wing Kut St., Central, H.K. E-mail: info@hksa.com.hk

(b) Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto? **Our response:** **Agreed**
(c) Do you think that the legislation should provide for additional safe harbours? If so, what are these additional safe harbours? **Our response:** **N.A**
(d) Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO? **Our response:** **Agreed**
Question 3
(a) Do you agree to extend the jurisdiction of the MMT to handle breaches of the statutory disclosure requirements? **Our response:** **Agreed**
(b) Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36? **Our response:** **We are of the view that persons suffering pecuniary loss as a result of others breaching the disclosure should not rely on the MMT findings to take civil actions to seek compensation. They should only pursue their claims under the normal court proceedings.** **We are also of the view that SFC should not be allowed take action under applicable sections of the SFO as this will effectively give SFC an additional power to impose additional sanctions over MMT thus undermining the effectiveness and creditability of MMT.**

香港證券業協會有限公司
HONG KONG SECURITIES ASSOCIATION LTD.
(Limited by Guarantee)
香港中環永吉街6-12號誠利商業大廈6樓C座 ☎ 2541-8832 2541-0322 FAX: 2541-1368
Flat C, 6/F., Shing Lee Comm. Bldg., 6-12 Wing Kut St., Central, H.K. E-mail: info@hksa.com.hk

(c) Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements? **Our response:** **Agreed**
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? **Our response:** **We suggest the initial period shall be at least 18 months**
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? **Our response:** **No further comment.**

香港證券學會
Hong Kong Securities Professionals Association

25 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F., Tower I
Admiralty Centre
18, Harcourt Road
Hong Kong

By fax and by email
Fax no. : 2529 2075
psi_consultation@fstb.gov.hk

Total no. of pages : 2 (inclusive)

Dear Sirs,

Re: Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by listed Corporations (the "Consultation Paper")

Capitalised terms used in this submission shall have the same meanings as defined in the Consultation Paper unless otherwise defined herein.

As our members are participants of the SEHK, we hereby submit our comments on the Consultation Paper from the perspectives of licensed corporations within the meaning of the SFO ("**Licensed Corporations**"). Our comments on the Consultation Paper are set out below by adopting the numberings as used in the Consultation Paper:

Question No.	
1 (a)	Agree.
1 (b)	Agree, this proposal is simply a codification of the current disclosure obligations of listed corporations under the rule 13.09 of the existing Main Board Listing Rules and rule 17.10 of the existing GEM Board Listing Rules.
1 (c)	Existing Listing Rules have similar provisions and we have no objection to codify the same in the new legislation.
2 (a)	Agree.
2 (b)	Agree.
2 (c)	The suggested four safe harbours are not exhaustive and we suggest adding the following as a harbour for the sake of flexibility : When shareholders, directors or senior management of listed corporations reasonably believe that such information has no material impact on the share price of listed corporations and they have sought appropriate advices from qualified professionals such as financial adviser, company secretary, legal advisers, auditors.

香港新界大埔廣福道 152-172 號大埔商業中心 604 室 TEL: (852) 8207 9108 FAX: (852) 8207 9109
Room 604, Tai Po Commercial Centre, 152-172 Kwong Fuk Road, Taipo, N.T., Hong Kong

2 (d)	Agree, this will make the rules more flexible so that it is not necessary to go through lengthy legislation procedure again.
3 (a)	Agree, it is more cost-effective to increase the function of MMT rather than setting up a new regime.
3 (b)	Agree.
4	Agree, the SFC should also review the results of the informal consultation after 6 months.
5	There should be clear segregation of duties and power between the SEHK and the SFC for the avoidance of doubt and overlap of resources and power.

Should you have any queries, please contact the undersigned at 9095 1655.

Yours faithfully,
For and on behalf of
Hong Kong Securities Professionals Association

Jeanne Lee Sai Yin
Chairman

香港新界大埔廣福道 152-172 號大埔商業中心 604 室 TEL: (852) 8207 9108 FAX: (852) 8207 9109
Room 604, Tai Po Commercial Centre, 152-172 Kwong Fuk Road, Taipo, N.T., Hong Kong

HKSFA 香港財經分析師學會
THE HONG KONG SOCIETY OF FINANCIAL ANALYSTS

28th June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs,

Re : **Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information**

As a leading international financial centre, the HKSFA is supportive that listed companies should disclosure price sensitive information on a timely basis. To strengthen the enforcement power on such requirement, we are supportive of the proposals listed in the consultation paper to establish a statutory regime to promote compliance. Among the questions raised in the consultation paper, we agreed on the proposals and suggestions, with the exception of the followings :

Question 2 (A) – We suggest a clearly definition of "trade secret" as more commercial information in theory are trade secrets. In particular, poor performance is usually considered important trade secrets for a company's competitor. A better definition is necessary to help strike the balance between the need for disclosure and the need of avoiding unnecessary negative impact on the company.

Question 2 (C) – We do not see the need of additional safe harbours at this stage, but are open minded on this issue.

Question 3 (B) – We consider the cap of $8 million regulatory fine is relatively small and insignificant compared to the size of some of the largest listed companies in Hong Kong. As paragraph 2.33 in the consultation paper already clearly defined the base of determining the fines, the cap could be raised considerably so that it will be a meaningful amount even for the large companies.

Yours Sincerely,
For and on behalf of
The Board of The Hong Kong Society of Financial Analysts

Karl H.K. Lung, CFA
Director

Room 1802, 18th Floor, 1 Duddell Street, Central, Hong Kong
Tel : (852) 2521 2543 Fax : (852) 2869 4800 E-mail : info@hksfa.org URL : http://www.hksfa.org

香港電燈集團有限公司
Hongkong Electric Holdings Ltd.

香港堅尼地道四十四號港燈中心
Hongkong Electric Centre, 44 Kennedy Road, Hong Kong
電話/Tel 2843 3111 傳真/Fax 2810 0506
電郵/Email mail@hec.com.hk
www.heh.com

港燈
HK Electric

25th June, 2010

Dear Sirs,

Proposed Statutory Backing for Disclosure of Price Sensitive Information (PSI): response to Government consultation

This letter and its Annex contains the response of the Hongkong Electric Group to the Government's Consultation Paper (CP) of March 2010 on the above subject.

In this letter, we first make some general observations on the Government's proposed approach as set out in the CP. We then set out our main comments on the draft clauses attached to the CP. Finally, in the Annex, we give our answers to the specific questions for consultation contained in the CP.

1. Initial Observations: the Need for an Incremental, Proportionate Approach

1.1 The proposal to enact new statutory requirements to disclose PSI, and to provide for potentially severe sanctions for breach of those requirements, will be major changes in Hong Kong's regulatory environment. We believe it is therefore essential that the Government proceeds **incrementally and proportionately** in introducing such changes, in other words it should only regulate to the extent necessary to address the perceived problem. We welcome the Government's recognition of the need to approach the matter in this way in terms of *sanctions*, in deciding that it is premature at this stage to make non-disclosure of PSI a criminal offence. However, the Government's proposals go further than giving the existing the existing disclosure requirements in the Listing Rules more 'teeth', which has been the Government's main stated policy objective. For example, this objective could have been achieved without codifying in a statute the requirements in the Listing Rules, and by simply introducing by statute new sanctions for breaching the existing requirements in the Listing Rules, as in the UK.

1.2 In fact, the Government's proposals go even further than codifying in statute the existing requirements in the Listing Rules. For example, the existing requirements place the emphasis on *equal and non-discriminatory* disclosure, whereas the emphasis in the new requirements is on *immediate* disclosure. This gives rise to potential conflict with the issuer's legitimate interest in preserving the confidentiality of commercially-sensitive information, as the CP accepts- hence the critical need to ensure that the safe harbours are sufficiently wide. In addition, whereas the existing requirements are on the issuers themselves, the Government's proposals would also impose significant new obligations on individual 'officers' of issuers.

1.3 At the very most, we would expect that an incremental, proportionate approach would mean that the new requirements go no further than the equivalent rules in other jurisdictions, which have been in place or much longer. However, the Government's proposals would go significantly further than the position in the UK (for example):

- As noted above, the UK legislation does not codify the existing disclosure requirements in the Listing Rules, but provides for financial penalties to be imposed if they are breached.
- There are no provisions in the UK for disqualification of directors, 'cold shoulder' orders, etc.
- Individual obligations are placed only on directors, who ultimately make the decision whether or not to disclose, whereas in HK the Government is also proposing to place individual obligations on managers below director level.
- Directors are only liable in the UK if they 'knowingly' (i.e. intentionally) breach the rules, whereas in Hong Kong the Government is proposing to impose liability on individuals also if they are found to have acted recklessly or negligently, a considerably more stringent standard.

If, nevertheless, the Government does not wish to adopt a more incremental and proportionate approach to addressing this issue, we believe it is all the more important that the full implications of the proposals are considered, and the legislation drafted, with great care, to ensure that no inadvertent and unnecessary disruption is caused to Hong Kong commerce, and the Hong Kong economy. In this respect, we have a number of concerns on the draft legislative provisions attached to the CP. Since most of these concerns are not addressed directly by the Questions for Consultation, we set them out in this letter below, including some suggestions to address them. Our answers to the Questions for Consultation are contained in the Annex.

2. Main Comments on the Government's Draft Clauses

Disclosure is a question of fine judgment in many cases: absolute or strict liability on issuers is not appropriate

2.1 As the SFC notes in its draft guidelines, decisions whether to disclose PSI are often marginal, involving subjective assessments. Directors, acting reasonably, having carefully considered the issues, may reach different conclusions in many cases. The SFC has recognized this fact in its draft guidelines, stating that it cannot advise companies on this issue, and that they have to make their own assessment. Where a company has acted promptly, has taken appropriate steps, and has carefully addressed the issues (such as whether a given piece of information is likely 'materially' to affect share price), it should not be held in breach of the requirement if its decision proves to be incorrect with the benefit of hindsight. Whereas proposed Clause 101G(2) states that an officer is in breach only if he or she is at *fault* (i.e. if his or her intentional, reckless or negligent act or omission has resulted in the breach, or if they have not taken all reasonable measures to prevent the breach), Clause 101B(1) currently places *absolute* or *strict* liability on the company to disclose PSI. This would result in over-disclosure of information which should properly be treated as commercially-sensitive, given the serious sanctions which can be imposed in the event of a breach. **Clause 101B(1) should be qualified accordingly. Alternatively, an additional safe harbour could be inserted in Clause 101D to achieve the same effect: a draft additional safe harbour is included in the Annex, in Answer to Question 2(c). For the same reason, individual liability under Clause 101G(2) should be restricted to directors, not**

officers, and only if the director has acted knowingly, as in the UK. This would also give appropriate protection to non-executive directors, who cannot be expected to have as detailed a knowledge about information affecting the company as executive directors. To maintain the negligence standard in particular would mean that failure to disclose inside information would be treated more strictly than virtually any type of market abuse under the SFO, which would be unfair and illogical since market abuse is generally more serious and less justifiable than non-disclosure, where the reasons for non-disclosure may be legitimate, and more difficult assessments need to be made.

References to an 'Officer' of the Company are inappropriate and should be replaced by 'Director'

2.2 Clause 101B(1) states that the company must disclose inside information 'as soon as practicable' after inside information has come to its knowledge. Clause 101B(2) states *inter alia* that information will be deemed to have come into the company's possession if it has come into the possession of an *individual officer* of the company in the course of performing his or her functions. The SFC draft guidelines ('the Guidelines') state (at para 32) that 'as soon as practicable' means 'immediately'. Clause 101B takes no account of the fact that the officer may need first to inform the Company's Board, which may need time to discuss the matter internally, and externally with professional advisers, before deciding whether disclosure is appropriate. Indeed, the SFC's draft guidelines (at para 2) recommend that companies seek independent legal advice, if in doubt as to whether to disclose. 'Immediate' disclosure by the officer or the company is therefore inappropriate and impracticable. **To accommodate this concern, the word 'practicable' should be prefaced with the word 'reasonably' in Clause 101B(1), and the word 'officer' should be replaced by 'director' in Clause 101B(2). The Guidelines should expressly recognize the fact that time may be needed not only to clarify the details and impact of certain facts (as stated in para 34), but also to consult internally and externally before deciding whether disclosure is appropriate. In addition, the words '*or ought reasonably to have*' in Clause 101B(2) should be deleted, otherwise the company would be required to disclose information it does not have. This cannot be correct: a company should not be required to do**

something which is physically impossible. We presume this was not the intention.

2.3 **The reference to an 'officer' in Clause 101G(2) should also be replaced by 'director'. It is inappropriate for any officer below director level to be subject to individual liability, since the decision whether or not to disclose is, or should be, made at director level. In addition, as noted in point 2.6, Clause 101G(1) should be deleted.**

Only Information Leaks which the Company is aware of should trigger Disclosure

2.4 Clause 101D(1)(b) would mean that the benefit of any of the safe harbours would be lost, and the obligation to disclose immediately triggered, whenever the information ceases to be confidential. This is harsh and unreasonable. Quite apart from the difficulty in determining the point in time at which confidentiality was lost, a company may simply be unaware that third parties have become aware of the information. This is particularly the case if information is leaked from a source within the other party to a transaction which is in the course of negotiation, as opposed to the company itself. Requiring disclosure in such circumstances is tantamount to requiring the company to do the impossible. It should be sufficient to benefit from the safe harbours that the company has taken reasonable precautions to preserve confidentiality (as stated in Clause101D(1)(a), unless the company is aware that the information has ceased to be confidential. The SFC's draft guidelines support this (see para 48, last sentence). **Clause 101D(1)(b) should therefore be deleted. In addition the term 'trade secret' in Clause 101D(1)(c)(iii) needs to be defined, to distinguish it from confidential information in a wider sense.**

Disclosure requirements should not be imposed retrospectively

2.5 Clause101B(4) states essentially that Clause 101B(3)- false or misleading disclosure- is not exhaustive as to the circumstances in which a company may be deemed not to have disclosed, but does not state what the other circumstances are. This in effect appears to reserve to the SFC and MMT the power to enforce retrospectively requirements which did not exist at the time when the decision

whether to disclose had to be made. If this is the case, **it appears to be contrary to Article 12 of the Hong Kong Bill of Rights and Clause 101B(4) should therefore be deleted.**

A separate duty to implement proper compliance safeguards is unnecessary and inappropriate

2.6 The Government is proposing to introduce not just a new statutory duty to disclose price sensitive information ('PSI'). It is also now proposing to impose a new, *separate* statutory duty on each 'officer' of the company to put in place 'proper safeguards' to ensure that the company discloses PSI: see **draft Clause 101G(1). Such a provision is unnecessary, disproportionate, and over-intrusive, and should be deleted**, for the following reasons:

- it means that where the company breaches the obligation to disclose PSI, the officer will be in breach not only of that obligation, if he or she is at fault (under Article 101G(2), but is also by definition likely to be in breach of 101G(1), by failing to ensure proper safeguards were in place to prevent a breach of the PSI obligation. In effect, therefore, this creates two potential statutory infringements, and two potential penalties, in respect of the same set of facts. This is analogous to 'double jeopardy', which is constitutionally prohibited not just in Hong Kong (under Article 11(6) of the Bill of Rights) but also in many other jurisdictions, including Europe and the US.
- Even where there was no suspected breach of the PSI obligation, other factors (such as perceived compliance weaknesses in other aspects of its business) might trigger an SFC investigation into whether the company had appropriate safeguards in place to prevent a breach of the PSI obligation. This is unduly intrusive.
- The concept of 'proper safeguards' is vague and would give the SFC and MMT too much discretion in determining what safeguards are appropriate to ensure compliance.
- Such an obligation is unnecessary: a person who is subject to the potential sanctions the Government is proposing for breach of the PSI obligation (the 'main obligation') will have every incentive in any event to ensure

appropriate safeguards are in place to prevent a breach. Conversely, administering and enforcing such an unnecessary obligation would be a waste of public resources.

- Such an obligation is typically imposed if a company has been found to be in persistent breach of the 'main' obligation: the company might then be ordered to put in place appropriate safeguards to prevent a recurrence. It is highly unusual to impose such an obligation in the statute in addition to the 'main obligation' itself.
- Even if, in spite of the above factors, it was appropriate to include a separate obligation to ensure compliance with the 'main' obligation, (which is not the case) it would be inappropriate, impracticable and unnecessary to place this requirement on 'every officer'. Companies typically choose to delegate to a *single* director or senior manager the task of establishing and maintaining an effective compliance system. If any duty to implement safeguards is to be introduced (which it should not), it should be placed on the *company*, and the company left with the discretion as to how to ensure that it complies with this obligation. However, imposing such an obligation on the company would be open to the same objections as those listed above, and should therefore not be contemplated.

Although there should be no separate *statutory duty* to implement proper compliance safeguards, it is entirely appropriate that the failure to put in place adequate safeguards should be a relevant factor in determining whether the company has breached the statutory duty to disclose PSI (see 2.1 above).

If you would like to discuss any of the points above or in the Annex please feel free to contact me.

Yours faithfully,
HONGKONG ELECTRIC HOLDINGS LTD.

Neil D. McGee
GROUP FINANC DIRECTOR

ANNEX- ANSWERS TO SPECIFIC QUESTIONS IN CP

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?

In our view, this question can only be answered in the light of how the Government proposes to address the substantive issues raised by the Consultation Paper, and in particular Question 1(b) below.

(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?

No. See comments in point 2.1 and 2.2 of our attached letter. In summary:

- The company's liability for failure to comply with the PSI requirement should not be absolute or strict- as it would be under Clause 101B(1), as currently drafted- because decisions whether to not to disclose often involve fine judgment on which reasonable people may disagree. A company which has followed proper internal processes and made a good faith and reasonable judgment not to disclose should not be held liable. This concern can be addressed by the insertion of an additional safe harbour, as set out in our answer to Question 2(c) below.
- The obligation cannot in practice be triggered by the possession of the information by an "officer". An officer (if not a director) needs to bring it to the attention of a director, a Board discussion may need to take place and (as the SFC draft guidelines recognize) external legal and other advisers may need to be consulted. This issue can be addressed by the suggestions we make in point 2.2 of our attached letter.

(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?

Yes.

Question 2

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

We agree with these safe harbours in themselves, subject to the following comments. First, for the reason set out in our letter, Clause 101D(1)(b) should be deleted. Secondly, a definition of 'trade secrets' should be included- see point 2.4 in our attached letter. Third, the safe harbour for incomplete proposals or negotiations should be made more flexible, along the lines of the SFC draft guidelines (para 55), under which the safe harbour will apply not only if the 'outcome' is prejudiced, but also if the 'normal pattern'

is prejudiced (this is also more consistent with the UK). We also recommend the inclusion of an additional safe harbour- see answer to (c) below.

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

Yes.

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

As noted in the attached letter, unless the Clause 101B(1) unless is qualified to the effect that the company is only liable (as with individuals) if it has acted intentionally, recklessly or negligently, an additional safe harbour should be included to the effect that a company does not need to disclose where it has followed proper internal processes to ensure that the matter is escalated to the Board as soon as reasonably practicable, and the Board has decided in good faith, on reasonable grounds, and as soon as reasonably practicable, that the information is not disclosable.

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

Yes.

Question 3

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

Yes.

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

Yes, subject to one point. The power to issue cease and desist orders should only be exercisable where the infringement is intentional and the company has a history of previous intentional infringements, given the difficult assessments involved in making disclosure decisions, and the fact that breach of a cease and desist order is a criminal offence..

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

No- the existing institutional arrangements under the SFO should be preserved, unless and until sufficient experience has been gained under the new regime which demonstrates that there is a problem with them.

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?

It is not clear why guidance is envisaged for an initial 12-month period only- such guidance will be needed on an indefinite basis.

Question 5

Do you think the administration and enforcement arrangements proposed by the SFC and SEHK in paragraphs 3.8 – 3.9 are appropriate?

No.

Do you have any comments on the respective roles of the SFC and SEHK to further enhance clarity?

Yes, we have three main comments, which we set out below:

1. The SFC should only investigate following referral by SEHK. The CP (rightly) states that SEHK should remain as the 'frontline regulator' and as the 'point of contact at the frontline' (para 3.5). **Consistent with this, HKEx's existing role of monitoring unusual or unexpected price movements and stock transactions should be maintained. The SFC should only investigate cases which have been referred to it by SEHK** (in the same way that the SFC may refer cases involving suspected criminal offences to the criminal enforcement authorities).

2. Informal Enquiries should always precede formal investigations. The Government is proposing to allow the SFC to conduct an investigation where it has reasonable cause to believe that a breach of the disclosure requirement 'may have' taken place (paragraph 3.9 of the Consultation Paper). This sets the threshold test for the opening of a formal investigation at a too low a level. The SFC should not be entitled, for example, to open a formal investigation merely because of an unexpected substantial change in a company's share price. In fact, such an unexpected change could be explained by a myriad of factors other than non-disclosure of PSI. Many such cases could be resolved, and formal investigations avoided, through informal, confidential enquiries with the company. Such informal enquiries should therefore always be conducted as a first step. Opening a formal investigation without such prior inquiries would therefore would be potentially wasteful of resources and disruptive, both for the company and for the regulator. **It should be for**

HKEx, as frontline regulator, to conduct the initial enquiries, to decide after initial enquiries whether there is a reasonable suspicion that a breach has occurred, and if so, to refer the case to the SFC for investigation.

3. The Overlap with section 214 needs to be clarified. In its *Warderly* judgment, the Court of First Instance recently disqualified two directors for five years under section 214 of the SFO for failing to disclose PSI. The Consultation Paper itself says that s 214 can be used as an alternative to the new PSI provision (which gives the MMT power to disqualify). If this overlap cannot be avoided, it would be useful to clarify the circumstances in which the SFC seek disqualification through the court under s214, rather than through the MMT under the new PSI provision.

HOPEWELL HOLDINGS LIMITED
合和實業有限公司

64th Floor Hopewell Centre, 183 Queen's Road East, Hong Kong
香港皇后大道東183號合和中心64樓

Our Ref. : HHL/CSD/10-047
25 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs

Re: Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

This letter states our views towards the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

We have the following overall comments:

1) We support the introduction of civil remedies, not criminal, for this legislation.

2) Both elements of the *mens rea* (the "guilty mind") and *actus reus* (the "guilty act") must be present if a disclosure obligation is deemed to be breached, hence the strict liability concept must not be applied here. A corporation and its directors that could show they had duly and carefully considered a piece of information and made a non-disclose decision based on prevailing circumstances and information should not be held liable even if the information had eventually caused material effect to share price.

Our response to specific questions listed in the Consultation Paper as follows:

Q.1a 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?

We agree.

Q.1b 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?

.../2

Tel : (852) 2528 4975 Fax : (852) 2861 2068 www.hopewellholdings.com

HOPEWELL HOLDINGS LIMITED
合和實業有限公司

64th Floor Hopewell Centre, 183 Queen's Road East, Hong Kong
香港皇后大道東183號合和中心64樓

We agree a listed corporation should disclose inside information promptly but feel that the SFC should provide more guidance on how long is "practicable" in its view and their definition of "immediate". A corporation needs to verify the information, make necessary internal review, and assess its impact and this may take time.

For a large corporation with a large number of officers, it is difficult for the corporation to ensure all directors or officers would report inside information instantly that has come to their knowledge. It is our view that if a corporation has established and maintained appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable.

Further, the existing definition of "officer" which includes directors, secretaries and managers is too wide. Under the UK regime, only directors who *knowingly* breach the disclosure requirement would be held liable. We concur with this and recommend Hong Kong follows the UK approach. The definition of "officer" should include only "director" throughout this draft legislation.

The phrase "ought reasonably to have" in s.101B(2) of the "draft legislation" should be taken out. This phrase suggests that it is possible that the information may not have been actually known by the officers and thus it is impossible for the corporation to disclose information on this basis.

Q.1c *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?*

We agree.

Q.2a *Do you agree to the provision of the four proposed Safe Harbours?*

We agree.

Q.2b *Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?*

We agree.

Q.2c *Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?*

.../3

Tel : (852) 2528 4975 Fax : (852) 2861 2068 www.hopewellholdings.com

HOPEWELL HOLDINGS LIMITED
合和實業有限公司

64th Floor Hopewell Centre,183 Queen's Road East, Hong Kong
香港皇后大道東183號合和中心64樓

We recommend an additional safe harbour which provides that if a corporation and its directors have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change -- due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show clear and proper records of board deliberations leading to a reasonable conclusion that the information needed not to be disclosed at the time.

Q.2d Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?

We agree. We also think that other market participants should also be given the opportunity to suggest Safe Harbours to match with market developments.

Question 3

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

We do not object.

Q.3b Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

We agree and would want to add that the proposed range of civil remedies is highly deterrent already.

Q.3c Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

Allowing SFC direct access to the MMT lacks the checks-and-balances under the existing arrangement of having the cases referred to the Financial Secretary first. While we support a more efficient process, some checks-and-balances controls are important. Moreover, under the proposed legislation, the other proceedings that cover the six types of market misconduct would be referred to the MMT directly by the SFC. This is a major change. The Government must consider this with a view to balance the market's need for checks-and-balances and whether the resources of MMT can cope with the possible increase in the number of cases referred to it.

Q.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?

.../4

Tel : (852) 2528 4975 Fax : (852) 2861 2068 www.hopewellholdings.com

HOPEWELL HOLDINGS LIMITED
合和實業有限公司

64th Floor Hopewell Centre,183 Queen's Road East, Hong Kong
香港皇后大道東183號合和中心64樓

We agree and add that this should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new Safe Harbours that may be prescribed from time to time.

Q.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?*

The lines of authorities and responsibilities between the SFC and SEHK must be clearly defined without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by Listing Committee.

We thank you for your attention.

Yours sincerely,
For and on behalf of
Hopewell Holdings Limited and
Hopewell Highway Infrastructure Limited

Richard Cho Wa Law
Company Secretary

Tel : (852) 2528 4975 Fax : (852) 2861 2068 www.hopewellholdings.com

Hua Yi Copper Holdings Ltd.
華藝礦業控股有限公司

28 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs

Re: Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

This letter states our views towards the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

We have the following overall comments:

1) We support the introduction of civil remedies, not criminal, for this legislation.

2) Both elements of the *mens rea* (the "guilty mind") and *actus reus* (the "guilty act") must be present if a disclosure obligation is deemed to be breached, hence the strict liability concept must not be applied here. A corporation and its directors that could show they had duly and carefully considered a piece of information and made a non-disclose decision based on prevailing circumstances and information should not be held liable even if the information had eventually caused material effect to share price.

Our response to specific questions listed in the Consultation Paper as follows:

Q.1a 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?

We agree.

Q.1b 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?

We agree a listed corporation should disclose inside information promptly but feel that the SFC should provide more guidance on how long is "practicable" in its view and their definition of "immediate". A corporation needs to verify the information, make necessary internal review, and assess its impact and this may take time.

Unit 7, 2/F, Kingsford Industrial Centre, 13 Wang Hoi Road, Kowloon Bay, Kowloon, H.K. 香港九龍九龍灣宏開道13號景發工業中心2樓7室
Tel 電話 : (852) 2758 9003 Fax 傳真 : (852) 2750 6003 Email 電郵 : enquiry@huayicopper.com Website 網址 : www.huayicopper.com

For a large corporation with a large number of officers, it is difficult for the corporation to ensure all directors or officers would report inside information instantly that has come to their knowledge. It is our view that if a corporation has established and maintained appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable.

Further, the existing definition of "officer" which includes directors, secretaries and managers is too wide. Under the UK regime, only directors who *knowingly* breach the disclosure requirement would be held liable. We concur with this and recommend Hong Kong follows the UK approach. The definition of "officer" should include only "director" throughout this draft legislation.

The phrase "ought reasonably to have" in s.101B(2) of the "draft legislation" should be taken out. This phrase suggests that it is possible that the information may not have been actually known by the officers and thus it is impossible for the corporation to disclose information on this basis.

Q.1c *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?*

We agree.

Q.2a *Do you agree to the provision of the four proposed Safe Harbours?*

We agree.

Q.2b *Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?*

We agree.

Q.2c *Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?*

We recommend an additional safe harbour which provides that if a corporation and its directors have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change -- due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show clear and proper records of board deliberations leading to a reasonable conclusion that the information needed not to be disclosed at the time.

Q.2d *Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?*

We agree. We also think that other market participants should also be given the opportunity to suggest Safe Harbours to match with market developments.

Question 3

Q 3a *Do you agree to extend the jurisdiction of the MMT to handle breaches of the statutory disclosure requirements?*

We do not object.

Q.3b *Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?*

We agree and would want to add that the proposed range of civil remedies is highly deterrent already.

Q.3c *Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?*

Allowing SFC direct access to the MMT lacks the checks-and-balances under the existing arrangement of having the cases referred to the Financial Secretary first. While we support a more efficient process, some checks-and-balances controls are important. Moreover, under the proposed legislation, the other proceedings that cover the six types of market misconduct would be referred to the MMT directly by the SFC. This is a major change. The Government must consider this with a view to balance the market's need for checks-and-balances and whether the resources of MMT can cope with the possible increase in the number of cases referred to it.

Q.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?*

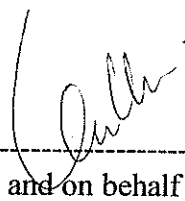
We agree and add that this should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new Safe Harbours that may be prescribed from time to time.

Q.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?*

The lines of authorities and responsibilities between the SFC and SEHK must be clearly defined without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by Listing Committee.

We thank you for your attention.

Yours sincerely,



For and on behalf of
Hua Yi Copper Holdings Limited (Stock code: 559)

和記港陸有限公司
科技・製造・地產・特許授權
香港中環夏慤道十號
和記大廈廿二字樓
電話 +852 2128 1188
傳真 +852 2128 1778
www.hutchisonharbourring.com

Hutchison Harbour Ring Limited
Technology · Manufacturing · Property · Licensing
22/F, Hutchison House
10 Harcourt Road, Central, Hong Kong
Tel +852 2128 1188
Fax +852 2128 1778
www.hutchisonharbourring.com

25 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I, Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs

Proposed Statutory Backing for Disclosure of Price Sensitive Information (PSI): response to Government consultation

This letter and its Annex contain the response of Hutchison Whampoa Limited to the Government's Consultation Paper (CP) of March 2010 on the above subject.

In this letter, we first make some general observations on the Government's proposed approach as set out in the CP. We then set out our main comments on the draft clauses attached to the CP. Finally, in the Annex we give our answers to the specific questions for consultation contained in the CP.

1. Initial Observations: the Need for an Incremental and Proportionate Approach

1.1 The proposals to enact new statutory requirements to disclose PSI, and to provide for potentially severe sanctions for breach of those requirements, will be major changes in Hong Kong's regulatory environment. We believe it is therefore essential that the Government proceeds incrementally and proportionately in introducing such changes; in other words it should only regulate to the extent necessary to address the perceived problem. We welcome the Government's recognition of the need to approach the matter in this manner, in terms of sanctions, in deciding that it is premature at this stage to make non-disclosure of PSI a criminal offence. However, the Government's proposals go further than giving the existing disclosure requirements in the Listing Rules more 'teeth', which has been the Government's main stated policy objective. For example, this objective could have been achieved without codifying in a statute the requirements in the Listing Rules, and by simply introducing by statute new sanctions for breaching the existing (suitably modified, if necessary) requirements in the Listing Rules, as in the UK.

1.2 In fact, the Government's proposals go even further than codifying in statute the existing requirements in the Listing Rules. For example, the existing requirements place the emphasis on equal and non-discriminatory disclosure, whereas the emphasis in the new requirements is on immediate disclosure. This gives rise to potential conflict with the issuer's legitimate interest in preserving the confidentiality of commercially-sensitive information, as the CP accepts - hence the critical need to ensure that the safe harbours are

sufficiently wide and commercially apt. In addition, whereas the existing Listing Rules requirements are principally on the issuers themselves, the Government's proposals would also impose significant new obligations on individual 'officers' of issuers.

1.3 At the very most, we would expect that an incremental and proportionate approach would mean that the new requirements go no further than the equivalent rules in other jurisdictions, which have been in place for much longer. However, the Government's proposals would go significantly further than the position in the UK. For example:

- As noted above, the UK legislation does not codify the existing disclosure requirements in the Listing Rules, but provides for financial penalties to be imposed if they are breached.
- There are no provisions in the UK for disqualification of directors, 'cold shoulder' orders, etc.
- Individual obligations are placed only on directors, who ultimately make the decision whether or not to disclose, whereas in Hong Kong the Government is also proposing to place individual obligations on managers below director level.
- Directors are only liable in the UK if they 'knowingly' (i.e. intentionally) breach the rules, whereas in Hong Kong the Government is proposing to impose liability on individuals also if they are found to have acted recklessly or negligently, a considerably more stringent standard.
- If, nevertheless, the Government does not wish to adopt a more incremental and proportionate approach to addressing this issue, we believe it is all the more important that the full implications of the proposals are considered, and the legislation drafted, with great care, to ensure that no inadvertent or unnecessary disruption is caused to Hong Kong commerce, and the Hong Kong economy. In this respect, we have a number of concerns on the draft legislative provisions attached to the CP. Since most of these concerns are not addressed directly by the Questions for Consultation, we set them out in this letter below, including some suggestions to address them. Our answers to the Questions for Consultation are contained in the Annex.

2. Main Comments on the Government's Draft Sections

Disclosure is a question of fine judgment in many cases: absolute or strict liability on issuers is inappropriate

2.1 As the SFC notes in its draft guidelines, decisions whether to disclose PSI are often marginal, involving subjective assessments. Directors, acting reasonably, having carefully considered the issues, may reach different conclusions in many cases. The SFC has recognised this fact in its draft guidelines, stating that it cannot advise companies on this issue, and that companies would have to make their own assessment. Whereas the proposed Section 101G(2) states that an officer is in breach only if he or she is at fault (i.e. if his or her intentional, reckless or negligent act or omission has resulted in the breach,

or if they have not taken all reasonable measures to prevent the breach), Section 101B(1) currently places absolute or strict liability on the company to disclose PSI. This would result in over-disclosure of information which should properly be treated as commercially-sensitive, given the serious sanctions which can be imposed on the company in the event of a breach. Where a company has acted promptly, has taken appropriate advice and steps, and has carefully addressed the issues (such as whether a given piece of information is likely 'materially' to affect share price), it should not be held in breach of the requirement if its decision proves to be incorrect with the benefit of hindsight. Section 101B(1) should be qualified accordingly. Alternatively, an additional safe harbour could be inserted in Section 101D to achieve the same effect, as explained in our Answer to Question 2(c). For the same reason, individual liability under Section 101G(2) should be restricted to directors, not 'officers' (as defined in the SFO), and only if the director has acted knowingly, as in the UK. This would also give appropriate protection to non-executive directors, who cannot be expected to have as detailed a knowledge about information affecting the company as executive directors. To maintain the negligence standard, in particular, would mean that failure to disclose inside information would be treated more strictly than virtually any type of market abuse under the SFO, which would be unfair and illogical since market abuse is generally more serious and less justifiable than non-disclosure, where the reasons for non-disclosure may be legitimate, and more difficult assessments need to be made.

References to an 'Officer' of the Company are inappropriate and should be replaced by Director'

2.2 Section 101B(1) states that the company must disclose inside information 'as soon as practicable' after inside information has come to its knowledge. Section 101B(2) states inter alia that information will be deemed to have come into the company's possession if it has come into the possession of an individual officer of the company in the course of performing his or her functions. The SFC draft guidelines ('the Guidelines') state (at para 32) that 'as soon as practicable' means 'immediately'. Section 101B takes no account of the fact that the officer may need first to realise (most probably after suitable consultation with others within the organisation) that the information is potentially discloseable, to then invoke the process for elevating the matter to the level of the Company's Board, which in turn may need time to discuss the matter internally, and externally with professional advisers, before deciding whether disclosure is appropriate. Indeed, the SFC's draft guidelines (at para 2) recommend that companies seek independent legal advice, if in doubt as to whether to disclose. 'Immediate' disclosure by the officer or the company is therefore inappropriate and impracticable. To accommodate this concern, the word 'practicable' should be prefaced with the word 'reasonably' in Section 101B(1), and the word 'officer' should be replaced by 'director' in Section 101B(2). The Guidelines should expressly recognise the fact that time may be needed not only to clarify the details and impact of certain facts (as stated in para 34), but also to consult internally and externally before deciding whether disclosure is appropriate. In addition, the words 'or ought reasonably to have' in Section 101B(2) should be deleted, otherwise the company would be required to disclose information it does not have. This cannot be correct: a

company should not be required to do something which is physically and practically impossible. We presume this was not the intention.

2.3 The reference to an 'officer' in Section 101G(2) should also be replaced by 'director'. It is inappropriate for any officer below director level to be subject to individual liability, since the decision whether or not to disclose is, or should be, made at director level. In addition, as noted in point 2.6, Section 101G(1) should be deleted.

Only Information Leaks which the Company is aware of should trigger Disclosure

2.4 Section 101D(1)(b) would mean that the benefit of any of the safe harbours would be lost, and the obligation to disclose immediately triggered, whenever the information ceases to be confidential. This is harsh and unreasonable. Quite apart from the difficulty in determining the point in time at which confidentiality was lost, a company may simply be unaware that third parties have become aware of the information. This is particularly the case if information is leaked from a source within the other party to a transaction which is in the course of negotiation, as opposed to the company itself. Requiring disclosure in such circumstances is tantamount to requiring the company to do the impossible. It should be sufficient to benefit from the safe harbours that the company has taken reasonable precautions to preserve confidentiality (as stated in Section101D(1)(a), unless the company is aware that the information has ceased to be confidential. The SFC's draft guidelines support this (see para 48, last sentence). Section 101D(1)(b) should therefore be deleted. In addition the term 'trade secret' in Section 101D(1)(c)(iii) needs to be defined, to distinguish it from confidential information in a wider sense.

Disclosure requirements should not be imposed retrospectively

2.5 Section101B(4) states essentially that Section 101B(3) - false or misleading disclosure - is not exhaustive as to the circumstances in which a company may be deemed not to have disclosed, but does not state what the other circumstances are. This in effect appears to reserve to the SFC and MMT the power to enforce retrospectively requirements which did not exist at the time when the decision whether to disclose had to be made. If this is the case, it appears to be contrary to Article 12 of the Hong Kong Bill of Rights and Section 101B(4) should therefore be deleted.

A separate duty to implement proper compliance safeguards is unnecessary and inappropriate

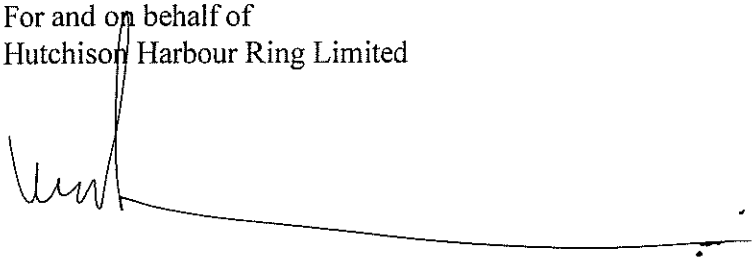
2.6 The Government is proposing to introduce not just a new statutory duty to disclose price sensitive information ('PSI') but to also impose a new, separate statutory duty on each 'officer' of the company to put in place 'proper safeguards' to ensure that the company discloses PSI: see draft Section 101G(1). Such a provision is unnecessary, disproportionate, and over-intrusive, and should be deleted, for the following reasons:

- The proposal means where the company breaches the obligation to disclose PSI, the officer will be in breach not only of that obligation, if he or she is at fault (under Section 101G(2), but is also by definition likely to be in breach of Section 101G(1), by failing to ensure proper safeguards were in place to prevent a breach of the PSI obligation. In effect, therefore, this creates two potential statutory infringements, and two potential penalties, in respect of the same set of facts. This is analogous to 'double jeopardy', which is constitutionally prohibited not only in Hong Kong (under Article 11(6) of the Bill of Rights) but also in many other jurisdictions, including Europe and the US.
- Even where there was no suspected breach of the PSI obligation, other factors (such as perceived compliance weaknesses in other aspects of its business) might trigger an SFC investigation into whether the company had appropriate safeguards in place to prevent a breach of the PSI obligation. This is unduly intrusive.
- The concept of 'proper safeguards' is vague and would give the SFC and MMT too much discretion in determining what safeguards are appropriate to ensure compliance.
- Such an obligation is unnecessary: a person who is subject to the potential sanctions the Government is proposing for breach of the PSI obligation (the 'main obligation') will have every incentive in any event to ensure appropriate safeguards are in place to prevent a breach. Conversely, administering and enforcing such an unnecessary obligation would be a waste of public resources.
- Such an obligation is typically imposed if a company has been found to be in persistent breach of the main obligation: the company might then be ordered to put in place appropriate safeguards to prevent a recurrence. It is highly unusual to impose such an obligation in the statute in addition to the main obligation itself.
- Even if, in spite of the above factors, it was appropriate to include a separate obligation to ensure compliance with the main obligation, (which is not the case) it would be inappropriate, impracticable and unnecessary to place this requirement on 'every officer'. Companies typically choose to delegate to a single director or senior manager the task of establishing and maintaining an effective compliance system. If any duty to implement safeguards is to be introduced (which it should not), it should be placed on the company, and the company left with the discretion as to how to ensure that it complies with this obligation. However, even an obligation on the company is unnecessary and disproportionate, since (as noted above) the sanctions for breach of the main obligation provide a sufficient incentive to ensure compliance safeguards are in place.

Although there should be no separate statutory duty to implement proper compliance safeguards, it is entirely appropriate that the failure to put in place adequate safeguards should be a relevant factor in determining whether the company has breached the statutory duty to disclose PSI (see 2.1 above).

If you would like to discuss any of the points above or in the Annexes please feel free to contact me.

Yours faithfully,
For and on behalf of
Hutchison Harbour Ring Limited



EDITH SHIH

Enclosures: Annex – Answers to Specific Questions in the CP

ANNEX - ANSWERS TO SPECIFIC QUESTIONS IN CP

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?

In our view, this question can only be answered in the light of how the Government proposes to address the substantive issues raised by the Consultation Paper, and in particular Question 1(b) below.

(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?

No. See comments in points 2.1 and 2.2 of our attached letter. In summary:

- The company's liability for failure to comply with the PSI requirement should not be absolute or strict - as it would be under Section 101B(1), as currently drafted - because decisions whether or not to disclose often involve fine judgment on which reasonable people may disagree. A company which has followed proper internal processes and made a good faith and reasonable judgment not to disclose should not be held liable. This concern can be addressed by the insertion of an additional safe harbour, as set out in our answer to Question 2(c) below.
- The obligation cannot in practice be triggered by the possession of the information by an 'officer'. An officer (if not a director) once becoming aware of the nature of the information needs to bring it to the attention of a director, a Board discussion may need to take place and (as the SFC draft guidelines recognise) external legal and other advisers may need to be consulted. This issue can be addressed by the suggestions we make in point 2.2 of our attached letter.

(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?

Yes.

Question 2

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

We agree with these safe harbours in themselves, subject to the following comments. First, for the reason set out in our letter, Section 101D(1)(b) should be deleted - see point

2.4 of our attached letter. Secondly, a definition of 'trade secrets' should be included. Thirdly, the safe harbour for incomplete proposals or negotiations should be made more flexible, along the lines of the SFC draft guidelines (para 55), under which the safe harbour will apply not only if the 'outcome' is prejudiced, but also if the 'normal pattern' is prejudiced (this is also more consistent with the UK). We also recommend the inclusion of an additional safe harbour- see answer to (c) below.

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

Yes.

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

As noted in the attached letter, unless the Section 101B(1) unless is qualified to the effect that the company is only liable (as with individuals) if it has acted intentionally, recklessly or negligently, an additional safe harbour should be included to the effect that a company does not need to disclose where it has followed proper internal processes to ensure that the matter is escalated to the Board in a timely manner, and the Board has decided in good faith, on reasonable grounds, and in a timely manner, that the information is not discloseable.

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

Yes.

Question 3

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

Yes.

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

Yes, subject to one point. The power to issue cease and desist orders should only be exercisable where the infringement is intentional and the company has a history of previous intentional infringements, given the difficult assessments involved in making disclosure decisions, and the fact that breach of a cease and desist order is a criminal offence.

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

No - the existing institutional arrangements under the SFO should be preserved, unless and until sufficient experience has been gained under the new regime which demonstrates that there is a problem with them.

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?

It is not clear why guidance is envisaged for an initial 12-month period only- such guidance will be needed on an indefinite basis.

Question 5

Do you think the administration and enforcement arrangements proposed by the SFC and SEHK in paragraphs 3.8 – 3.9 are appropriate?

No.

Do you have any comments on the respective roles of the SFC and SEHK to further enhance clarity?

Yes, we have four main comments, which we set out below:

1. The SFC should only investigate following referral by SEHK. The CP (rightly) states that SEHK should remain as the 'frontline regulator' and as the 'point of contact at the frontline' (para 3.5). **Consistent with this, HKEx's existing role of monitoring unusual or unexpected price movements and stock transactions should be maintained. The SFC should only investigate cases which have been referred to it by SEHK** (in the same way that the SFC may refer cases involving suspected criminal offences to the criminal enforcement authorities).

2. Informal Enquiries should always precede formal investigations. The Government is proposing to allow the SFC to conduct an investigation where it has reasonable cause to believe that a breach of the disclosure requirement 'may have' taken place (paragraph 3.9 of the Consultation Paper). This sets the threshold test for the opening of a formal investigation at too low a level. The SFC should not be entitled, for example, to open a formal investigation merely because of an unexpected substantial change in a company's share price. In fact, such an unexpected change could be explained by a myriad of factors other than non-disclosure of PSI. Many such cases could be resolved, and formal

investigations avoided, through informal, confidential enquiries with the company. Such informal enquiries should therefore always be conducted as a first step. Opening a formal investigation without such prior inquiries would therefore be potentially wasteful of resources and disruptive, both for the company and for the regulator. **It should be for SEHK, as frontline regulator, to conduct the initial enquiries, to decide after initial enquiries whether there is a reasonable suspicion that a breach has occurred, and if so, to refer the case to the SFC for investigation.**

3. The Overlap with section 214 needs to be clarified. In its *Warderly* judgment, the Court of First Instance recently disqualified two directors for five years under section 214 of the SFO for failing to disclose PSI. The Consultation Paper itself says that section 214 can be used as an alternative to the new PSI provision (which gives the MMT the power to disqualify). If this overlap cannot be avoided, it would be useful to clarify the circumstances in which the SFC seeks disqualification through the court under section 214, rather than through the MMT under the new PSI provision.

4. Modifications of the Listing Rules should be concurrent with introduction of the new PSI provision. Para 3.4 envisages SEHK would conduct its own public consultation and then seek SFC's approval before modifying the general obligations of disclosure in the Listing Rules to dovetail with the statutory provisions. This time lag should be eliminated as much as possible in order to enhance clarity and certainty to the market.

Hutchison Telecom
Hong Kong Holdings

Hutchison Telecommunications Hong Kong Holdings Limited
和記電訊香港控股有限公司
19/F, Hutchison Telecom Tower, 99 Cheung Fai Road, Tsing Yi, Hong Kong
T +852 2128 2828 F +852 2128 3388
www.hthkh.com

25 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I, Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs

Proposed Statutory Backing for Disclosure of Price Sensitive Information (PSI): response to Government consultation

This letter and its Annex contain the response of Hutchison Whampoa Limited to the Government's Consultation Paper (CP) of March 2010 on the above subject.

In this letter, we first make some general observations on the Government's proposed approach as set out in the CP. We then set out our main comments on the draft clauses attached to the CP. Finally, in the Annex we give our answers to the specific questions for consultation contained in the CP.

1. Initial Observations: the Need for an Incremental and Proportionate Approach

1.1 The proposals to enact new statutory requirements to disclose PSI, and to provide for potentially severe sanctions for breach of those requirements, will be major changes in Hong Kong's regulatory environment. We believe it is therefore essential that the Government proceeds incrementally and proportionately in introducing such changes; in other words it should only regulate to the extent necessary to address the perceived problem. We welcome the Government's recognition of the need to approach the matter in this manner, in terms of sanctions, in deciding that it is premature at this stage to make non-disclosure of PSI a criminal offence. However, the Government's proposals go further than giving the existing disclosure requirements in the Listing Rules more 'teeth', which has been the Government's main stated policy objective. For example, this objective could have been achieved without codifying in a statute the requirements in the Listing Rules, and by simply introducing by statute new sanctions for breaching the existing (suitably modified, if necessary) requirements in the Listing Rules, as in the UK.

1.2 In fact, the Government's proposals go even further than codifying in statute the existing requirements in the Listing Rules. For example, the existing requirements place the emphasis on equal and non-discriminatory disclosure, whereas the emphasis in the new requirements is on immediate disclosure. This gives rise to potential conflict with the issuer's legitimate interest in preserving the confidentiality of commercially-sensitive information, as the CP accepts - hence the critical need to ensure that the safe harbours are

sufficiently wide and commercially apt. In addition, whereas the existing Listing Rules requirements are principally on the issuers themselves, the Government's proposals would also impose significant new obligations on individual 'officers' of issuers.

1.3 At the very most, we would expect that an incremental and proportionate approach would mean that the new requirements go no further than the equivalent rules in other jurisdictions, which have been in place for much longer. However, the Government's proposals would go significantly further than the position in the UK. For example:

- As noted above, the UK legislation does not codify the existing disclosure requirements in the Listing Rules, but provides for financial penalties to be imposed if they are breached.
- There are no provisions in the UK for disqualification of directors, 'cold shoulder' orders, etc.
- Individual obligations are placed only on directors, who ultimately make the decision whether or not to disclose, whereas in Hong Kong the Government is also proposing to place individual obligations on managers below director level.
- Directors are only liable in the UK if they 'knowingly' (i.e. intentionally) breach the rules, whereas in Hong Kong the Government is proposing to impose liability on individuals also if they are found to have acted recklessly or negligently, a considerably more stringent standard.
- If, nevertheless, the Government does not wish to adopt a more incremental and proportionate approach to addressing this issue, we believe it is all the more important that the full implications of the proposals are considered, and the legislation drafted, with great care, to ensure that no inadvertent or unnecessary disruption is caused to Hong Kong commerce, and the Hong Kong economy. In this respect, we have a number of concerns on the draft legislative provisions attached to the CP. Since most of these concerns are not addressed directly by the Questions for Consultation, we set them out in this letter below, including some suggestions to address them. Our answers to the Questions for Consultation are contained in the Annex.

2. Main Comments on the Government's Draft Sections

Disclosure is a question of fine judgment in many cases: absolute or strict liability on issuers is inappropriate

2.1 As the SFC notes in its draft guidelines, decisions whether to disclose PSI are often marginal, involving subjective assessments. Directors, acting reasonably, having carefully considered the issues, may reach different conclusions in many cases. The SFC has recognised this fact in its draft guidelines, stating that it cannot advise companies on this issue, and that companies would have to make their own assessment. Whereas the proposed Section 101G(2) states that an officer is in breach only if he or she is at fault (i.e. if his or her intentional, reckless or negligent act or omission has resulted in the breach,

or if they have not taken all reasonable measures to prevent the breach), Section 101B(1) currently places absolute or strict liability on the company to disclose PSI. This would result in over-disclosure of information which should properly be treated as commercially-sensitive, given the serious sanctions which can be imposed on the company in the event of a breach. Where a company has acted promptly, has taken appropriate advice and steps, and has carefully addressed the issues (such as whether a given piece of information is likely 'materially' to affect share price), it should not be held in breach of the requirement if its decision proves to be incorrect with the benefit of hindsight. Section 101B(1) should be qualified accordingly. Alternatively, an additional safe harbour could be inserted in Section 101D to achieve the same effect, as explained in our Answer to Question 2(c). For the same reason, individual liability under Section 101G(2) should be restricted to directors, not 'officers' (as defined in the SFO), and only if the director has acted knowingly, as in the UK. This would also give appropriate protection to non-executive directors, who cannot be expected to have as detailed a knowledge about information affecting the company as executive directors. To maintain the negligence standard, in particular, would mean that failure to disclose inside information would be treated more strictly than virtually any type of market abuse under the SFO, which would be unfair and illogical since market abuse is generally more serious and less justifiable than non-disclosure, where the reasons for non-disclosure may be legitimate, and more difficult assessments need to be made.

References to an 'Officer' of the Company are inappropriate and should be replaced by Director'

2.2 Section 101B(1) states that the company must disclose inside information 'as soon as practicable' after inside information has come to its knowledge. Section 101B(2) states inter alia that information will be deemed to have come into the company's possession if it has come into the possession of an individual officer of the company in the course of performing his or her functions. The SFC draft guidelines ('the Guidelines') state (at para 32) that 'as soon as practicable' means 'immediately'. Section 101B takes no account of the fact that the officer may need first to realise (most probably after suitable consultation with others within the organisation) that the information is potentially discloseable, to then invoke the process for elevating the matter to the level of the Company's Board, which in turn may need time to discuss the matter internally, and externally with professional advisers, before deciding whether disclosure is appropriate. Indeed, the SFC's draft guidelines (at para 2) recommend that companies seek independent legal advice, if in doubt as to whether to disclose. 'Immediate' disclosure by the officer or the company is therefore inappropriate and impracticable. To accommodate this concern, the word 'practicable' should be prefaced with the word 'reasonably' in Section 101B(1), and the word 'officer' should be replaced by 'director' in Section 101B(2). The Guidelines should expressly recognise the fact that time may be needed not only to clarify the details and impact of certain facts (as stated in para 34), but also to consult internally and externally before deciding whether disclosure is appropriate. In addition, the words 'or ought reasonably to have' in Section 101B(2) should be deleted, otherwise the company would be required to disclose information it does not have. This cannot be correct: a

company should not be required to do something which is physically and practically impossible. We presume this was not the intention.

2.3 The reference to an 'officer' in Section 101G(2) should also be replaced by 'director'. It is inappropriate for any officer below director level to be subject to individual liability, since the decision whether or not to disclose is, or should be, made at director level. In addition, as noted in point 2.6, Section 101G(1) should be deleted.

Only Information Leaks which the Company is aware of should trigger Disclosure

2.4 Section 101D(1)(b) would mean that the benefit of any of the safe harbours would be lost, and the obligation to disclose immediately triggered, whenever the information ceases to be confidential. This is harsh and unreasonable. Quite apart from the difficulty in determining the point in time at which confidentiality was lost, a company may simply be unaware that third parties have become aware of the information. This is particularly the case if information is leaked from a source within the other party to a transaction which is in the course of negotiation, as opposed to the company itself. Requiring disclosure in such circumstances is tantamount to requiring the company to do the impossible. It should be sufficient to benefit from the safe harbours that the company has taken reasonable precautions to preserve confidentiality (as stated in Section101D(1)(a), unless the company is aware that the information has ceased to be confidential. The SFC's draft guidelines support this (see para 48, last sentence). Section 101D(1)(b) should therefore be deleted. In addition the term 'trade secret' in Section 101D(1)(c)(iii) needs to be defined, to distinguish it from confidential information in a wider sense.

Disclosure requirements should not be imposed retrospectively

2.5 Section101B(4) states essentially that Section 101B(3) - false or misleading disclosure - is not exhaustive as to the circumstances in which a company may be deemed not to have disclosed, but does not state what the other circumstances are. This in effect appears to reserve to the SFC and MMT the power to enforce retrospectively requirements which did not exist at the time when the decision whether to disclose had to be made. If this is the case, it appears to be contrary to Article 12 of the Hong Kong Bill of Rights and Section 101B(4) should therefore be deleted.

A separate duty to implement proper compliance safeguards is unnecessary and inappropriate

2.6 The Government is proposing to introduce not just a new statutory duty to disclose price sensitive information ('PSI') but to also impose a new, separate statutory duty on each 'officer' of the company to put in place 'proper safeguards' to ensure that the company discloses PSI: see draft Section 101G(1). Such a provision is unnecessary, disproportionate, and over-intrusive, and should be deleted, for the following reasons:

- The proposal means where the company breaches the obligation to disclose PSI, the officer will be in breach not only of that obligation, if he or she is at fault (under Section 101G(2), but is also by definition likely to be in breach of Section 101G(1), by failing to ensure proper safeguards were in place to prevent a breach of the PSI obligation. In effect, therefore, this creates two potential statutory infringements, and two potential penalties, in respect of the same set of facts. This is analogous to 'double jeopardy', which is constitutionally prohibited not only in Hong Kong (under Article 11(6) of the Bill of Rights) but also in many other jurisdictions, including Europe and the US.
- Even where there was no suspected breach of the PSI obligation, other factors (such as perceived compliance weaknesses in other aspects of its business) might trigger an SFC investigation into whether the company had appropriate safeguards in place to prevent a breach of the PSI obligation. This is unduly intrusive.
- The concept of 'proper safeguards' is vague and would give the SFC and MMT too much discretion in determining what safeguards are appropriate to ensure compliance.
- Such an obligation is unnecessary: a person who is subject to the potential sanctions the Government is proposing for breach of the PSI obligation (the 'main obligation') will have every incentive in any event to ensure appropriate safeguards are in place to prevent a breach. Conversely, administering and enforcing such an unnecessary obligation would be a waste of public resources.
- Such an obligation is typically imposed if a company has been found to be in persistent breach of the main obligation: the company might then be ordered to put in place appropriate safeguards to prevent a recurrence. It is highly unusual to impose such an obligation in the statute in addition to the main obligation itself.
- Even if, in spite of the above factors, it was appropriate to include a separate obligation to ensure compliance with the main obligation, (which is not the case) it would be inappropriate, impracticable and unnecessary to place this requirement on 'every officer'. Companies typically choose to delegate to a single director or senior manager the task of establishing and maintaining an effective compliance system. If any duty to implement safeguards is to be introduced (which it should not), it should be placed on the company, and the company left with the discretion as to how to ensure that it complies with this obligation. However, even an obligation on the company is unnecessary and disproportionate, since (as noted above) the sanctions for breach of the main obligation provide a sufficient incentive to ensure compliance safeguards are in place.

Although there should be no separate statutory duty to implement proper compliance safeguards, it is entirely appropriate that the failure to put in place adequate safeguards should be a relevant factor in determining whether the company has breached the statutory duty to disclose PSI (see 2.1 above).

If you would like to discuss any of the points above or in the Annexes please feel free to contact me.

Yours faithfully,
For and on behalf of
Hutchison Telecommunications Hong Kong Holdings Limited

EDITH SHIH

Enclosures: Annex – Answers to Specific Questions in the CP

ANNEX - ANSWERS TO SPECIFIC QUESTIONS IN CP

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?

In our view, this question can only be answered in the light of how the Government proposes to address the substantive issues raised by the Consultation Paper, and in particular Question 1(b) below.

(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?

No. See comments in points 2.1 and 2.2 of our attached letter. In summary:

- The company's liability for failure to comply with the PSI requirement should not be absolute or strict - as it would be under Section 101B(1), as currently drafted - because decisions whether or not to disclose often involve fine judgment on which reasonable people may disagree. A company which has followed proper internal processes and made a good faith and reasonable judgment not to disclose should not be held liable. This concern can be addressed by the insertion of an additional safe harbour, as set out in our answer to Question 2(c) below.
- The obligation cannot in practice be triggered by the possession of the information by an 'officer'. An officer (if not a director) once becoming aware of the nature of the information needs to bring it to the attention of a director, a Board discussion may need to take place and (as the SFC draft guidelines recognise) external legal and other advisers may need to be consulted. This issue can be addressed by the suggestions we make in point 2.2 of our attached letter.

(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?

Yes.

Question 2

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

We agree with these safe harbours in themselves, subject to the following comments. First, for the reason set out in our letter, Section 101D(1)(b) should be deleted - see point

2.4 of our attached letter. Secondly, a definition of 'trade secrets' should be included. Thirdly, the safe harbour for incomplete proposals or negotiations should be made more flexible, along the lines of the SFC draft guidelines (para 55), under which the safe harbour will apply not only if the 'outcome' is prejudiced, but also if the 'normal pattern' is prejudiced (this is also more consistent with the UK). We also recommend the inclusion of an additional safe harbour- see answer to (c) below.

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

Yes.

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

As noted in the attached letter, unless the Section 101B(1) unless is qualified to the effect that the company is only liable (as with individuals) if it has acted intentionally, recklessly or negligently, an additional safe harbour should be included to the effect that a company does not need to disclose where it has followed proper internal processes to ensure that the matter is escalated to the Board in a timely manner, and the Board has decided in good faith, on reasonable grounds, and in a timely manner, that the information is not discloseable.

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

Yes.

Question 3

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

Yes.

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

Yes, subject to one point. The power to issue cease and desist orders should only be exercisable where the infringement is intentional and the company has a history of previous intentional infringements, given the difficult assessments involved in making disclosure decisions, and the fact that breach of a cease and desist order is a criminal offence.

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

No - the existing institutional arrangements under the SFO should be preserved, unless and until sufficient experience has been gained under the new regime which demonstrates that there is a problem with them.

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?

It is not clear why guidance is envisaged for an initial 12-month period only- such guidance will be needed on an indefinite basis.

Question 5

Do you think the administration and enforcement arrangements proposed by the SFC and SEHK in paragraphs 3.8 – 3.9 are appropriate?

No.

Do you have any comments on the respective roles of the SFC and SEHK to further enhance clarity?

Yes, we have four main comments, which we set out below:

1. The SFC should only investigate following referral by SEHK. The CP (rightly) states that SEHK should remain as the 'frontline regulator' and as the 'point of contact at the frontline' (para 3.5). **Consistent with this, HKEx's existing role of monitoring unusual or unexpected price movements and stock transactions should be maintained. The SFC should only investigate cases which have been referred to it by SEHK** (in the same way that the SFC may refer cases involving suspected criminal offences to the criminal enforcement authorities).

2. Informal Enquiries should always precede formal investigations. The Government is proposing to allow the SFC to conduct an investigation where it has reasonable cause to believe that a breach of the disclosure requirement 'may have' taken place (paragraph 3.9 of the Consultation Paper). This sets the threshold test for the opening of a formal investigation at too low a level. The SFC should not be entitled, for example, to open a formal investigation merely because of an unexpected substantial change in a company's share price. In fact, such an unexpected change could be explained by a myriad of factors other than non-disclosure of PSI. Many such cases could be resolved, and formal

investigations avoided, through informal, confidential enquiries with the company. Such informal enquiries should therefore always be conducted as a first step. Opening a formal investigation without such prior inquiries would therefore be potentially wasteful of resources and disruptive, both for the company and for the regulator. **It should be for SEHK, as frontline regulator, to conduct the initial enquiries, to decide after initial enquiries whether there is a reasonable suspicion that a breach has occurred, and if so, to refer the case to the SFC for investigation.**

3. The Overlap with section 214 needs to be clarified. In its *Warderly* judgment, the Court of First Instance recently disqualified two directors for five years under section 214 of the SFO for failing to disclose PSI. The Consultation Paper itself says that section 214 can be used as an alternative to the new PSI provision (which gives the MMT the power to disqualify). If this overlap cannot be avoided, it would be useful to clarify the circumstances in which the SFC seeks disqualification through the court under section 214, rather than through the MMT under the new PSI provision.

4. Modifications of the Listing Rules should be concurrent with introduction of the new PSI provision. Para 3.4 envisages SEHK would conduct its own public consultation and then seek SFC's approval before modifying the general obligations of disclosure in the Listing Rules to dovetail with the statutory provisions. This time lag should be eliminated as much as possible in order to enhance clarity and certainty to the market.

Edith Shih
Head Group General Counsel &
Company Secretary

Dir Tel : +852 2128-1233
Dir Fax : +852 2128-1778
Email : ediths@hwl.com.hk

Hutchison Whampoa Limited

24 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I, Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs

Proposed Statutory Backing for Disclosure of Price Sensitive Information (PSI): response to Government consultation

This letter and its Annex contain the response of Hutchison Whampoa Limited to the Government's Consultation Paper (CP) of March 2010 on the above subject.

In this letter, we first make some general observations on the Government's proposed approach as set out in the CP. We then set out our main comments on the draft clauses attached to the CP. Finally, in the Annex we give our answers to the specific questions for consultation contained in the CP.

1. Initial Observations: the Need for an Incremental and Proportionate Approach

1.1 The proposals to enact new statutory requirements to disclose PSI, and to provide for potentially severe sanctions for breach of those requirements, will be major changes in Hong Kong's regulatory environment. We believe it is therefore essential that the Government proceeds incrementally and proportionately in introducing such changes; in other words it should only regulate to the extent necessary to address the perceived problem. We welcome the Government's recognition of the need to approach the matter in this manner, in terms of sanctions, in deciding that it is premature at this stage to make non-disclosure of PSI a criminal offence. However, the Government's proposals go further than giving the existing disclosure requirements in the Listing Rules more 'teeth', which has been the Government's main stated policy objective. For example, this objective could have been achieved without codifying in a statute the requirements in the Listing Rules, and by simply introducing by statute new sanctions for breaching the existing (suitably modified, if necessary) requirements in the Listing Rules, as in the UK.

1.2 In fact, the Government's proposals go even further than codifying in statute the existing requirements in the Listing Rules. For example, the existing requirements place the emphasis on equal and non-discriminatory disclosure, whereas the emphasis in the new requirements is on immediate disclosure. This gives rise to potential conflict with the issuer's legitimate interest in preserving the confidentiality of commercially-sensitive information, as the CP accepts - hence the critical need to ensure that the safe harbours are

sufficiently wide and commercially apt. In addition, whereas the existing Listing Rules requirements are principally on the issuers themselves, the Government's proposals would also impose significant new obligations on individual 'officers' of issuers.

1.3 At the very most, we would expect that an incremental and proportionate approach would mean that the new requirements go no further than the equivalent rules in other jurisdictions, which have been in place for much longer. However, the Government's proposals would go significantly further than the position in the UK. For example:

- As noted above, the UK legislation does not codify the existing disclosure requirements in the Listing Rules, but provides for financial penalties to be imposed if they are breached.
- There are no provisions in the UK for disqualification of directors, 'cold shoulder' orders, etc.
- Individual obligations are placed only on directors, who ultimately make the decision whether or not to disclose, whereas in Hong Kong the Government is also proposing to place individual obligations on managers below director level.
- Directors are only liable in the UK if they 'knowingly' (i.e. intentionally) breach the rules, whereas in Hong Kong the Government is proposing to impose liability on individuals also if they are found to have acted recklessly or negligently, a considerably more stringent standard.
- If, nevertheless, the Government does not wish to adopt a more incremental and proportionate approach to addressing this issue, we believe it is all the more important that the full implications of the proposals are considered, and the legislation drafted, with great care, to ensure that no inadvertent or unnecessary disruption is caused to Hong Kong commerce, and the Hong Kong economy. In this respect, we have a number of concerns on the draft legislative provisions attached to the CP. Since most of these concerns are not addressed directly by the Questions for Consultation, we set them out in this letter below, including some suggestions to address them. Our answers to the Questions for Consultation are contained in the Annex.

2. Main Comments on the Government's Draft Sections

Disclosure is a question of fine judgment in many cases: absolute or strict liability on issuers is inappropriate

2.1 As the SFC notes in its draft guidelines, decisions whether to disclose PSI are often marginal, involving subjective assessments. Directors, acting reasonably, having carefully considered the issues, may reach different conclusions in many cases. The SFC has recognised this fact in its draft guidelines, stating that it cannot advise companies on this issue, and that companies would have to make their own assessment. Whereas the proposed Section 101G(2) states that an officer is in breach only if he or she is at fault (i.e. if his or her intentional, reckless or negligent act or omission has resulted in the breach,

or if they have not taken all reasonable measures to prevent the breach), Section 101B(1) currently places absolute or strict liability on the company to disclose PSI. This would result in over-disclosure of information which should properly be treated as commercially-sensitive, given the serious sanctions which can be imposed on the company in the event of a breach. Where a company has acted promptly, has taken appropriate advice and steps, and has carefully addressed the issues (such as whether a given piece of information is likely 'materially' to affect share price), it should not be held in breach of the requirement if its decision proves to be incorrect with the benefit of hindsight. Section 101B(1) should be qualified accordingly. Alternatively, an additional safe harbour could be inserted in Section 101D to achieve the same effect, as explained in our Answer to Question 2(c). For the same reason, individual liability under Section 101G(2) should be restricted to directors, not 'officers' (as defined in the SFO), and only if the director has acted knowingly, as in the UK. This would also give appropriate protection to non-executive directors, who cannot be expected to have as detailed a knowledge about information affecting the company as executive directors. To maintain the negligence standard, in particular, would mean that failure to disclose inside information would be treated more strictly than virtually any type of market abuse under the SFO, which would be unfair and illogical since market abuse is generally more serious and less justifiable than non-disclosure, where the reasons for non-disclosure may be legitimate, and more difficult assessments need to be made.

References to an 'Officer' of the Company are inappropriate and should be replaced by Director'

2.2 Section 101B(1) states that the company must disclose inside information 'as soon as practicable' after inside information has come to its knowledge. Section 101B(2) states inter alia that information will be deemed to have come into the company's possession if it has come into the possession of an individual officer of the company in the course of performing his or her functions. The SFC draft guidelines ('the Guidelines') state (at para 32) that 'as soon as practicable' means 'immediately'. Section 101B takes no account of the fact that the officer may need first to realise (most probably after suitable consultation with others within the organisation) that the information is potentially discloseable, to then invoke the process for elevating the matter to the level of the Company's Board, which in turn may need time to discuss the matter internally, and externally with professional advisers, before deciding whether disclosure is appropriate. Indeed, the SFC's draft guidelines (at para 2) recommend that companies seek independent legal advice, if in doubt as to whether to disclose. 'Immediate' disclosure by the officer or the company is therefore inappropriate and impracticable. To accommodate this concern, the word 'practicable' should be prefaced with the word 'reasonably' in Section 101B(1), and the word 'officer' should be replaced by 'director' in Section 101B(2). The Guidelines should expressly recognise the fact that time may be needed not only to clarify the details and impact of certain facts (as stated in para 34), but also to consult internally and externally before deciding whether disclosure is appropriate. In addition, the words 'or ought reasonably to have' in Section 101B(2) should be deleted, otherwise the company would be required to disclose information it does not have. This cannot be correct: a

company should not be required to do something which is physically and practically impossible. We presume this was not the intention.

2.3 The reference to an 'officer' in Section 101G(2) should also be replaced by 'director'. It is inappropriate for any officer below director level to be subject to individual liability, since the decision whether or not to disclose is, or should be, made at director level. In addition, as noted in point 2.6, Section 101G(1) should be deleted.

Only Information Leaks which the Company is aware of should trigger Disclosure

2.4 Section 101D(1)(b) would mean that the benefit of any of the safe harbours would be lost, and the obligation to disclose immediately triggered, whenever the information ceases to be confidential. This is harsh and unreasonable. Quite apart from the difficulty in determining the point in time at which confidentiality was lost, a company may simply be unaware that third parties have become aware of the information. This is particularly the case if information is leaked from a source within the other party to a transaction which is in the course of negotiation, as opposed to the company itself. Requiring disclosure in such circumstances is tantamount to requiring the company to do the impossible. It should be sufficient to benefit from the safe harbours that the company has taken reasonable precautions to preserve confidentiality (as stated in Section101D(1)(a), unless the company is aware that the information has ceased to be confidential. The SFC's draft guidelines support this (see para 48, last sentence). Section 101D(1)(b) should therefore be deleted. In addition the term 'trade secret' in Section 101D(1)(c)(iii) needs to be defined, to distinguish it from confidential information in a wider sense.

Disclosure requirements should not be imposed retrospectively

2.5 Section101B(4) states essentially that Section 101B(3) - false or misleading disclosure - is not exhaustive as to the circumstances in which a company may be deemed not to have disclosed, but does not state what the other circumstances are. This in effect appears to reserve to the SFC and MMT the power to enforce retrospectively requirements which did not exist at the time when the decision whether to disclose had to be made. If this is the case, it appears to be contrary to Article 12 of the Hong Kong Bill of Rights and Section 101B(4) should therefore be deleted.

A separate duty to implement proper compliance safeguards is unnecessary and inappropriate

2.6 The Government is proposing to introduce not just a new statutory duty to disclose price sensitive information ('PSI') but to also impose a new, separate statutory duty on each 'officer' of the company to put in place 'proper safeguards' to ensure that the company discloses PSI: see draft Section 101G(1). Such a provision is unnecessary, disproportionate, and over-intrusive, and should be deleted, for the following reasons:

- The proposal means where the company breaches the obligation to disclose PSI, the officer will be in breach not only of that obligation, if he or she is at fault (under Section 101G(2), but is also by definition likely to be in breach of Section 101G(1), by failing to ensure proper safeguards were in place to prevent a breach of the PSI obligation. In effect, therefore, this creates two potential statutory infringements, and two potential penalties, in respect of the same set of facts. This is analogous to 'double jeopardy', which is constitutionally prohibited not only in Hong Kong (under Article 11(6) of the Bill of Rights) but also in many other jurisdictions, including Europe and the US.
- Even where there was no suspected breach of the PSI obligation, other factors (such as perceived compliance weaknesses in other aspects of its business) might trigger an SFC investigation into whether the company had appropriate safeguards in place to prevent a breach of the PSI obligation. This is unduly intrusive.
- The concept of 'proper safeguards' is vague and would give the SFC and MMT too much discretion in determining what safeguards are appropriate to ensure compliance.
- Such an obligation is unnecessary: a person who is subject to the potential sanctions the Government is proposing for breach of the PSI obligation (the 'main obligation') will have every incentive in any event to ensure appropriate safeguards are in place to prevent a breach. Conversely, administering and enforcing such an unnecessary obligation would be a waste of public resources.
- Such an obligation is typically imposed if a company has been found to be in persistent breach of the main obligation: the company might then be ordered to put in place appropriate safeguards to prevent a recurrence. It is highly unusual to impose such an obligation in the statute in addition to the main obligation itself.
- Even if, in spite of the above factors, it was appropriate to include a separate obligation to ensure compliance with the main obligation, (which is not the case) it would be inappropriate, impracticable and unnecessary to place this requirement on 'every officer'. Companies typically choose to delegate to a single director or senior manager the task of establishing and maintaining an effective compliance system. If any duty to implement safeguards is to be introduced (which it should not), it should be placed on the company, and the company left with the discretion as to how to ensure that it complies with this obligation. However, even an obligation on the company is unnecessary and disproportionate, since (as noted above) the sanctions for breach of the main obligation provide a sufficient incentive to ensure compliance safeguards are in place.

Although there should be no separate statutory duty to implement proper compliance safeguards, it is entirely appropriate that the failure to put in place adequate safeguards should be a relevant factor in determining whether the company has breached the statutory duty to disclose PSI (see 2.1 above).

If you would like to discuss any of the points above or in the Annexes please feel free to contact me.

Yours faithfully,
For and on behalf of
Hutchison Whampoa Limited

EDITH SHIH

Enclosures: Annex – Answers to Specific Questions in the CP

ANNEX - ANSWERS TO SPECIFIC QUESTIONS IN CP

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?

In our view, this question can only be answered in the light of how the Government proposes to address the substantive issues raised by the Consultation Paper, and in particular Question 1(b) below.

(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?

No. See comments in points 2.1 and 2.2 of our attached letter. In summary:

- The company's liability for failure to comply with the PSI requirement should not be absolute or strict - as it would be under Section 101B(1), as currently drafted - because decisions whether or not to disclose often involve fine judgment on which reasonable people may disagree. A company which has followed proper internal processes and made a good faith and reasonable judgment not to disclose should not be held liable. This concern can be addressed by the insertion of an additional safe harbour, as set out in our answer to Question 2(c) below.
- The obligation cannot in practice be triggered by the possession of the information by an 'officer'. An officer (if not a director) once becoming aware of the nature of the information needs to bring it to the attention of a director, a Board discussion may need to take place and (as the SFC draft guidelines recognise) external legal and other advisers may need to be consulted. This issue can be addressed by the suggestions we make in point 2.2 of our attached letter.

(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?

Yes.

Question 2

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

We agree with these safe harbours in themselves, subject to the following comments. First, for the reason set out in our letter, Section 101D(1)(b) should be deleted - see point

2.4 of our attached letter. Secondly, a definition of 'trade secrets' should be included. Thirdly, the safe harbour for incomplete proposals or negotiations should be made more flexible, along the lines of the SFC draft guidelines (para 55), under which the safe harbour will apply not only if the 'outcome' is prejudiced, but also if the 'normal pattern' is prejudiced (this is also more consistent with the UK). We also recommend the inclusion of an additional safe harbour- see answer to (c) below.

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

Yes.

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

As noted in the attached letter, unless the Section 101B(1) unless is qualified to the effect that the company is only liable (as with individuals) if it has acted intentionally, recklessly or negligently, an additional safe harbour should be included to the effect that a company does not need to disclose where it has followed proper internal processes to ensure that the matter is escalated to the Board in a timely manner, and the Board has decided in good faith, on reasonable grounds, and in a timely manner, that the information is not discloseable.

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

Yes.

Question 3

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

Yes.

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

Yes, subject to one point. The power to issue cease and desist orders should only be exercisable where the infringement is intentional and the company has a history of previous intentional infringements, given the difficult assessments involved in making disclosure decisions, and the fact that breach of a cease and desist order is a criminal offence.

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

No - the existing institutional arrangements under the SFO should be preserved, unless and until sufficient experience has been gained under the new regime which demonstrates that there is a problem with them.

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?

It is not clear why guidance is envisaged for an initial 12-month period only- such guidance will be needed on an indefinite basis.

Question 5

Do you think the administration and enforcement arrangements proposed by the SFC and SEHK in paragraphs 3.8 – 3.9 are appropriate?

No.

Do you have any comments on the respective roles of the SFC and SEHK to further enhance clarity?

Yes, we have four main comments, which we set out below:

1. The SFC should only investigate following referral by SEHK. The CP (rightly) states that SEHK should remain as the 'frontline regulator' and as the 'point of contact at the frontline' (para 3.5). **Consistent with this, HKEx's existing role of monitoring unusual or unexpected price movements and stock transactions should be maintained. The SFC should only investigate cases which have been referred to it by SEHK** (in the same way that the SFC may refer cases involving suspected criminal offences to the criminal enforcement authorities).

2. Informal Enquiries should always precede formal investigations. The Government is proposing to allow the SFC to conduct an investigation where it has reasonable cause to believe that a breach of the disclosure requirement 'may have' taken place (paragraph 3.9 of the Consultation Paper). This sets the threshold test for the opening of a formal investigation at too low a level. The SFC should not be entitled, for example, to open a formal investigation merely because of an unexpected substantial change in a company's share price. In fact, such an unexpected change could be explained by a myriad of factors other than non-disclosure of PSI. Many such cases could be resolved, and formal

investigations avoided, through informal, confidential enquiries with the company. Such informal enquiries should therefore always be conducted as a first step. Opening a formal investigation without such prior inquiries would therefore be potentially wasteful of resources and disruptive, both for the company and for the regulator. **It should be for SEHK, as frontline regulator, to conduct the initial enquiries, to decide after initial enquiries whether there is a reasonable suspicion that a breach has occurred, and if so, to refer the case to the SFC for investigation.**

3. The Overlap with section 214 needs to be clarified. In its *Warderly* judgment, the Court of First Instance recently disqualified two directors for five years under section 214 of the SFO for failing to disclose PSI. The Consultation Paper itself says that section 214 can be used as an alternative to the new PSI provision (which gives the MMT the power to disqualify). If this overlap cannot be avoided, it would be useful to clarify the circumstances in which the SFC seeks disqualification through the court under section 214, rather than through the MMT under the new PSI provision.

4. Modifications of the Listing Rules should be concurrent with introduction of the new PSI provision. Para 3.4 envisages SEHK would conduct its own public consultation and then seek SFC's approval before modifying the general obligations of disclosure in the Listing Rules to dovetail with the statutory provisions. This time lag should be eliminated as much as possible in order to enhance clarity and certainty to the market.

希慎興業有限公司
Hysan Development Company Limited

Hysan 希慎

The Lee Gardens, 33 Hysan Avenue,
Causeway Bay, Hong Kong
Tel: (852) 2895 5777 Fax: (852) 2577 5153
www.hysan.com.hk

Direct Tel : 2830 5138
Direct Fax: 2907 3313
E-mail: wyung@hysan.com.hk

Our Ref :

28 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I
Admiralty Centre
18 Harcourt Road, Hong Kong

By Fax and Mail

Dear Sirs,

Consultation (the "Consultation") on Proposed Statutory Codification of Requirements relating to disclosure of Price Sensitive Information

Hysan Development is committed to maintaining the highest standards of corporate governance. We welcome the government's proposal to codify the above requirements. The "statutory" approach is in line with practices in major jurisdictions, including the U.K and North America. Such a step will further support Hong Kong's infrastructure as a leading international financial centre.

We generally support the proposals set out in the Consultation. However, we would like to seek your clarification on certain issues, particularly as regards to the "Safe Harbour B" in the context of incomplete transactions. Clarification as to the definition of "officers" under the new requirements is also sought.

1. "Safe Harbour B" in the context of incomplete transactions – relevant to Questions 1 and 2

Under the current Stock Exchange Listing Rules, it is provided that no disclosure is required until a "decision" is made. It is unclear whether "Safe Harbour B", as interpreted under the guidelines (set out in Annex 2 to the Consultation) issued by the Securities and Futures Commission ("SFC") would differ from the approach currently adopted by the Stock Exchange.

We noted the examples given in Annex 2 regarding the interpretation of "prejudicial" [to the ongoing negotiations]. The examples given do not qualify "prejudicial" by reference to a

"probability" test, specifically as to whether a decision is made. It is therefore unclear as whether the new requirement differs from the "decision" test currently adopted under the Listing Rules.

In practice, listed issuers are most concerned at this stage when negotiations are still on-going and commitment has not been reached. Premature disclosure may adversely affect ongoing negotiations. Also, such disclosure may be potentially confusing to the market as no transaction may eventually be concluded.

We have checked practices in overseas jurisdictions where a similar statutory codification approach has been taken and it seems that the "probability" test is highly relevant.

In the U.K., while the same test of "insider information" has been adopted regarding "disclosure" as well as "insider trading", there are directives to the effect that "incomplete negotiations short of a decision" is not required to be disclosed. The emphasis is on confidentiality. No disclosure made before a decision has been arrived so long as confidentiality is preserved.

A similar approach is adopted in Canada. While the terminology adopted may appear to be different, the underlying principle is consistent with that adopted in the U.K. Insider trading making use of the confidential information is strictly prohibited regardless as to whether a decision is made. Disclosure is, however, only required after a commitment is made.

(Further information on U.K. and Canadian practices as set out in Appendices 1 and 2 respectively.)

We would, therefore, urge the government and SFC to consider the practical experience of these two jurisdictions in finalizing the codification proposal and the interpretation guidelines. In any event, we would appreciate clarification as to whether the new requirements adopt a different test as that currently applied under the Listing Rules as regards incomplete transactions.

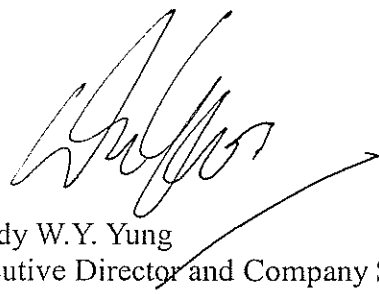
2. <u>The definition of "officers" – relevant to Question 1</u>

Under Part 1 of Schedule 1 to the Securities and Future Ordinance ("SFO"), an "officer" in relation to a corporation means a "director, manager or secretary of, or any other persons involved in a management of, the corporation". We appreciate the practical difficulties involved in setting out an exhaustive list of such "officers". The key is whether that person is involved in the "management of the corporation". The titles of such personnel differ from corporation to corporation. We would like to seek your clarification as to whether the

expression "manager" is qualified by the requirement of being "involved in a management of, the corporation". Otherwise, "manager" is potentially a very broad expression. We take the view that an officer should be a person involved in the management of the business and affairs of the corporation as a whole, not a manager taking care of one or more business line or function.

In closing, we reiterate our support for the proposals. We would, however, appreciate clarification as to the two issues set out above. Should you need further information, please do not hesitate to contact the undersigned.

Yours faithfully,



Wendy W.Y. Yung
Executive Director and Company Secretary

Encl.

Appendix 1

U.K. Practice

We have checked the U.K. practice with a City law firm, as summarized below.

- The test of "inside information" is the same under the Listing Rules as it is under the insider dealing/market abuse statutory regimes.

- DTR 2.5 allows an issuer to delay the release of inside information where it is a pending transaction. DTR 2.5.1 refers to such an ability to delay so as not to "prejudice" the issuer's legitimate interest. This is then softened by DTR 2.5.3 which states that legitimate interest may include "negotiations in course" where the "outcome or normal pattern of those negotiations would be likely to be affected by public disclosure". i.e. the test is effectively reduced to whether negotiations would be affected rather than prejudiced.

- The U.K. Financial Services Authority is very concerned about leakages. In practice, we understand that issuers and their advisers apply the following tests in relation to matters in the course of negotiation. Firstly, whether the matter is still in the course of negotiation; and secondly, whether or not there has been a leak of information about it. Thus, provided that there is no leakage in information, no disclosure of "incomplete transactions" is made.

- Prohibition of "insider dealing", of course, applies regardless as to whether a decision has been made in the negotiations or not.

[Note: our own underlining for your ease of reference.]

Appendix 2

Canada – extracts from the leading Ontario AiTcase (2008)

Paragraph 211 - "...the distinction between "material facts" and "material changes" in the legislation recognizes the need of issuers to keep certain developing transactions confidential in the course of negotiations. For example, in a negotiation for a merger transaction, such negotiations may be material at a very early stage and for the purpose of insider trading laws, persons aware of such "material facts" should be prohibited from trading on this information. However, this may be well before the negotiations have reached a point of commitment to be characterized as a change in the issuer's business, operations or capital, and therefore, before public disclosure of the information would be appropriate."

[Note: our own underlying for your ease of reference.]

The Institute of Accountants in Management
IAM
香港管理會計師公會
Level 19 Two International Finance Centre, Central ,Hong Kong.

28 June 2010

Fax (852) 2529 2075

Financial Services Branch
Financial Services and the Treasury Bureau,
18/F, Tower I,
Admiralty Centre,
18 Harcourt Road,
Hong Kong.

Dear Sirs,

Price Sensitive Information
To be disclosed by Listed Companies
Legislative Proposals

1. The Institute of Accountants in Management ("Institute") is a group of professional accountants who are members of various leading professional accounting bodies and who are working in commercial firms, listed and unlisted, and universities. The Institute is a professional society and not a political party.

2. With reference to the invitation of comments of the public on the captioned subject, the Institute is of the view that the proposal should demand serious consideration before putting it to legislation.

3. At the outset, the present system of controlling insider trading has generally caused no much problem. It is doubtful as whether it is necessary to disturb the present system in Hong Kong albeit it may have problems in other countries, which is one of the reasons for the proposed legislative changes.

4. As for the setting up of the proposed Market Misconduct Tribunal, the Institute is of the view that given the current system of monitoring insider trading is operating efficiently and leakage of sensitive information if any is not resulted in insider trading and in the absence of any damages or losses suffered by any person in particular minority investors, there should not be any sanction of penalties; and hence the proposed Tribunal is not necessary.

5. The primary concern of the Institute is the proposed penalty, which are extremely heavy even though it is not of a criminal nature, together with the unclear definition of price sensitive information. Listed companies do make business decisions day after day. It is not clear and hence burdensome on directors of listed companies, especially in borderline cases, whether certain pieces of business information, after business decisions, should be disclosed to the public.

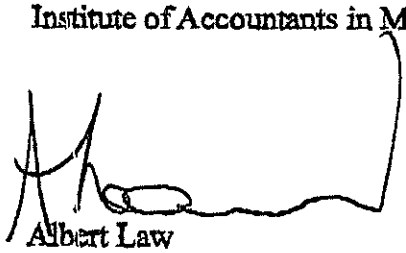
6. For instance, according to the draft guidelines published by the SFC, it is proposed that once a potential deal is "leaked" even by third parties, the directors of the company are responsible to make the relevant disclosures. This guideline is made by people who are oblivious to business practices. Third parties or even potential partners could benefit from "potentially ruining" a deal by selective leakage. This requirement would put listed companies at a disadvantageous position in contract making and business negotiation. This is just an example of the types of restrictions listed companies will have to face under such a regime.

7. Under the circumstances, the Institute does not support the proposed legislative changes, specifically with the proposed increased penalties.

8. The Institute urges the government to solicit thoroughly the views of the management of the listed companies in Hong Kong first, in particular on the definition of price sensitive information, before the proposal is put to the public for consideration of legislation.

Yours faithfully,

For and on behalf of
Institute of Accountants in Management



Albert Law
President

K. WAH INTERNATIONAL HOLDINGS LIMITED
嘉華國際集團有限公司
(Incorporated in Bermuda with Limited Liability)

A Member of K. Wah Group

28 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs

Re: Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

In respect of the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations, we would like to express our opinion towards the questions set out in the Consultation Paper as follows:

Q.1a 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?

We agree.

Q.1b 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?

We agree that listed corporation should disclose inside information ***as soon as acknowledged the same and immediately after*** all necessary verification and review on such information by internal management in order to avoid any missing or misleading information published.

It may consider to establish a comprehensive policy by the listed corporations as part of internal control on precautions and procedures for dealing with and reporting the inside information by its directors, officers or any employee.

Q.1c 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?

We agree.

Q.2a Do you agree to the provision of the four proposed Safe Harbours?

We agree.

Q.2b Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?

We agree.

Q.2c Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?

We recommend an additional safe harbour which provides that if a corporation and its directors have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change -- due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show clear and proper records of board deliberations leading to a reasonable conclusion that the information needed not to be disclosed at the time.

Q.2d Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?

We agree. We also think that other market participants should also be given the opportunity to suggest Safe Harbours to match with market developments.

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

We do not object.

Q.3b Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

We agree and would want to add that the proposed range of civil remedies is highly deterrent already.

Q.3c Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

We have no objection but would support a more efficient process, some checks-and-balances controls must be in place.

Q.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?*

We agree and add that this should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new Safe Harbours that may be prescribed from time to time.

Q.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?*

The lines of authorities and responsibilities between the SFC and SEHK must be clearly defined without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by Listing Committee.

We thank you for your attention.

Yours sincerely,
For and on behalf of
K. Wah International Holdings Limited
(Stock Code: 173)

Paddy Lui Wai Yu
Executive Director

江山控股有限公司
Kong Sun Holdings Limited

A Company Listed on the Hong Kong Stock Exchange (Code: 295)

28 JUN 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs

Re: Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

This letter states our views towards the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

We have the following overall comments:

1) We support the introduction of civil remedies, not criminal, for this legislation.

2) Both elements of the *mens rea* (the "guilty mind") and *actus reus* (the "guilty act") must be present if a disclosure obligation is deemed to be breached, hence the strict liability concept must not be applied here. A corporation and its directors that could show they had duly and carefully considered a piece of information and made a non-disclose decision based on prevailing circumstances and information should not be held liable even if the information had eventually caused material effect to share price.

Our response to specific questions listed in the Consultation Paper as follows:

Q.1a 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?

We agree.

Q.1b 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?

We agree a listed corporation should disclose inside information promptly but feel that the SFC should provide more guidance on how long is "practicable" in its view and their definition of "immediate". A corporation needs to verify the information, make necessary internal review, and assess its impact and this may take time.

For a large corporation with a large number of officers, it is difficult for the corporation to ensure all directors or officers would report inside information

Unit C, 10/F, Wings Building, 110-116 Queen's Road Central, Central, Hong Kong
Tel: (852) 2868 1190 Fax: (852) 2530 1770

instantly that has come to their knowledge. It is our view that if a corporation has established and maintained appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable.

Further, the existing definition of "officer" which includes directors, secretaries and managers is too wide. Under the UK regime, only directors who *knowingly* breach the disclosure requirement would be held liable. We concur with this and recommend Hong Kong follows the UK approach. The definition of "officer" should include only "director" throughout this draft legislation.

The phrase "ought reasonably to have" in s.101B(2) of the "draft legislation" should be taken out. This phrase suggests that it is possible that the information may not have been actually known by the officers and thus it is impossible for the corporation to disclose information on this basis.

Q.1c 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?

We agree.

Q.2a Do you agree to the provision of the four proposed Safe Harbours?

We agree.

Q.2b Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?

We agree.

Q.2c Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?

We recommend an additional safe harbour which provides that if a corporation and its directors have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change -- due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show clear and proper records of board deliberations leading to a reasonable conclusion that the information needed not to be disclosed at the time.

Q.2d Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?

We agree. We also think that other market participants should also be given the opportunity to suggest Safe Harbours to match with market developments.

Question 3

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

We do not object.

Q.3b Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

We agree and would want to add that the proposed range of civil remedies is highly deterrent already.

Q.3c Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

Allowing SFC direct access to the MMT lacks the checks-and-balances under the existing arrangement of having the cases referred to the Financial Secretary first. While we support a more efficient process, some checks-and-balances controls are important. Moreover, under the proposed legislation, the other proceedings that cover the six types of market misconduct would be referred to the MMT directly by the SFC. This is a major change. The Government must consider this with a view to balance the market's need for checks-and-balances and whether the resources of MMT can cope with the possible increase in the number of cases referred to it.

Q.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?

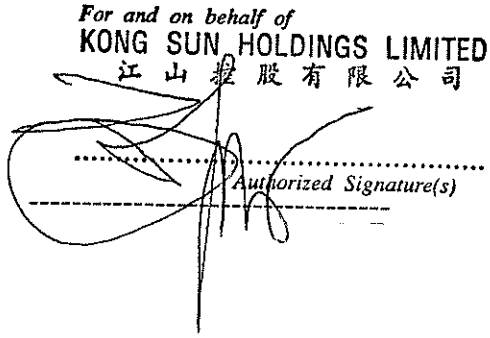
We agree and add that this should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new Safe Harbours that may be prescribed from time to time.

Q.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?

The lines of authorities and responsibilities between the SFC and SEHK must be clearly defined without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by Listing Committee.

We thank you for your attention.

Yours sincerely,
For and on behalf of
Kong Sun Holdings Limited (stock code:295)



KPMG
8th Floor, Prince's Building
10 Chater Road
Central, Hong Kong
P O Box 50
General Post Office
Hong Kong

Telephone +852 2522 6022
Fax +852 2845 2588
Internet www.kpmg.com.hk

Divison 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

Our ref IMP/IH/DPPCMG

Contact Ian M Parker
852 2978 8260

Corporate Finance Division
The Securities and Futures Commission
8/F Chater House
8 Connaught Road Central
Hong Kong

25 June 2010

Dear Sirs

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

On behalf of KPMG I set out below our comments on the proposed statutory codification of certain requirements to disclose price sensitive information ("PSI").

In general KPMG is supportive of the proposals as a means to enhance market transparency and quality. However, we also welcome the Administration's recognition 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 their operation and business developments.[1] We further consider that it is necessary to ensure that an appropriate balance is struck between the directors' responsibility to act in the best interests of the listed corporation and its existing shareholders as opposed to its responsibility towards the investing public at large. This is particularly the case where the financial viability of an issuer is in jeopardy and immediate release of information could, in and of itself, be a significant contributing factor in preventing the long-term financial recovery of the issuer.

[1] Paragraph 4 of the Executive Summary to the Consultation Paper and paragraph 2.9 of the Consultation Paper

KPMG

In this respect we consider that both the safe harbours and the SFC's Guidelines on Disclosure of Inside Information are essential elements of the proposal. Our further comments on these elements are as follows:

We support the proposal to grant the SFC the power to create new safe harbours to cater for future market developments and would also support review of the proposed safe harbours to ensure that they are sufficiently wide in their scope to provide protection for directors who have acted in good faith and in the best interests of the listed corporation and the investing public to the best of their ability.

We also welcome the Guidelines, which provide useful guidance on how the new regulations should be interpreted. However, similar to the need to keep the safe harbours under constant review, the need to provide additional practical implementation guidance should also be considered, particularly to provide clarity where it appears that directors are falling short of the obligations inadvertently or, conversely, are over-whelming the investing public with frequent disclosure of information which is not regarded by the SFC as being price-sensitive. We would encourage, therefore, the SFC to update the Guidelines on a regular basis, to deal with emerging practical issues that Hong Kong companies will inevitably face as they apply these new requirements.

We also note that the SFC's informal consultation arrangement is to be established initially for a 12 month period. We consider that there will be a need for such consultation facilities on an ongoing basis and would encourage the SFC to continue this role indefinitely.

We trust that you find these comments useful but if you would like to discuss our views further, please do not hesitate to contact me.

Yours sincerely

Ian M Parker
Partner
Head of Capital Markets Group

THE LAW SOCIETY OF HONG KONG 香港律師會

Consultation Papers

1. Financial Services and Treasury Bureau (FSTB)

"Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations"

2. Securities and Futures Commission (SFC)

"Draft Guidelines on Disclosure of Inside Information"

General Comments

The Law Society's Company and Financial Law Committee and Securities Law Committee have considered the proposals in the Consultation Papers. Our members have divergent views on giving statutory backing to the disclosure requirements for price-sensitive information (PSI), as outlined in the Consultation Paper published by FSTB *"Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations"* (Consultation Paper).

As Hong Kong builds its status as a key financial and business centre of the world, we understand the Government's intention to enhance investors' protection and corporate governance by stepping up regulation of disclosure failures and some of our members are sympathetic to the codification proposals.

However, a majority is very concerned about the prospect of giving statutory backing to the disclosure of PSI. Their reasons are summarised below:

- Whether something should be considered PSI can be an extremely complex and nuanced question. It is also a continuously evolving concept, which is evident in statistical trends.[1] The difficulty in defining inside information makes it inherently unsuitable for forming the subject of a positive statutory obligation (even on a civil basis). Imposing such an obligation is almost certain to result in over-disclosure which has the undesirable effects of disruption to businesses, mishandling of confidential information, and unnecessary and confusing surplus information in the market. If companies opt to over-disclose to avoid liability, the very purpose of encouraging the early disclosure of information that is useful to the market will be lost. In some members' view, the issues outlined in paragraphs 2.27 and 2.28 of the Consultation Paper give rise to serious concerns not just with respect to any future criminalisation, but also with respect to the proposals which are being put forward in the Consultation Paper.

[1] For example, in 2006, among the 204 companies listed on the Hong Kong Stock Exchange that recorded a decrease of 50% or more of their net interim profits for the first six months of 2006, only a very limited number of those companies issued profits warning announcements under Listing Rule 13.09. While the practice of issuing profit warning announcements is more prevalent subsequent to 2006, it has not become an inflexible requirement. In March 2009 a leading financial institution listed on the Hong Kong Stock Exchange announced a 62% decrease in pre-tax profit without issuing a profit warning in advance. In 2010, not all listed companies that reported an increase in profits opted for the issue of positive profit alert announcements. Codification of Rule 13.09 will not only impose a heavy burden on directors, it would create great confusion and uncertainty while what constitutes PSI remains unclear or changes over time.

- The need for the Government's main policy objective, namely to give the existing Listing Rule requirement more "*teeth*", has not been sufficiently demonstrated. No evidence has been put forward to show that companies are failing systematically to comply with Listing Rule 13.09. Whilst one could point to laws covering a similar concept overseas many of our members consider that this in itself is not a good reason for introducing burdensome legislation in Hong Kong without ample evidence of need. One of Hong Kong's traditional strengths has been that it has not been overburdened with legislation.

- With recent evidence of a real statutory remedy for substantial abuses of Listing Rule 13.09[2], the various successful insider dealing prosecutions by the SFC and the existing s.384 SFO penalty for any false or misleading information published in response to a Rule 13.09 enquiry, it is doubtful that Hong Kong needs another piece of legislation covering such a broad ambit.

- Many directors of small and medium-sized listed companies in Hong Kong are not professionally trained in securities laws. To guard against over-regulation which deters honest and able persons from taking up directorships (especially non-executive roles), attempts to expand the regulatory burden must be counter-balanced by appropriate protection for a director who makes an honest and reasonable mistake.

- In some cases, the directors' duty to keep information confidential where this is in the company's best interest may conflict with the statutory duty to disclose. If directors feel (in order to protect themselves from personal liability) safer to over-disclose, this may actually be detrimental to the company and shareholders.

There is a fundamental problem with imposing a vaguely drafted and potentially wide-ranging penalty regime where the regulators may impose a fine of up to HK$8 million (which might be construed as being aimed at deterrence)[3] and other very substantial sanctions.

We wish to emphasise that while we respond on the particular detailed questions below, some of our members are fundamentally against the idea of statutory backing of PSI. There is also considerable consensus that there are serious flaws in the "indicative" draft legislation which has been put forward.

SFC's *Draft Guidelines on Disclosure of Inside Information* (draft Guidelines)

With regard to the draft Guidelines, in the view of some members the fact that these are thought necessary (i.e. that the legislation itself is not sufficiently clear) is a worrying comment on the wisdom of introducing the legislation at all.

Some members are also uncomfortable with the draft Guidelines because in some paragraphs (for example paragraphs 63, 64, 70, 71) these may actually represent the SFC's desired position rather than the law. It is made clear in paragraph 2 that the draft Guidelines cannot be relied upon as an authoritative legal opinion, but it is a relevant concern that the SFC's view has not always held up with the tribunals. Just to take one detailed example, reference to the "possibility for a substantial price cut in [a listed company's] products" in paragraph 63. Once such matter becomes "specific or definite .... the corporation should make an announcement as soon as practicable". This does not sit at all easily with the IDT's decision in the *Tingyi* tribunal

[2] The application of s.214 SFO in SFC v. Yeung Kui Wong and others, HCMP 1742/2009.

[3] See the Court of Final Appeal case of Koon Wing Yee v Insider Dealing Tribunal and another, [2008] 3 HKLRD 372; (2008) 11 HKCFAR 170 where the Court held that punitive deterrent penalties render an offence criminal under the Hong Kong Bill of Rights, irrespective of whether it was classified as civil, and hence proof beyond reasonable doubt was required.

hearing, which looked at possession of five or six different pieces of information obtained by analysts (including information on profit margins) and came to the view these would not be relevant information unless in the context of what was known by investors (which itself required exhaustive analysis) it meant that expectations for bottom line results would be meaningfully affected.

In paragraph 2, it should perhaps suggest that the listed company should seek independent legal "and other professional" advice instead of just legal advice; it may need to seek advice from its accountants as to whether the specific information is material, and from its financial advisers as to whether such specific information is price sensitive.

Paragraph 5 and 14: in general the summary of the tribunals' decisions is fair, but some members were concerned that without reference to *Tingyi*, all key aspects of tribunals' views on relevant information have not been set out as fulsomely as they should be.

In paragraph 9, there are comments that the reference to "which might unduly prejudice a corporation's legitimate interests" does not actually accord with the drafting of the safe harbour.

With respect to paragraph 29, there are comments that the list should not include 'pledge of the corporation's shares by controlling shareholders' as one of the possible events or circumstances where a listed company should consider whether a disclosure obligation arises, given that (a) such event is governed by the SDI regime under the SFC under which no disclosure is required if such pledge of shares is to a bank or other qualified lenders and (b) such event does not constitute a price sensitive information under paragraph 6 of the *Guide on Disclosure of Price Sensitive Information* issued by the Hong Kong Stock Exchange in January, 2002 - noting that the list therein is also for illustrative purpose and is not a definitive list (vide paragraph 7 thereof); the market is aware of the SDI regime under SFO in relation to the pledge of shares by controlling shareholders and hence if this is incorporated, the market may have a different interpretation as to whether the regulators intend to regulate such disclosure by back-door means; if the regulators do intend to regulate such pledge of shares by way of disclosure, this should be the subject of a separate consultation and should not be grouped under the PSI regime.

Some members are concerned as to whether the fact that the draft Guidelines highlight specific information that there is a "difference between the results which the market might predict and the results the directors or officers know" (paragraph 27 of the draft Guidelines) and the comments in relation to "material changes in the corporation's ... performance of its business [etc.]" (paragraph 45 of the draft Guidelines) will exacerbate issues regarding reporting of profits / losses, and possibly reopen by the back door the issue of frequency of reports.

With regard to paragraph 55, a query has been raised on the meaning of "impending" negotiations and a view has been expressed that there should be more guidance (ideally in the legislation itself) as to what "incomplete" means. Query whether there are issues which might not be described as "proposals" or "negotiations" to which the same concept should apply.

Some members consider that it is unsatisfactory that an attempt to describe "trade secrets" is made in paragraph 57 rather than in the legislation itself.

In Appendix A, the SFC has omitted some cases – it should include all cases.

Law Society's Response to Questions in FSTB's Consultation Paper

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?

Law Society:
There were divergent views on this:

Opposing view
It is one thing to prohibit a person from dealing in securities whilst in possession of unpublished "relevant information" even though the definition "relevant information" lacks precision or may be incomplete. If a statutory disclosure obligation is to be imposed on a person in possession of "relevant information", consideration should be given to refining the definition such that the disclosure obligation can be properly discharged, noting that criminal liability is already attached to making any incomplete or misleading announcement.

There could be a conceptual problem between using the same definitions for the insider dealing and the PSI regime: there may well be sufficiently specific information for the relevant people to be restricted from dealing, but which is not of a type, or is not yet, suitable for publication. The proposed legislation, and in particular both the scope and clarity of the proposed safe harbours, does not address this.

Some of those who objected supported retaining the definition of PSI under Listing Rule 13.09 with which the market is familiar.

Favourable view
"Relevant information" is a concept familiar to the market and there are case law / tribunal decisions on the application of this concept, therefore, it is practical and reasonable to define PSI in similar terms.

As pointed out in the Consultation Paper, what constitutes "relevant information" involves the making of an assessment on the part of the directors taking into consideration a number of broadly crafted principles and so express provisions could be included in the legislation (either in the "relevant information" provisions, or as a safe harbour) to the effect that:

- the corporation should not be held liable if a reasonable board of directors, taking into account the guidelines issued by the SFC (Guidelines), could have come to the conclusion that the specific information does not amount to "inside information", even if another reasonable board of directors could have come to a contrary conclusion; and

- directors will not be liable provided they act honestly and reasonably in making their decision.

Question 1(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?

Law Society:
There are many potential problems with this proposal.

As mentioned above, a majority of our members are very concerned about giving statutory backing to the disclosure of PSI disclosure requirement. Their view is that the existing obligation under Listing Rule 13.09 does not require codification.

There is some support the proposals could be acceptable subject to the following qualifications:

- The term "as soon as practicable" should be more clearly defined. The draft Guidelines states that this means "immediately take all steps that are reasonable in the circumstances". While there can be black and white cases of inside information, in many cases compliance with such vague legislation is likely to be problematic. Every individual officer in possession of information which is not public (and officers will continually be in possession of confidential information relating to the relevant business) will have to make frequent judgement calls as to whether the information is potentially serious enough to require escalation for decision making (including judgement calls of a type that in some cases have required hundreds of pages of analysis in tribunal decisions).

- A director or an officer who has come into possession of inside information should be obliged to notify the listed corporation according to procedures it has established for the purpose, but the listed corporation should not be regarded as having knowledge of the information if the relevant director or officer failed to notify the listed corporation according to such procedure. The listed corporation should however be held liable if it has failed to establish such relevant procedure.

- There should not be a broad requirement to release <u>any</u> inside information that has come to the company's possession. For example, a listed company may receive PSI in the course of negotiating a transaction with a third party (e.g. another listed company) and it may be under a contractual obligation to keep the PSI confidential. In such a case, it does not make sense for the first listed company to be under an obligation to release such information to the public. The general principle should be the <u>timely</u> release of PSI but not in cases where such information is still premature.

- In relation to the presumption of knowledge, the current definition of "officer" under the SFO is too wide, as it includes not only directors, managers and secretaries, but also "any other involved in the management of the corporation". It is inappropriate for individual liability to be imposed on persons who are not directors, as proposed in s.101G(2) of the draft provisions. In comparison, in the UK, only directors are subject to individual liability in respect of non-disclosure, and only if they have acted "knowingly" (not recklessly or negligently, as the Government has proposed). We suggest that only directors and persons occupying equivalent senior management positions and having power to make managerial decisions affecting the future development and business prospects of the company (such as a chief executive) should be capable of having their knowledge imputed to the company.

- The requirement that directors and officers be required to take "<u>all</u> reasonable measures <u>from time to time</u>" [emphasis added] to ensure that proper safeguards exist to prevent the company from breaching the statutory disclosure requirements is problematic. This wording emanates from the existing compliance duty in s.279 SFO, but the scope of that duty, which relates to the prevention of obviously egregious activities, is in reality narrower than a duty which involves a positive obligation to do something (the scope of which is intrinsically unclear in many circumstances). Even if an officer has not been negligent, he will still be held to the "all reasonable" standard. Without knowing how this standard will

be administered in practice (e.g. whether it is sufficient to ensure that general protocols have been circulated, or whether some objective measure of "effective" circulation will be applied after the event; and whether all directors and officers need to supervise information dissemination, etc) severe difficulties will exist for directors and officers in their everyday compliance duties.

- Another problem with s.101B(1) is that it imposes absolute liability on the company for non-compliance, whereas individuals are to be liable only if they are at fault. Absolute liability is not appropriate where decisions involve in many cases difficult, subjective and marginal assessments, as is acknowledged to be the case with PSI. The SFC acknowledges in the draft Guidelines that it cannot advise companies on whether something constitutes inside information, and that this is for the company to assess.

- Finally, the words "or ought reasonably to have" in s.101B(2) should be deleted, otherwise a company would be obliged to do the impossible, i.e. to disclose information it does not have. Only actual knowledge should attract liability for breaches of the statutory disclosure requirements. Another serious problem with the concept is that it puts the company on notice and expects it to make enquiries, but there is potentially no limit on how far such enquiries should go, which could produce an impossible dilemma for the company.[4]

Question 1(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?

Law Society:
We agree with the proposal, subject to some concern with regard to the codification approach generally and the safe harbours we propose in this response.

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

Law Society:
Subject to the stated objections to codification generally, we agree in principle with the proposed safe harbours. However, there is a problem with s.101D(1)(b) in that the benefit of the safe harbours would be lost, and the disclosure obligation triggered, even if the company is unaware that information had leaked. This would be unfair, and does not seem to be the intention of the proposal - under the draft Guidelines the safe harbours would be lost only if the company is aware that information has leaked.

In addition, we have the following comments on the four proposed safe harbours:

Safe Harbour A
Although it is proposed that the SFC be empowered to grant a waiver to listed corporations if they face disclosure prohibitions arising from court orders or legislation of another jurisdiction, there may be a situation where a listed corporation or director or officer is prohibited from notifying the SFC of such inside information in the first place. The safe harbour should be extended to cover such situations. The delay inherent in the waiver application will likely have a

[4] For example: A major supplier is considering terminating supplies of a key product but has not yet made a decision. The fact is known to the company but it does not know that even if there is no termination, prices will be increased significantly. If the company then releases an announcement admitting that termination is possible, is the announcement complete?

material impact on the obligation to disclose price sensitive information "as soon as practicable". A listed corporation wishing to avail itself of the foreign statute and court order safe harbour will of course need to be able to prove that it falls within it, if challenged.

Safe Harbour B
We support the safe harbour for incomplete proposals or negotiations. In the draft Guidelines the SFC provided four examples to illustrate this safe harbour. All four focus on the premature disclosure of information which might "jeopardize" or "undermine" a transaction. This is similar to Note 7 to Listing Rule 13.09 which applies where "disclosure...might prejudice the issuer's business interests".

Circumstances may exist where premature disclosure would create an undesirable state of affairs which does not necessarily amount to "jeopardizing" or "undermining" a transaction. We urge the FSTB and SFC to consider adopting wording similar to that in the UK Disclosure and Transparency Rules (DTR 2.5.1), namely, "*the outcome or normal pattern of those negotiations [being] likely to be affected by the public disclosure*" as this is broader than the draft. The safe harbour should be available even if the "outcome" of the proposal or negotiation is not prejudiced, to avoid premature disclosure of negotiations or proposals which may cause unnecessary speculation and confusion.

Finally, the concept of "incompleteness" requires clarification in the statutory provision.

Safe Harbour C
We generally agree with this safe harbour. However, concern was expressed over the definition of "trade secret". "Trade secret" is not a term defined in any ordinance in Hong Kong. Nor is it a common term encountered in a securities law context, as it is usually linked to intellectual property laws and regulations. In practice, this may be counter-productive to efficient compliance.

The elaborations in the draft Guidelines are mainly focused on technology-intensive processes, e.g. inventions and manufacturing processes. Customer lists are cited as a further example. The draft Guidelines are silent about other types of potentially sensitive information of a more commercial nature, such as the terms and conditions of key business alliances, distribution agreements and pricing policies. We believe the market would benefit from more detailed guidance on the meaning of "trade secret".

Safe Harbour D
We agree with this safe harbour.

Question 2(b)
Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?

Law Society
We agree with this proposal. However, we think that the SFC's ability to grant waivers and to attach conditions should be far wider than under the proposed draft s.101E which only allows the SFC to grant a waiver if disclosure is prohibited by or contravenes a foreign court order or foreign laws or regulations. The SFC should have complete discretion to grant a waiver in any circumstances it deems appropriate.

Question 2(c)
Do you think that the legislation should provide for additional safe harbours? If so, what are these additional safe harbours?

Law Society
Yes, if the codification approach is adopted, we strongly recommend the following safe harbours be added:

Reasonableness test
We believe that, on the question of what constitute "inside information", a listed corporation should not be held liable for not treating certain information as "inside information" as long as the decision is not "*Wednesbury*" unreasonable. Thus, a listed corporation should not be held liable if a reasonable board of directors, taking into account the guidelines issued by the SFC, and by reference to the circumstances existing at the relevant time of making the disclosure, could have come to the conclusion that the specific information does not amount to "inside information", even if another reasonable board of directors could have come to a contrary conclusion. This can operate either as an additional safe harbour or as a separate provision.

Internal reporting procedures
There should be an additional safe harbour to the effect that a company will not need to disclose where it has followed proper internal processes to ensure that the matter is escalated to the Board as soon as reasonably practicable, and the Board has decided in good faith, on reasonable grounds, and as soon as reasonably practicable, that the information is not subject to the disclosure requirement. To this end, the SFC may provide general guidance as to what internal procedures a listed company should have in place.

Disclosure by listed subsidiary to parent
In a group company situation, the parent entity may be under a legal or regulatory obligation (e.g. where the parent is listed or is a regulated entity such as a bank) to collect financial or management information from its listed subsidiary for the purpose of constructing its own accounts which are to be released or reported at the same time as the listed subsidiary's financials or perhaps to prepare reports to its regulator on a more frequent basis. Such financials are likely to be price-sensitive in relation to the listed subsidiary and might present a practical problem which is not dealt with satisfactorily under the current or proposed regime.

Paragraphs 72 and 73 of the draft Guidelines relate to preparation of financials and other "structured disclosures". These paragraphs focus on the obtaining of PSI previously unknown to the directors and officers and stress the importance of "separate and immediate" disclosure of any PSI which has arisen from the preparation of periodic disclosures. There is no additional guidance on (1) how a listed subsidiary may be expected to assist its parent to comply with the parent's disclosure or reporting obligations; and (2) how the timing of the "separate and immediate" disclosure (as stated in paragraph 72) should be managed alongside the respective publications of the two companies' financial reports.

We suggest that an express safe harbour should be available for:

(a) generally providing information to the parent where (1) it is necessary for the proper conduct of the group's or substantial shareholders' business operations and (2) the directors of the company supplying the information are of the opinion that it is in the best interest of the company to provide such disclosure; and

(b) specifically, the provision of financial information by a listed company to another for the purposes of compliance with financial reporting or other legal or regulatory requirements of the other,

in each case subject to an undertaking by the recipient of the information to keep the information strictly confidential and not to use it for any other purpose.

M&A and due diligence / financing
Currently, Note 1 to Listing Rule 13.09 provides a de facto safe harbour for advance disclosure of information to "persons with whom negotiations are taking place with a view to the making of a contact or the raising of finance", subject to strict confidentiality and non-dealing requirements. We suggest that this express safe harbour be preserved and expanded in the new regime as described below:

In an M&A context, a listed issuer may be obliged to provide information about its business to the prospective buyer, for example where (1) the company is doing a share exchange offer or otherwise issuing its own shares as consideration for an acquisition; (2) where a substantial or controlling shareholder is disposing of its stake and the listed company is required to facilitate due diligence; or (3) where a new potential investor is considering a purchase of shares (whether primary or secondary) in the listed company. In principle, there should be no impediment to the provision of PSI by a listed company to facilitate a transaction or contract (to which the company may or may not be a party) with a third party, provided that the recipient is under a duty to keep it confidential, and to refrain from any dealing that would infringe the insider dealing laws. We would strongly recommend the FSTB and the SFC to consider reflecting this principle in the draft Guidelines.

Suspension of trading
We also believe that a safe harbour should be available for corporations which have applied for a suspension of trading of its shares pending the release of the PSI.

Question 2(d)
Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?

Law Society:
We agree with this proposal.

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

Law Society:
Subject to the proviso that there are objections to the codification approach generally, this proposal is acceptable. The MMT already deals with civil cases under the insider dealing provisions. Putting this Tribunal in charge of PSI disclosure cases will be a natural extension of its function and would facilitate consistency and certainty in the approach concerning disclosure and use of PSI.

Question 3(b)
Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

Law Society:
Subject to the proviso that there are objections to the codification approach generally, we believe the proposals regarding MMT's jurisdiction must be reconsidered taking into account the following:

- In respect of paragraph 2.35, liability should attach to the listed corporation only.

- Some of our members do not agree that civil remedies be extended to persons suffering pecuniary loss as a result of breaching the PSI obligation. These members believe it is too onerous an obligation to be imposed on directors of listed companies.

- Comments have been made it is essential that the ability to issue a private reprimand should be preserved to deal with less serious breaches of the disclosure obligations. Concern has been expressed that the proposed maximum fine of HK$8 million is excessive for a *civil* offence given the MMT has no power to impose a fine (other than to make an order for the payment of a profit made or loss avoided) for a *civil* market misconduct offence under s.257 SFO, and the maximum fine for a *criminal* market misconduct offence is set at HK$10 million. There is disagreement that disqualification orders should be a potential penalty for breach of the proposed disclosure obligation. This is a harsh penalty which should only be warranted in the more serious cases, namely where the non-disclosure constitutes a civil market offence under Part XIII SFO or amounts to misconduct towards the company's members under s.214 SFO. If harsher penalties are retained, then clearer guidelines should be laid down as to their imposition, for instance for repeat offenders.

- **We do not support the proposal to introduce a criminal regime for failure to disclose PSI to the public.**

Question 3(c)
Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

Law Society:
We generally agree with this proposal. However, by removing the Financial Secretary "filter" will there be a risk that the MMT may become overburdened, particularly since this would apply not just to PSI but to civil market abuse cases?

We disagree that the SFC, with the role of investigator, should be empowered to institute proceedings directly before the MMT (or any other tribunal or court established to handle PSI cases), without the approval of the Financial Secretary. We believe this filter is appropriate.

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 12-month period?

Law Society
We agree that the SFC should provide informal consultation with the following additional comments:

- There is likely to be an ongoing need for advice and there is no reason in principle why informal guidance should have a time limit. The guidance service should be made available generally.

- The guidance service should not be restricted to applicability of safe harbours as suggested in the Consultation Paper. At the moment, if directors are in any doubt as to whether what they possess amounts to "relevant information", they should not be subject to legal sanctions as long as they do not deal in the relevant securities. Under the proposed legislation, they must make an assessment on the basis of the broadly crafted principles set out in the SFC Guidelines and decide whether the information amounts to "inside information". We believe that this creates difficulties for directors and a consultation service provided by the SFC would be useful.

- Going forward, as the SFC consolidates the questions it receives it should consider issuing advice, for example in the form of FAQs, to help listed companies comply.

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?

Law Society:
As there are existing areas of market regulation where the two regulators already work closely together in referrals, we do not have a problem in principle with the co-operative enforcement arrangements outlined in paragraphs 3.8 and 3.9. However, we believe the proposed regime can be improved by taking into account the following:

1. The regime outlined in paragraph 3.9 involves significant overlap of the SFC and SEHK's functions in monitoring and enforcing the PSI rules. In particular, paragraph 3.5 states that the current Listing Rule 13.09 will continue to exist and to be administered by SEHK (after modifications to dovetail the rule with its statutory equivalent).

   It is not easy to tell from paragraph 3.9 what will happen where there is suspected breach e.g.:

   - what are the relevant considerations for SEHK to refer a case to the SFC?

   - what are the practical differences for the listed company if one regulator (rather than the other) initiates investigations or disciplinary action?

   - in a case initiated by the SFC, whether it is possible for the SFC to refer it back to the SEHK for handling under the Listing Rules rather than the statutory regime (which involves different disciplinary proceedings and carries a different range of sanctions)

   - whether one body taking action means the other will be precluded from doing so, and whether there is any chance of re-opening a case by another regulator, or any form of "double jeopardy"?

2. Consistently with the stated policy objective of retaining SEHK's role as a "frontline regulator", the role of monitoring unusual movements in share prices/ volumes should continue to be carried out by SEHK which may refer cases warranting further investigation to the SFC. This would be a way of resolving the potential for overlaps, duplication (and resulting confusion) identified above.

The Law Society of Hong Kong
Company and Financial Law Committee
Securities Law Committee
22 June 2010

135475v5

MALLESONS STEPHEN JAQUES
萬盛國際律師事務所

BY HAND

Division 2, Financial Services Branch
Financial Services and Treasury Bureau
18/F Tower I
Admiralty Centre
18 Harcourt Road
Hong Kong

Securities & Futures Commission
8th Floor
Chater House
8 Connaught Road Central
Hong Kong

Attn: Corporate Finance Division

24 June 2010

Dieter Yih
Partner
3443 1010

Nicola Wakefield Evans
Partner
3443 1190

Dear Sir

Matter: Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations ("Consultation Paper")

We write in relation to the Consultation Paper; we have considered the proposed legislation and guidelines and seek confirmation and make the submissions as set out below.

1 Interpretation of proposed section 101B (Requirement for listed corporations to disclose inside information)

We have reviewed the proposed amendments to the Securities and Futures Ordinance, in particular section 101B set out in Annex 1 of the Consultation Paper and have concluded that the effect of that proposed section is that the board of directors of a listed corporation ("**Board**"):

(i) does not need to determine whether information is "inside information"; and

(ii) does not need to determine whether such inside information should be disclosed.

The wording of the proposed section 101B(1) and (2) does not suggest that the *Board* is responsible for making the disclosure.

The proposed section 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 and that 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 the relevant officer performing his or her functions as an officer of the corporation. Prima facie, it appears that it is the responsibility of the *individual officer* of the listed corporation to discharge his or her duties effectively by ensuring that a disclosure is made, albeit a listed corporation should ensure that there are adequate procedures in place internally to enable its officers to comply with their duty.

Please confirm that our interpretation of proposed section 101B is correct.

2 Suggested clarification of the proposed legislation

In the alternative to point 1 above, we suggest that the proposed legislation (in particular, proposed section 101B) is amended to ensure greater clarity in relation to *who* within the listed corporation is responsible for ensuring the listed corporation complies with its obligations. We have prepared the below draft wording (which can be inserted after section 101B(4) as new section 101B(5) and the remaining section re-numbered accordingly) for your consideration:

> For the avoidance of doubt, a listed corporation may execute its functions through any of its authorised representatives (which includes its officers, directors, board of directors, committee of directors or any other person or committee to whom authority has been delegated) in connection with the discharge of its obligations under section 101B.

We believe that the *listed corporation* should determine where the authority (to assess whether information is inside information and whether it should be disclosed) resides within its operations. Some listed corporations may like to delegate these functions to specified individual persons whereas others may prefer for the authority to be delegated to a specially formulated Board committee.

3 Responsibility for compliance and management controls

We have reviewed the "Guidelines on Disclosure of Inside Information" in the Appendix to the SFC's consultation paper at Annex 2 of the Consultation Paper (**"Draft Guidelines"**) and submit that paragraph 44 of the Draft Guidelines be amended along the following lines:

> 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 disclosed in accordance with any internal disclosure and reporting policy to enable each and every officer of the corporation to comply with his or her obligation.

We believe that by removing the need for an officer to escalate information to the Board would enhance the effectiveness of disclosure, in light of the requirement under proposed section 101B(1)

that a listed corporation discloses inside information, *as soon as practicable*. Some listed corporations may not be able to organise Board meetings at short notice. Further, bringing a matter before the Board for its consideration may be inefficient due to practical reasons for some listed corporations.

Given that section 101B(2) imputes the knowledge of an officer of the listed corporation to the listed corporation (i.e., by stipulating that inside information comes to the knowledge of the listed corporation if an officer or the corporation has come into possession of the information), the officers of the corporation should be responsible for making, and indeed should be empowered to make, the relevant disclosures as and when they become privy to any relevant inside information rather than refer a matter to the Board for assessment which would not only cause undue delay in the disclosure but could also impede the Board from effectively discharging its other duties due to the amount of time which may need to be spent in making an assessment.

We also submit that paragraph 45 of the Draft Guidelines would need to be amended to clarify that the individual officers of the listed corporation should determine whether or not information is inside information and whether or not it should be disclosed.

4 Delegation to a Board Committee

In the alternative to point 2 above, we submit that there is no need for a matter to be escalated to the *Board* to assess whether information is "inside" and whether disclosure is required; instead, the Board could delegate any such responsibility to a specifically designated committee of the Board ("**Board Committee**"). As discussed in point 3 above, in light of the fact that some listed corporations cannot convene Board meetings at short notice, we believe that either the proposed legislation or the Draft Guidelines should contain adequate provisions so that the *authority* to determine (i) whether or not information is inside information and (ii) whether or not it should be disclosed should be able to be *delegated*.

Delegation to a Board Committee could enhance the effectiveness of disclosure with the advantage that information could be assessed and evaluated more expeditiously by a smaller number of people who are more experienced in dealing with such matters without detracting the focus of the Board from the day to day operations of the listed corporation.

Escalating a matter to the Board may, in addition to resulting in a delay in the disclosure of inside information (which we believe to be unnecessary), may impede on the ability of the Board to carry out the business of the corporation and fulfil its other obligations.

As stated in point 2 above, we are of the view that the listed corporation should be able to determine the residence of the authority to decide on inside information and disclosure.

We look forward to your response. In the meantime, should you have any enquiries or require any further information in this regard, please do not hesitate to contact Mr Dieter Yih on 3443 1010 or Ms Nicola Wakefield-Evans on 3443 1190 of this office.

Yours faithfully

Mallesons Stephen Jaques

強制性公積金計劃管理局
MANDATORY PROVIDENT FUND
SCHEMES AUTHORITY

電話號碼 Tel. No. : 2292 1221
傳真號碼 Fax. No. : 2259 8811
本局檔號 Our Ref. : MPFA/CS/CA/62/1/E1
來函檔號 Your Ref.:

17 June 2010

Ms Jane Lee
Financial Services Branch
Financial Services and the Treasury Bureau
18th Floor Admiralty Centre Tower 1
18 Harcourt Road
Hong Kong

Dear Ms Lee,

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

Thank you for your letter of 29 March 2010, inviting the MPFA's comments on the proposal in the subject consultation paper.

We support the proposal in principle as it can promote a continuous disclosure culture among listed corporations, enhance market transparency, and protect the interest of the investing public.

Yours sincerely,

Alice Tang.

(Alice Tang)
Senior Manager
Corporate Affairs Department

129

香港九龍柯士甸道西一號環球貿易廣場16樓
Level 16, International Commerce Centre, 1 Austin Road West, Kowloon, Hong Kong

MASCOTTE HOLDINGS LIMITED

(Incorporated in Bermuda with limited liability)

HEAD OFFICE: 1/F., PO CHAI INDUSTRIAL BUILDING, 28 WONG CHUK HANG ROAD, ABERDEEN, HONG KONG
TEL: (852) 2814 0328 **FAX:** (852) 2552 1333 **Email:** mascotte@mascotte.net

June 28, 2010

Division 2, Financial Services Branch,
Financial Services and the Treasury Bureau,
18/F., Tower 1, Admiralty Centre,
18 Harcourt Road,
Hong Kong.

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

Dear Sirs,

We are of the impression that Codification would help us to ease from restrictions set upon us by HKEX and provide us a clear guideline as to what information we need to disclose in order to meet our obligations under listing rules.

However, after reading through your consultation papers and the Guidelines on Disclosure of Inside Information from SFC, we are of the view that this Codification will create additional burden for smaller listed companies like us and will not add transparency to our investors.

In order to avoid being prosecuted of breaching the relevant rules, directors will tend to release pre-mature information which will create market turbulence and we need to employ more company secretarial staff in our company to arrange filing of these announcements on the other hand.

More working hours will be spent by directors in paper work for determining and approval of the disclosures of business information rather than making strategic directions of the company. More cost of legal consultation will be incurred to evaluate whether information is price sensitive or not.

MASCOTTE HOLDINGS LIMITED

(Incorporated in Bermuda with limited liability)

HEAD OFFICE: 1/F., PO CHAI INDUSTRIAL BUILDING, 28 WONG CHUK HANG ROAD, ABERDEEN, HONG KONG
TEL: (852) 2814 0328 **FAX:** (852) 2552 1333 **Email:** mascotte@mascotte.net

We think the government's policies are making life easy for us but this Codification is not the way to do it. Accordingly we are objecting to the Codification.

Yours sincerely,

For and on behalf of
Mascotte Holdings Limited

Lam Suk Ping
Executive Director

Melco

23 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs

Re: Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

This letter states our views towards the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

We have the following overall comments:

1) We support the introduction of civil remedies, not criminal, for this legislation.

2) Both elements of the *mens rea* (the "guilty mind") and *actus reus* (the "guilty act") must be present if a disclosure obligation is deemed to be breached, hence the strict liability concept must not be applied here. A corporation and its directors that could show they had duly and carefully considered a piece of information and made a non-disclose decision based on prevailing circumstances and information should not be held liable even if the information had eventually caused material effect to share price.

Our response to specific questions listed in the Consultation Paper as follows:

Q.1a 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?

We agree.

Q.1b 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?

We agree a listed corporation should disclose inside information promptly but feel that the SFC should provide more guidance on how long is "practicable" in its view and their definition of "immediate". A corporation needs to verify the information, make necessary internal review, and assess its impact and this may take time.

For a large corporation with a large number of officers, it is difficult for the corporation to ensure all directors or officers would report inside information instantly that has come to their knowledge. It is our view that if a corporation has established and maintained appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable.

Further, the existing definition of "officer" which includes directors, secretaries and managers is too wide. Under the UK regime, only directors who *knowingly* breach the disclosure requirement would be held liable. We concur with this and recommend Hong Kong follows the UK approach. The definition of "officer" should include only "director" throughout this draft legislation.

The phrase "ought reasonably to have" in s.101B(2) of the "draft legislation" should be taken out. This phrase suggests that it is possible that the information may not have been actually known by the officers and thus it is impossible for the corporation to disclose information on this basis.

Q.1c *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?*

We agree.

Q.2a *Do you agree to the provision of the four proposed Safe Harbours?*

We agree.

Q.2b *Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?*

We agree.

Q.2c *Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?*

We recommend an additional safe harbour which provides that if a corporation and its directors have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change -- due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show clear and proper records of board deliberations leading to a reasonable conclusion that the information needed not to be disclosed at the time.

Q.2d Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?

We agree. We also think that other market participants should also be given the opportunity to suggest Safe Harbours to match with market developments.

Question 3

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

We do not object.

Q.3b Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

We agree and would want to add that the proposed range of civil remedies is highly deterrent already.

Q.3c Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

Allowing SFC direct access to the MMT lacks the checks-and-balances under the existing arrangement of having the cases referred to the Financial Secretary first. While we support a more efficient process, some checks-and-balances controls are important. Moreover, under the proposed legislation, the other proceedings that cover the six types of market misconduct would be referred to the MMT directly by the SFC. This is a major change. The Government must consider this with a view to balance the market's need for checks-and-balances and whether the resources of MMT can cope with the possible increase in the number of cases referred to it.

Q.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?

We agree and add that this should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new Safe Harbours that may be prescribed from time to time.

Q.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?

The lines of authorities and responsibilities between the SFC and SEHK must be clearly defined without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by Listing Committee.

Melco

We thank you for your attention.

Yours faithfully,
For and on behalf of
Melco International Development Limited

Lawrence Ho
Chairman and Chief Executive Officer

(Stock Code of Melco International Development Limited: 200)

Miramar Hotel and Investment Company, Limited
15/F Miramar Tower
132 Nathan Road
Tsim Sha Tsui, Kowloon, Hong Kong
T 852 2315 1555
F 852 2736 1975
www.miramar-group.com

Member of Hanglung Land Group

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I
Admiralty Centre
18, Harcourt Road
Hong Kong

28 June 2010

(Total pages : 13)

Dear Sirs,

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

Reference is made to the captioned consultation paper issued by the Financial Services and the Treasury Bureau in March 2010.

We would like to submit for your kind consideration our comments as more particularly described in the schedule attached hereto. The said schedule adopts the same numberings of your list of questions for consultation. Unless otherwise defined, terms used in the said schedule have the same meanings of those contained in the captioned consultation paper.

Yours faithfully,
For and on behalf of
MIRAMAR HOTEL AND INVESTMENT
COMPANY LIMITED

Charles K.S. Chu
Corporate Secretary

Encl.

SCHEDULE

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?	We agree adopting the existing definition of "relevant information" under the SFO to define PSI. This avoids introducing a new definition. However, such definition has the following drawbacks: a) The material effect of "relevant information" on the price of the listed securities under the insider dealing regime may be easily assessed by the litigants and MMT because such price fluctuation has already taken place resulting from the "relevant information" while decisions on disclosure of price sensitive information involve difficult and subjective judgements and directors and officers of a listed corporation may have difficulties to assess the effect of "relevant information" on the price of the listed securities which has not occurred before such disclosure of the "relevant information". b) In addition, the draft Guidelines on Disclosure of Inside Information do not address the degree of likelihood which would be required and just refer to

	determining how the "general investor" would behave if in possession of the "relevant information". It would be helpful if such Guidelines give more elaboration on the degree of such likelihood in terms of effect on the price of the listed securities. c) SFC's Guidelines on Disclosure of Inside Information under SFO and SEHK's Guide on Disclosure of Price-sensitive Information under the Listing Rules may, in certain extent, be inconsistent with the interpretation of such price-sensitive information. Under the proposed codification, the three key elements in the concept of "inside information" are: "specific", "not generally known" and "likely to have material effect on the price of the corporation's securities" whilst the definition of "price-sensitive information" under the Listing Rules and the relevant guide comprises "necessary to enable the public to appraise the position of the group", "necessary to avoid the establishment of a false market in its securities" and "**reasonably** expected materially to affect market activity in and the price of its securities". In the course of determining whether a piece of information will trigger a disclosure obligation, the criteria of "inside information" involves a subjective view whereas that of "price-sensitive information" includes an objective view of a reasonable man. In addition,

	the different reliefs/exceptions available under the respective concepts of "inside information" and "price-sensitive information" may also cause uncertainty as to whether disclosure should be made. For example, a proposed fundraising exercise may fall within the meaning of both an "inside information" and a "price-sensitive information". In SEHK's letter dated 31 October 2008 in relation to disclosure obligations of listed issuers, a conditional relief from immediate disclosure in the course of development of fundraising is provided. However, there is no corresponding specific exception for disclosure of such "inside information". Safe Harbours A, C and D are not applicable and the corporation may not necessarily be able to rely on Safe Harbour B because it may not be possible to ascertain whether the outcome of the proposed fundraising may be prejudiced if the information is disclosed prematurely.
(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	In relation to a listed corporation's obligations to disclose to the public "as soon as practicable", we are concerned about how long is practicable to the SFC. The SFC guidelines further state that "the corporation should *immediately* take all necessary steps that are reasonable in the circumstances to disclose the information to the public" (paragraph 32). What is "immediate" is also problematic. The SFC's stance on what is "immediate" and how long is

information in the course of the performance of his duties?	"practicable" is crucial. More guidance and clarification need to be provided. We also have reservations on the second part of this question: - a) The definition of "officer" which includes directors, secretaries and managers is too wide. A large corporation may hire many managers and many such managers may not actually have any role in the management of the corporation. Further, under the UK regime for PSI disclosure, only the directors, and not even the company secretaries, who *knowingly* breach the disclosure requirement would be held liable. We concur with this since it is the directors who would make decisions for the corporation. We therefore suggest following the UK approach of requiring only directors to be subjected to the proposed legislation. References to "officers" should either be deleted or be replaced by references to "directors" throughout the proposed legislation. b) The phrase "ought reasonably to have" as contained in s.101B(2) of the "draft legislation" suggests that it is possible that the information may not have been actually known by the directors/officers. To require the corporation to disclose information on this basis is to require the

	impossible. We suggest that this phrase be taken out. c) If a corporation establishes and maintains appropriate and effective proper systems and procedures requiring its directors or officers to report relevant information, but they fail to follow, the corporation should not be at fault and be held liable. Therefore, there would be a need for a defence from liability for a corporation to cover the situation where a director or officer deliberately fails to comply with the corporation's disclosure procedures to disclose relevant information. This could take the form of a due diligence defence in circumstances where reasonable steps have been taken to ensure compliance with the disclosure obligation.
(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?	We agree.
Question 2	
(a) Do you agree to the provision of the four proposed	We agree to the provisions of the proposed Safe Harbours A, C and D. In

safe harbours?	relation to the proposed Safe Harbour B, we consider that it should not be subject to the condition that the outcome may be prejudiced if the information is prematurely disclosed and it should also be extended to expressly cover negotiations in relation to litigation and fair value accounting issues under review.
(b) Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?	We agree. In addition to the power to grant waivers relating to disclosures prohibited by a foreign law or court order, we consider that the SFC should also have the power to grant waivers, with or without conditions, in any circumstances in which it considers appropriate.
(c) Do you think that the legislation should provide for additional safe harbours? If so, what are these additional safe harbours?	We agree and we suggest additional safe harbours should be provided in the following circumstances: a) where directors of a listed corporation have, after due and careful consideration, come to a conclusion in good faith that a piece of inside information would not materially affect the corporation's share price. Under this safe harbour, if subsequently the information is found to have caused material price change due to unexpected market reaction or change in

	market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors should not be held liable as long as they can show clear and proper records of board deliberations leading to a reasonable conclusion that the relevant information need not to be disclosed at the material time; b) where the information is of a defamatory nature as the disclosure of which may subject the corporation to claims by the concerned parties for defamation resulting in a potential liability to be incurred by the corporation; c) where the information comprises matters of supposition or is insufficiently definite to warrant disclosure; d) where the information is generated only for the internal management purposes of the corporation; or e) during intervals in which dealings of the listed securities are suspended by SEHK pending further enquiries.

(d) Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?	We agree that the SFC should be empowered to prescribe additional safe harbours. Other market participants should also be given the opportunity to suggest additional safe harbours. Any such additional safe harbours should be introduced expeditiously without a lengthy legislation-making process.
Question 3	
(a) Do you agree to extend the jurisdiction of the MMT to handle breaches of the statutory disclosure requirements?	We agree.
(b) Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?	We disagree on the following grounds: a) The proposed maximum fine of HK$8 million, which is only slightly below the maximum fine which can be imposed for a criminal offence under the SFO's market misconduct regime, is excessive for civil liability. It should also be provided that any fine to be imposed would be proportional to the seriousness of the breach, the extent to which the contravention was deliberate or reckless and whether the penalty is to be imposed on a corporation or an individual.

	b) We consider that "disqualification orders" and "cold shoulder orders", which could effectively end a person's career, are inappropriate for breach of disclosure rules. In the limited circumstances in which these orders might be justified, it is more than likely that the individual would also face charges and be punished under one of the market misconduct offences. c) We disagree with the proposal to let persons suffering pecuniary loss as result of others breaching the disclosure requirements rely on the MMT findings to take civil actions to seek compensation from those having breached the disclosure requirements, as it would place an onerous obligation on a corporation and its directors and officers in making disclosure decision of such inside information. In addition, we consider the proposal unjustified because such reliance effectively reduces the duty of the claimants to prove the causation between his loss associated with his dealing in such listed securities and non-disclosure of the relevant inside information. It may also cause a flood of litigations of such nature which may be unduly burdensome on our civil courts. d) One particular shortcoming of the proposed civil sanctions is that they do

	not provide for a timely rectification of the non-disclosure. Cases of suspected non-disclosure can often be dealt with and remedied informally. Consideration should be given to the use of private warnings in cases of less serious breaches of the statutory continuous disclosure requirements.
(c) Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?	We disagree. The existing system of having the cases referred to the Financial Secretary first has the merit of providing stronger checks-and-balances and would avoid potential abuses of hasty decisions, although we recognize that this might slow down the process. More importantly, under the proposed legislation, not only PSI-related breaches will be referred to MMT directly by the SFC but the other proceedings that cover the six types of market misconduct as well. This is a major deviation from existing market practices and arrangements. MMT may not cope with the potentially increased number of cases under the direct access arrangement. The Government should therefore reconsider the whole issue of allowing SFC direct access to MMT balancing the market's need for checks-and-balances and the resources consideration against the "streamlined process" requirement suggested in the consultation document. We are, however, supportive of an efficient process, provided that appropriate checks-and-balances controls are put in place.

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?	It is important that SFC provides informal consultation, through a help desk or hotline services, to listed corporations to help them interpret the guidelines and understand what constitutes inside information and when it is necessary to disclose on a case-by-case basis. This should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new safe harbours that may be prescribed from time to time. Alternatively, given the many years of experience of SEHK in interpreting and giving guidance on the continuous disclosure obligations of the Listing Rules, the consultation process could continue to be provided by SEHK instead.
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?	It is important that under the new statutory regime, the lines of authorities and responsibilities between the SFC and SEHK are clearly defined without duplication, and listed corporations and their directors and officers will not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by Listing Committee.

	While we agree that the proposed statutory disclosure obligations coupled with the ability of the MMT to impose fines would serve to underpin the Listing Rules' disclosure obligations, we nevertheless feel that SEHK's role as the frontline regulator puts it in the best position to regulate these obligations on a day-to-day basis. SEHK's proximity to the market facilitates the pragmatic application of the continuous disclosure obligations with regard to the particular circumstances of individual corporations. Accordingly, we suggest that the day-to-day discussions with listed corporations regarding compliance of the PSI disclosure rules could be made the responsibility of SEHK, while enforcement of the statutory provisions could be vested with the SFC.
Overall comment: The difficulty of determining what constitutes discloseable inside information coupled with the severity of the proposed sanctions for non-compliance of the relevant disclosure rules would put directors and officers of listed corporations in an extremely undesirable position. It is very likely that listed corporations and their directors and officers will tend to err on the side of caution and this could result in a large amount of superfluous disclosure. The strategy is also not without risk: the premature disclosure of incomplete or indefinite matters risks creating a false market and could well constitute an offence under the market misconduct regime of SFO.	

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

Q1(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?
Answer:	Agree.
Q1(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?
Answer:	We agree, subject to (1) reasonable safe harbours (including those proposed in the Consultation Paper) to be included, and (2) giving a narrower definition to an officer. For (1), it is considered that if a non-disclosure decision is made in good faith by a corporation, the corporation (and therefore its directors) should not be subject to the disclosure obligations nor be liable to the civil sanctions. On (2) and based on the principle of proportionality, it is proposed that officers should only refer to those who are in possession of key information of a corporation, and participate in making major decisions for the organization.
Q1(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?
Answer:	Agree.

Q2(a):	Do you agree to the provision of the four proposed safe harbours?
Answer:	Agree. Subject to other reasonable safe harbours to be included (e.g. non-disclosure is based on a reasonable business judgement) (see also our response to Q1(b)).
Q2(b):	Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?
Answer:	Agree.
Q2(c):	Do you think that the legislation should provide for additional safe harbours? If so, what are these additional safe harbours?
Answer:	Agree. Please see our response to Q1(b) and Q2(a).
Q2(d):	Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?
Answer:	Agree. Given the momentum of the securities market, it is believed that empowering SFC to prescribe new safe harbours will help sustain Hong Kong as a leading international centre and the premier capital formation centre in the region.
Q3(a):	Do you agree to extend the jurisdiction of the MMT to handle breaches of the statutory disclosure requirements?
Answer:	Agree.
Q3(b):	Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?
Answer:	Agree, subject to narrowing the definition of an officer and the inclusion of safe harbours as mentioned above. It is a question of striking a reasonable balance: on one hand, it is

	necessary to enhance market transparency and fairness in the provision of information to investors. On the other hand, the proposed disclosure obligation should not 'encourage' directors to play safe (given the severity of the civil liabilities) by making disclosure indiscriminately.
Q3(c):	Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?
Answer:	Understood that the purpose of the proposal is to streamline the process to enforce the statutory disclosure requirement but it will also rest the power of investigation and prosecution solely with SFC. It is therefore suggested to follow the current system under SFO for the Financial Secretary to institute proceedings before the Market Misconduct Tribunal.
Q4	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?
Answer:	Agree. It is also believed that listed corporations who do not have legal resource in house will be benefited by SFC establishing a 'frequency asked questions' section on the subject on their Website.
Q5	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?
Answer:	It is likely that listed corporations in general are not that concerned whether it will be SFC or Stock Exchange being the regulatory body in this regard, so long as their respective power (on the assumption that there is no overlapping) and the obligations therefore on listed corporations are clearly spelt out.

Date: 2 July 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs

Re: Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

This letter states our views towards the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

We have the following overall comments:

1) We support the introduction of civil remedies, not criminal, for this legislation.

2) Both elements of the *mens rea* (the "guilty mind") and *actus reus* (the "guilty act") must be present if a disclosure obligation is deemed to be breached, hence the strict liability concept must not be applied here. A corporation and its directors that could show they had duly and carefully considered a piece of information and made a non-disclose decision based on prevailing circumstances and information should not be held liable even if the information had eventually caused material effect to share price.

Our response to specific questions listed in the Consultation Paper as follows:

Q.1a 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?

We agree.

Q.1b 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?

We agree a listed corporation should disclose inside information promptly but feel that the SFC should provide more guidance on how long is "practicable" in its view and their definition of "immediate". A corporation needs to verify the information, make necessary internal review, and assess its impact and this may take time.

For a large corporation with a large number of officers, it is difficult for the corporation to ensure all directors or officers would report inside information instantly that has come to their knowledge. It is our view that if a corporation has

established and maintained appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable.

Further, the existing definition of "officer" which includes directors, secretaries and managers is too wide. Under the UK regime, only directors who *knowingly* breach the disclosure requirement would be held liable. We concur with this and recommend Hong Kong follows the UK approach. The definition of "officer" should include only "director" throughout this draft legislation.

The phrase "ought reasonably to have" in s.10IB(2) of the "draft legislation" should be taken out. This phrase suggests that it is possible that the information may not have been actually known by the officers and thus it is impossible for the corporation to disclose information on this basis.

Q.1c *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?*

We agree.

Q.2a *Do you agree to the provision of the four proposed Safe Harbours?*

We agree.

Q.2b *Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?*

We agree.

Q.2c *Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?*

We recommend an additional safe harbour which provides that if a corporation and its directors have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change -- due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show clear and proper records of board deliberations leading to a reasonable conclusion that the information needed not to be disclosed at the time.

Q.2d *Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?*

We agree. We also think that other market participants should also be given the opportunity to suggest Safe Harbours to match with market developments.

Question 3

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

We do not object.

Q.3b Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

We agree and would want to add that the proposed range of civil remedies is highly deterrent already.

Q.3c Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

Allowing SFC direct access to the MMT lacks the checks-and-balances under the existing arrangement of having the cases referred to the Financial Secretary first. While we support a more efficient process, some checks-and-balances controls are important. Moreover, under the proposed legislation, the other proceedings that cover the six types of market misconduct would be referred to the MMT directly by the SFC. This is a major change. The Government must consider this with a view to balance the market's need for checks-and-balances and whether the resources of MMT can cope with the possible increase in the number of cases referred to it.

Q.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?

We agree and add that this should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new Safe Harbours that may be prescribed from time to time.

Q.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?

The lines of authorities and responsibilities between the SFC and SEHK must be clearly defined without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by Listing Committee.

We thank you for your attention.

Yours sincerely,
For and on behalf of
New Media Group Holdings Limited
新傳媒集團控股有限公司

Authorised Signature(s)

For and on behalf of
New Media Group Holdings Limited (Stock code: 708)

Prosperity Investment Holdings Limited
Suite 2701, Shui On Centre, 6-8 Harbour Road, Wanchai, Hong Kong
嘉進投資國際有限公司
香港灣仔港灣道6-8號瑞安中心2701室
Tel 電話: (852) 3106 3939 Fax 傳真: (852) 3106 3938 www.prosperityinvestment.hk

24th June, 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

By fax: 2529 2075

Dear Sirs,

Re: Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

This letter states our views towards the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

We were given the impression that Codification was taking existing HKEx rules and making them the jurisdiction of the SFC. However, from the Consultation paper, it appears that there will be joint jurisdiction which does not ameliorate our concern but exacerbate it even further.

Under this proposed regime, the SFC will be able to trigger an investigation even where there is no suspected breach of price sensitive information. The SFC could investigate for lack of safeguards.

According to the draft guidelines published by the SFC, it is proposed that once a potential deal is "leaked" even by third parties, the directors of the company are responsible to make the relevant disclosures. This guideline is made by people who are not familiar with business practices. Third parties, or even potential partners could benefit from "potentially ruining" a deal by selective leakage. This requirement would put listed companies at a disadvantage in contract and other business negotiations, resulting in losing business opportunities. Hence, the disclosure may disadvantage to our company and putting our business in a less competitive position and giving less return to our shareholders. This is just an example of the types of restrictions listed companies will have to face under such a regime.

What was set out and advertised as beneficial to Hong Kong's community is in effect putting our businesses in a less competitive position. We are protecting stock speculators and not protecting the actual businesses, the ones creating value in the economy and not those who are looking for quick gains.

In addition, we have the following overall views on the Consultation Paper:

1) We support the introduction of civil remedies, not criminal, for this legislation.

2) Both elements of the *mens rea* (the "guilty mind") and *actus reus* (the "guilty act") must be present if a disclosure obligation is deemed to be breached, hence the strict liability concept must not be applied here. A corporation and its directors that could show they had duly and carefully considered a piece of information and made a non-disclosure decision based on prevailing circumstances and information should not be held liable even if the information had eventually caused material effect to share price.

Our response to specific questions listed in the Consultation Paper as follows:

Q.1a 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?

We agree.

Q.1b 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?

We agree a listed corporation should disclose inside information promptly but feel that the SFC should provide more guidance on how long is "practicable" in its view and their definition of "immediate". A corporation needs to verify the information, make necessary internal review, and assess its impact and this may take time.

For a large corporation with a large number of officers, it is difficult for the corporation to ensure all directors or officers would report inside information instantly that has come to their knowledge. It is our view that if a corporation has established and maintained appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable.

Further, the existing definition of "officer" which includes directors, secretaries and managers is too wide. Under the UK regime, only directors who *knowingly* breach the disclosure requirement would be held liable. We concur with this and recommend Hong Kong follows the UK approach. The definition of "officer" should include only "director" throughout this draft legislation.

The phrase "ought reasonably to have" in s.101B(2) of the "draft

legislation" should be taken out. This phrase suggests that it is possible that the information may not have been actually known by the officers and thus it is impossible for the corporation to disclose information on this basis.

Q.1c *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?*

We agree and suggest that the submission through the Electronic Publication System operated by the SEHK or similar system suffice.

Q.2a *Do you agree to the provision of the four proposed Safe Harbours?*

We agree.

Q.2b *Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?*

We agree.

Q.2c *Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?*

We recommend an additional safe harbour which provides that if a corporation and its directors have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change -- due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show proper records of board deliberations leading to a reasonable conclusion that the information needed not to be disclosed at the time.

Q.2d *Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?*

We agree. We also think that other market participants should also be given the opportunity to suggest Safe Harbours to match with market developments.

Q.3a Do you agree to extend the jurisdiction of the MMT to handle breaches of the statutory disclosure requirements?

We do not object.

Q.3b Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

We agree and would want to add that the proposed range of civil remedies is highly deterrent already. In particular, the proposed fine of up to HK$8 million is considered very high, especially for only negligence acts and we suggest to phrase out as the disqualification of directorship to barring from the market activities already have serious implication.

Q.3c Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

Allowing SFC direct access to the MMT lacks the checks-and-balances under the existing arrangement of having the cases referred to the Financial Secretary first. While we support a more efficient process, some checks-and-balances controls are important. Moreover, under the proposed legislation, the other proceedings that cover the six types of market misconduct would be referred to the MMT directly by the SFC. This is a major change. The Government must consider this with a view to balance the market's need for checks-and-balances and whether the resources of MMT can cope with the possible increase in the number of cases referred to it.

Q.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?

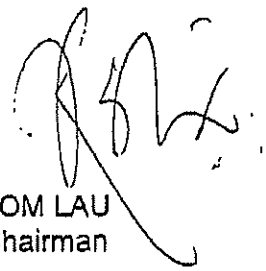
We agree and add that this should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new Safe Harbours that may be prescribed from time to time with a specified team of adequate experienced staff from the SFC to handle the issuers' enquiries in a timely manner.

Q.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?

The lines of authorities and responsibilities between the SFC and SEHK must be clearly defined without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by the Listing Committee.

We thank you for your attention.

Yours faithfully,
For and on behalf of
PROSPERITY INVESTMENT HOLDINGS LIMITED
(Stock Code: 310)



TOM LAU
Chairman

24th June, 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

By fax: 2529 2075

Dear Sirs,

Re: Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

This letter states our views towards the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

We were given the impression that Codification was taking existing HKEx rules and making them the jurisdiction of the SFC. However, from the Consultation paper, it appears that there will be joint jurisdiction which does not ameliorate our concern but exacerbate it even further.

Under this proposed regime, the SFC will be able to trigger an investigation even where there is no suspected breach of price sensitive information. The SFC could investigate for lack of safeguards.

According to the draft guidelines published by the SFC, it is proposed that once a potential deal is "leaked" even by third parties, the directors of the company are responsible to make the relevant disclosures. This guideline is made by people who are not familiar with business practices. Third parties, or even potential partners could benefit from "potentially ruining" a deal by selective leakage. This requirement would put listed companies at a disadvantage in contract and other business negotiations, resulting in losing business opportunities. Hence, the disclosure may disadvantage to our company and putting our business in a less competitive position and giving less return to our shareholders. This is just an example of the types of restrictions listed companies will have to face under such a regime.

What was set out and advertised as beneficial to Hong Kong's community is in effect putting our businesses in a less competitive position. We are protecting stock speculators and not protecting the actual businesses, the ones creating value in the economy and not those who are looking for quick gains.

In addition, we have the following overall views on the Consultation Paper:

1) We support the introduction of civil remedies, not criminal, for this legislation.

2) Both elements of the *mens rea* (the "guilty mind") and *actus reus* (the "guilty act") must be present if a disclosure obligation is deemed to be breached, hence the strict liability concept must not be applied here. A corporation and its directors that could show they had duly and carefully considered a piece of information and made a non-disclosure decision based on prevailing circumstances and information should not be held liable even if the information had eventually caused material effect to share price.

Our response to specific questions listed in the Consultation Paper as follows:

Q.1a 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?

We agree.

Q.1b 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?

We agree a listed corporation should disclose inside information promptly but feel that the SFC should provide more guidance on how long is "practicable" in its view and their definition of "immediate". A corporation needs to verify the information, make necessary internal review, and assess its impact and this may take time.

For a large corporation with a large number of officers, it is difficult for the corporation to ensure all directors or officers would report inside information instantly that has come to their knowledge. It is our view that if a corporation has established and maintained appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable.

Further, the existing definition of "officer" which includes directors, secretaries and managers is too wide. Under the UK regime, only directors who *knowingly* breach the disclosure requirement would be held liable. We concur with this and recommend Hong Kong follows the UK approach. The definition of "officer" should include only "director" throughout this draft legislation.

The phrase "ought reasonably to have" in s.101B(2) of the "draft

legislation" should be taken out. This phrase suggests that it is possible that the information may not have been actually known by the officers and thus it is impossible for the corporation to disclose information on this basis.

Q.1c *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?*

We agree and suggest that the submission through the Electronic Publication System operated by the SEHK or similar system suffice.

Q.2a *Do you agree to the provision of the four proposed Safe Harbours?*

We agree.

Q.2b *Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?*

We agree.

Q.2c *Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?*

We recommend an additional safe harbour which provides that if a corporation and its directors have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change -- due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show proper records of board deliberations leading to a reasonable conclusion that the information needed not to be disclosed at the time.

Q.2d *Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?*

We agree. We also think that other market participants should also be given the opportunity to suggest Safe Harbours to match with market developments.

Q.3a *Do you agree to extend the jurisdiction of the MMT to handle breaches of the statutory disclosure requirements?*

We do not object.

Q.3b *Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?*

We agree and would want to add that the proposed range of civil remedies is highly deterrent already. In particular, the proposed fine of up to HK$8 million is considered very high, especially for only negligence acts and we suggest to phrase out as the disqualification of directorship to barring from the market activities already have serious implication.

Q.3c *Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?*

Allowing SFC direct access to the MMT lacks the checks-and-balances under the existing arrangement of having the cases referred to the Financial Secretary first. While we support a more efficient process, some checks-and-balances controls are important. Moreover, under the proposed legislation, the other proceedings that cover the six types of market misconduct would be referred to the MMT directly by the SFC. This is a major change. The Government must consider this with a view to balance the market's need for checks-and-balances and whether the resources of MMT can cope with the possible increase in the number of cases referred to it.

Q.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?*

We agree and add that this should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new Safe Harbours that may be prescribed from time to time with a specified team of adequate experienced staff from the SFC to handle the issuers' enquiries in a timely manner.

Q.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?*

The lines of authorities and responsibilities between the SFC and SEHK must be clearly defined without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by the Listing Committee.

We thank you for your attention.

Yours faithfully,
For and on behalf of
PYI CORPORATION LIMITED
(Stock Code: 498)

TOM LAU
Managing Director

香港地產建設商會
THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG
香港中環德輔道中十九號環球大廈1403室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

28 June 2010

Secretary for Financial Services and the Treasury
Financial Services Branch
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

Attention: Ms. Jane Lee

Dear Ms. Lee

Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

We thank you for your letter of 30 March and as requested, would like to offer our views on the above subject.

General Comments

1) We support the introduction of civil remedies, not criminal, for the proposed legislation.

2) The strict liability concept should not be applied if a listed corporation and its directors may show that they have taken all reasonable measures from time to time to ensure that proper safeguards are in place to prevent the breach of a disclosure requirement in relation to the corporation.

Response to the specific questions for consultation

Q.1a 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?

We agree.

Q.1b 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

香港地產建設商會
THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG
香港中環德輔道中十九號環球大廈1403室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

director or an officer has come into possession of that information in the course of the performance of his duties?

We agree that a listed corporation should disclose inside information promptly. In this connection, we would request the SFC to provide a clear definition for "as soon as practicable".

It is also our view that if a listed corporation has established and maintained appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable.

The consultation paper provided that an "officer" means a director, manager or secretary of, or any other person involved in the management of, the corporations. This definition is too wide. Under the UK regime, only directors who *knowingly* breach the disclosure requirement would be held liable. We recommend Hong Kong to follow the UK approach and also define "officer" to include director only throughout this draft legislation.

The phrase "ought reasonably to have" in s.101B(2) of the draft legislation suggests that it is possible that the information may not have been actually known by the officers and thus it is impossible for the corporation to disclose information on this basis. We recommend it be removed from the consultation paper.

Q.1c *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?*

We agree.

Q.2a *Do you agree to the provision of the four proposed safe harbours?*

We agree.

Q.2b *Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?*

We agree.

香港地產建設商會
THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG
香港中環德輔道中十九號環球大廈1403室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

Q.2c Do you think that the legislation should provide for additional safe harbours? If so, what are these additional safe harbours?

We recommend one additional safe harbour as follows. If a corporation and its directors had duly and carefully considered a piece of inside information and come to the conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if the information is subsequently found to be causing material price change, for example, owing to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors should not be held liable as long as it can show clear and proper records of board deliberations leading to a reasonable conclusion that the information was not required to be disclosed at the time.

Q.2d Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?

We agree. We propose that other market participants should also be given the opportunity to make suggestions for additional safe harbours to match with changing market developments.

Q. 3a Do you agree to extend the jurisdiction of the MMT to handle breaches of the statutory disclosure requirements?

We agree.

Q.3b Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

We agree and would add that the proposed range of civil remedies is highly deterrent already.

Q.3c Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

Under the proposed legislation, the other proceedings that cover the six types of market misconduct would be referred to the MMT directly by the SFC, which is different with the existing arrangement of having the cases referred to the Financial Secretary first. While we support a more efficient process, the Administration

香港地產建設商會
THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG
香港中環德輔道中十九號環球大廈1403室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

should consider this with a view to balance the market's need for checks-and-balances and whether the resources of MMT may cope with the increase in case-load.

Q.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?*

We agree and add that this informal consultation should be provided without any limitation of time in order to cope with changing market developments and new safe harbours that may be prescribed from time to time.

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

We believe that the lines of authorities and responsibilities between the SFC and SEHK should be clearly defined in order to avoid duplication of regulatory control.

Yours sincerely

Louis Loong
Secretary General

Rosedale
Hotel Holdings Limited
珀麗酒店控股有限公司
(Incorporated in Bermuda with limited liability)

28 June 2010

By Fax (Fax no.: 2529 2075)

Financial Services and the Treasury Bureau
18/F., Tower I
Admiralty Centre
18 Harcourt Road
Hong Kong

Attn: Division 2, Financial Services Branch

Dear Sirs

Company : Rosedale Hotel Holdings Limited (the "Company")
Re : Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

I, a director of the Company would like to voice my OBJECTION to the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

At the onset, I was given the impression that Codification would help ease the restrictions set upon us by HKEx and provide greater clarity as to what information we need to provide in order to meet our obligations as a listed company. We are a responsible company who wants to maximise returns to our investors as well as compete on a level playing field.

However, after reading through your consultation as well as the subsequent "Guidelines on Disclosure of Inside Information" published by the SFC, I am of the opinion that this Codification not only creates an additional burden to listed companies but also does not add transparency to our investors. In fact, it will create greater market turbulence because of a myriad of half-baked information that will be submitted to the market by the companies afraid of running afoul of the law. This Codification, in effect, will make Hong Kong the laughing stock of the financial community world wide.

Yours faithfully
For Rosedale Hotel Holdings Limited

Chan Ling, Eva
Managing Director

RUYAN GROUP (HOLDINGS) LIMITED
如烟集团(控股)有限公司

15th Floor, Hong Kong and Macau Building
156-157 Connaught Road Central, Hong Kong
Tel: (+852) 2858 4999 Fax: (+852) 2547 9221

25 June 2010

BY FAX (2529 2075) AND BY POST

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I, Admiralty Centre
18 Harcourt Road, Hong Kong

Dear Sirs,

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

I, a director of Ruyan Group (Holdings) Limited, write to express my greatest disappointment and voice my objection to the "Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations".

As a director of a listed company, I had high expectation to the proposal that could provide greater clarity as to what information I am required to disclose to the public in order to meet the obligations as a responsible listed company. However, this proposed Codification will not contribute greater transparency. Instead, it will create confusion for investors and increase additional burdens on listed companies for the following reasons:-

(1) Directors will be paranoid and publish every announcement on any event that may have a remote chance of being "price sensitive" as no director is willing to take risks and be prosecuted;

(2) the financial market will be flooded by frivolous announcements and disclosures which confuse investors in making investment decisions;

(3) listed companies will have to hire additional staff in the company secretariat to file more announcements which may not be relevant to investors and increase costs unnecessarily;

RUYAN GROUP (HOLDINGS) LIMITED
如烟集团(控股)有限公司

(4) an unreasonable amount of directors' time will be spent on reviewing and approving disclosures. Strategic planning and operational activities will no longer have top priority which may impact negatively the company's performance.

(5) Significant advantages will be list in attracting qualified people to serve on the Board, but rather attract reckless or greedy people who likely would not serve in the best interests of the company.

(6) Existing options providing for civil action are the reasonable and appropriate level of deterrent. An overly aggressive policy places undue restrictions on officers which will reduce the competitiveness of the HKEx vis-a-vis other markets.

We are supportive for improving Hong Kong transparency which is the right path for a bigger and livelier market. I cannot concur with non-compliance on your proposal.

Yours faithfully,

For and on behalf of
Ruyan Group (Holdings) Limited

Ching Yuen Man, Angela
Director

SBI E2-Capital *Our small ideas are BIG !*

19 May 2010

Financial Services and Treasury Bureau,
18/F, Tower 1,
Admiralty Centre,
18. Harcourt Road
Hong Kong

Attention: Division 2, Financial Services Branch

Dear Sirs,

Re: **Consultation Paper on The Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations**

In relation to the consultation paper on the proposed statutory codification of certain requirements to disclose price sensitive information by listed companies that was issued by the Financial Services and Treasury Bureau in March 2010, we, SBI E2-Capital (HK) Limited, have the following comments for your consideration. References to "PSI" below are taken to denote "price-sensitive information".

General Observations

We note that the Administration is 'supportive of the cultivation of a continuous disclosure culture among listed companies in Hong Kong' and acknowledges that a way to achieve this is to oblige timely disclosure of price-sensitive information by statute instead of relying on the existing non-statutory Listing Rules administered by the SEHK. We also note that it is proposed to adopt the European approach whereby the same set of information that is prohibited from being used in insider dealing will be required to be disclosed to the public. Under the proposals, the disclosure of price-sensitive information would become a statutory requirement and the enforcement authority under this new regime would be the SFC – which would act upon a referral from the SEHK, or on its own initiative, in respect of a possible breach and use its investigation powers under the SFO. We note that there are four proposed '*safe harbours*' to cater for legitimate circumstances where non-disclosure or delay in disclosure would be permitted. We note the current focus is on civil sanctions (although the Administration reserves the right to introduce criminal sanctions, in light of local and international developments) with proposed penalties, which include (but are not limited to) a regulatory fine of HK$8 million and disqualification of director(s) concerned and payment of the SFC's costs. Finally, we note the FSTB's suggestion that the SFC be permitted to instigate regulatory proceedings via the MMT, without having first to report to the Financial Secretary for his decision in so doing.

SBI E2-Capital (HK) Limited 新程金融融資有限公司
Unit A2, 32/F., United Centre, 95 Queensway, Hong Kong 香港金鐘道95號統一中心32樓A2室
Tel 電話 (852) 2533 5661 Fax 傳真 (852) 2525 2203 Web site 網址 www.sbie2capital.com

Given the significance of this regulatory development, we recommend that the HKSAR Government and the relevant regulatory authorities consider cooperating in presenting this proposed major regulatory reform through **free workshops** focusing, inter alia, on staged case studies to give listed company controlling shareholders, directors and senior management people a clearer idea of the potential scenarios that could be caught by the new requirements. A useful source for this could be some examples of actual cases which have occurred in the UK under the FSA's jurisdiction – where some companies made decisions not to disclose, or to delay disclosure, based on an erroneous perception of the substance of the requirements. Examples of final notices/press releases issued by the UK FSA on some non-disclosure or delayed disclosure cases are enclosed at **Appendix A** for your reference.

We consider that what is important in such workshops is to make clear through **practical examples** the materiality which would become the yardstick as to whether disclosure would be required or not. Without such arrangements and some detailed guidance on how in practice to implement the dual requirement of preserving confidentiality of material inside information while having in place effective procedures for immediate dissemination of such information if the listed issuer is unable to preserve its confidentiality, there is a risk of listed companies, their directors and management misunderstanding the substance of these requirements – this could in turn result in a tendency for listed companies (concerned not to inadvertently breach the new requirements) to flood the market with information. This may in turn lead to investors, overloaded with information, not being able to judge what is significant and what is not. We note that this scenario is acknowledged in the last sentence of paragraph 2.27 of the consultation document.

It is interesting that one of the recent breaches of the disclosure regime in the UK (Wolfson Microelectronics plc Jan 2009) occurred because a listed company followed the advice of a investor relations adviser, rather than a legal adviser or corporate broker (like compliance adviser in Hong Kong), and that such advice was considered to have been erroneous. This recent case in the UK indicates that previous practices of relying on investor relations firms or PR companies for "news dissemination management advice" (including 'damage control' in case of significant negative developments affecting a listed issuer) may be considered inadequate and that new procedures and advisory arrangements must be put in place by listed companies – thereby increasing the costs of compliance.

List of Questions for Consultation
Chapter 2 – Proposed Legislative Framework
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?

We consider that there must be a 'materiality' concept attached to the definition. To facilitate this, we recommend that the legal concept be amended from "*inside information*" to "*material inside information*". This and other minor suggested amendments to the draft indicative legislation are attached at **Appendix B**.

(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?

More consideration should be given to clarifying the materiality of such inside information. . It is hoped that the Administration would understand that, operationally, companies would need time to assess the significance of information that comes into their possession before making a judgment call as to whether it constitutes "*material inside information*", is covered by the '*safe harbours*', might necessitate a disclosure waiver application to the SFC or needs public disclosure as soon as practicable.

Consideration should be given to the practice in Europe whereby under the Market Abuse Directive an issuer "*may under his own responsibility delay the public disclosure of inside information.....such as not to prejudice his legitimate interests provided that such omission would not be likely to mislead*
the public and provided that the issuer is able to ensure the confidentiality of that information."(Article 6.2 of the Market Abuse Directive refers).

See comment below on '*safe harbours*'.

(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?

Yes – disclosures of '*material inside information*' made pursuant to new requirements should be by way of issuance of an announcement through the electronic publication system on the HKEx's website (with, preferably, (as close as possible to) simultaneous release of the same on the listed company's website) is the most appropriate approach.

Question 2

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

Yes – Safe Harbour B and C, in particular, are constructive.

We note that some of the guidance provided by the CESR (to be superseded by the European Securities and Markets Authority in 2011) to clarify the circumstances under which companies could delay the release of information as a result of 'negotiations in course' has been incorporated in the "Draft Guidelines on Disclosure of Inside Information":

"*Confidentiality constraints relating to a competitive situation (e.g. where a contract was being negotiated but had not been finalized and the disclosure that negotiations were taking place would jeopardise the conclusion of the contract or threaten its loss to another party). This is subject to the provision that any confidentiality arrangement entered into by an issuer with a third party does not prevent it from meeting its disclosure obligations;*
- Product development, patents, inventions etc where the issuer needs to protect its rights provided that significant events that impact on major product developments (for example the results of clinical trials in the case of new pharmaceutical products) should be disclosed as soon as possible;
- When an issuer decides to sell a major holding in another issuer and the deal will fail with premature disclosure;
- Impending developments that could be jeopardised by premature disclosure."

But the issue and concern remains how would the '*safe harbour*' mechanisms work in practice in Hong Kong and whether the existing '*safe harbours*' would be enough to ensure that a listed company's "*legitimate interests.....in preserving certain information in confidence to facilitate its operation and business development*" are safeguarded.

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

Yes – provided that there would be a mechanism to ensure disclosure of such waivers granted (including any key criteria relating thereto) and conditions attached with reasons as soon as practicable after such decision. This is, of course, easier said than done, given that waivers are typically granted on a case-by-case basis – but some effort must be made to inform the market of such waivers, even if the relevant (applying) parties may not be identified at the outset. The reason for this is to ensure a level-playing field among listed issuers and to maintain a perception in the market of the same.

We agree with the '*user pays*' principle in relation to waivers but consider that 2 business days after the refusal of a waiver application for a listed issuer to submit a request the Board of the SFC for a review of a decision to reject the waiver request is too short. For reviews of Listing Committee decisions, usually it is **within 7 business days of the receipt of the rejection**. We recommend that the FSTB re-consider the shortness of this proposed time period, which seems unreasonable and unrealistic.

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

Yes - there should be scope for additional safe harbours through secondary legislation (see comment on (d) below).

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

Yes. This will be a useful mechanism to facilitate additional safe harbours which the SFC, in the light of experience in the operation of these new requirements, considers advisable and in the interest of the market and listed issuers.

Separately, in relation to rumours, we note that in paragraph 22 of the FSTB consultation paper it is stated that the proposal "*would not oblige corporations to respond to mere rumours*" and adds that the "*EU (including the UK) handles rumours in a similar manner*". The FSTB's policy is elaborated somewhat in paragraphs 61 and 62 of the SFC draft disclosure guidelines, which, while repeating that "*companies are under no obligation to respond to press speculation or market rumours*", in the following sentence indicates that "*the existence of speculation or rumours about a corporation might indicate that matters intended to be kept confidential have leaked*".

Under the current Listing Rules, listed issuers often have to respond to rumours and speculation that appear in the local media relating to their company, its business, even the reputation of their directors and substantial shareholders. It is possible that, in the current uncertainty among listed issuers about how the proposed new disclosure regime will work in practice, some listed companies in Hong Kong might even share the concern expressed in

Europe by the Union of Listed Companies ("ULC") in response to a consultation by the CESR on the handling of rumours that"*special attention should be paid by CESR in cases of deliberate publication of rumours with the purpose to extract from a company a piece of information that would otherwise be kept confidential "fishing of confidential information" such practices should be closely monitored by competent authorities, and CESR should take a stand on the issue.*" Although the topic of rumours is a broad and difficult area to police, this nonetheless is a scenario that we consider that the SFC should keep an eye on and may need to issue further specific guidance on. We note that in the EU guidance there is a reference to the prohibition on the dissemination of rumours or false or misleading news under the market abuse regime. Perhaps the wording of the relevant provisions of the SFO relating to the use of false and misleading information inducing transactions can be reviewed in this light.

Notwithstanding the foregoing, it is clear that how rumours can be handled under a statutory regulatory regime that requires a listed issuer to be prepared on a continuing basis at very short notice to issue immediate and accurate disclosure of confidential information, if it is suspected that a leak of confidential information has occurred, is a sensitive issue also for regulatory bodies. We note that ASIC announced on 12 May 2010 that it would continue to work closely with the market to improve industry standards on the responsible handling of rumours and corporations' management of confidential information.

Question 3

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

Yes – subject to our comments, including, in particular, in relation to the FSTB continuing to be involved in the process of determining whether or not proceedings should be instituted by the MMT (our response to Question 3 (c)), the MMT to formulate clear procedures in relation to the determining of penalties (our response to Question 3 (b)) and the proposed grace period for compliance (our response to Question 5).

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

Paragraph 2.31 – we agree but note, with respect to the financial penalty that is at the top of the list of proposed civil remedies, that the actual financial penalties levied by the FSA in London in the cases that we have identified are significantly lower than the HK$8 million proposed in the FSTB's consultation paper. We hope that the MMT will set out clear procedures to reflect the Administration's statement in paragraph 2.33 that "*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*" and the Administration's proposed requirement of the MMT "*to only order the payment of a fine, which is, in the circumstances of the case, proportionate and reasonable n relation to the conduct of the listed corporations and/or director breaching the requirements.*"

Paragraph 2.35 - we agree.

Paragraph 2.36 – we agree.

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

This is a more difficult question. On the one hand, we understand the argument that it will make it easier and more streamlined for the SFC to initiate enforcement actions through the MMT directly without having to obtain the FSTB's approval to proceed. On the other hand, requiring the SFC to seek FSTB approval before initiating such action would ensure that proper care and attention to the concept of natural justice would continue to be given in preparing a potential enforcement case. It would seem that there was a sound reason behind the wording of s.252 of the SFO which states that "*If it appears to the Financial Secretary, whether or not following any report by the Commission under subsection (8) or any notification by the Secretary for Justice under subsection (9), that market misconduct has or may have taken place, he may institute proceedings before the Tribunal concerning the matter.*" If the concern is that there may be a time lag between preparing such cases for MMT action and the initiation of proceedings by the MMT because of the need to seek the Financial Secretary's approval for MMT action, we suggest that the procedures involved in previous MMT applications by the SFC to the FSTB be reviewed and, if deemed appropriate, streamlined. Maintaining the requirement for the FSTB to review and approve/reject such proposed action promptly would be a useful 'last stage' safeguard prior to the initiation of such proceedings.

We would add that we are not aware of the current specific arrangements between the SFC and the FSTB in relation to the reporting of potential instances of suspected market abuse but we recommend that, if such procedures are not already in place, that there be a regular summary of potential cases notified by the SFC to the FSTB in accordance with s.252(8) – so that if the SFC decides to seek to institute MMT proceedings in relation to a particular case, the FSTB would be already aware of the salient aspects of the case and could provide its decision promptly. Key here would be the commitment of the FSTB, as a responsible government department, to deal with such applications promptly, equitably and efficiently so that the concern of enforcement staff in the SFC about losing momentum in a potential enforcement case would be met while the FSTB's stated "*overarching aim of keeping Hong Kong's financial market open, fair and efficient and meeting the needs of commerce*" would be properly met. As the department of the Administration with responsibility for the financial services sector, it is important that the FSTB remain involved in such process.

Chapter 3 – Regulatory Structure and Enforcement

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?

Given the importance of these new statutory requirements and the significance of the sanctions that can be applied to those found culpable of breaching such requirements, we agree that the SFC should provide informal consultation to listed corporations with regard to the statutory disclosure requirements. However, we consider that this should be open-ended, not just for the 12-month period post-implementation. The reason for this suggestion is that we understand that even now in Europe there is considerable debate about what should trigger disclosure.

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

We note that the new proposed regime may result in amendments to the MOU between the SFC and the SEHK. Just as both regulatory organisations will need time to get used to their new roles, we believe that it would be regarded as helpful and constructive by listed corporations and market participants if the SEHK's previous practice of following up on rumours or media reports and of alerting or prompting listed issuers to issue announcements would be continued for a period of time (similar to a grace period or transition period) – so that in essence listed issuers would be given an opportunity to put into place necessary procedures and to adjust such procedures to ensure proper compliance.It is appropriate for the SFC and the SEHK to continue to cooperate closely in relation to the development of this new disclosure regime and that the FSTB remains a stakeholder in the process.

Should you have any queries, please do not hesitate to contact the undersigned on 2533-5638.
Yours faithfully,

For and on behalf of
SBI E2-Capital (HK) Limited

Simon Harding
Executive Director

Financial Services Authority

FINAL NOTICE

To: **Woolworths Group plc**

Of: **Woolworth House**
242/246 Marylebone Road
London
NW1 6JL

Date: **11 June 2008**

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS (the "FSA") gives you final notice about a requirement to pay a financial penalty:

1. THE PENALTY

1.1 The FSA gave Woolworths Group plc ("Woolworths") a Decision Notice dated 9 May 2008 which notified Woolworths that for the reasons set out below and pursuant to section 91 of the Financial Services and Markets Act 2000 (the "Act"), the FSA had decided to impose on Woolworths a financial penalty of £350,000 in respect of a breach of Disclosure Rule 2.2.1 and Listing Principle 4.

1.2 Woolworths has not referred the matter to the Financial Services and Markets Tribunal.

2. REASONS FOR THE PENALTY

Summary

2.1 The FSA has decided to impose a penalty as a result of the conduct of Woolworths in relation to its delay in disclosing a significant variation to the terms of a major supply contract of one of Woolworths subsidiaries, Entertainment UK Limited ("EUK"), and its impact on Woolworths' profits. In reaching its decision the FSA has had regard to

the written and oral representations made on behalf of Woolworths which are summarised below.

2.2 On 9 August 2004 Woolworths and EUK entered into an agreement (the "Agreement") with Tesco Stores Limited ("Tesco"), a subsidiary of Tesco plc for the wholesale provision of entertainment products. A variation to the Agreement was agreed by way of a Deed of Variation (the "Variation") dated 20 December 2005, but was not announced to the market until the scheduled Christmas trading update was made on 18 January 2006 (the "Announcement").

2.3 The Variation increased the amount of retrospective discount that would be paid by EUK to Tesco by an estimated £8 million for the 12 month period from 1 March 2006. The consequential reduction in profits represented over 10% of Woolworths' anticipated profits for the following financial year (2006/07), which were expected to be approximately £68 million.

2.4 On the basis of the facts and matters described below the FSA is satisfied that:

a) Due to the size of reduction in profit in comparison to Woolworths' anticipated group profits the information about the Variation constituted inside information and as a result a disclosure obligation arose under Disclosure Rule 2.2.1 when the Variation was signed on 20 December 2005. The failure to disclose until 18 January 2006 resulted in a breach of this rule.

b) The failure to disclose led to the creation of a false market in Woolworths' shares from 20 December 2005 to 18 January 2006. As a result there was also a breach of Listing Principle 4.

Relevant Statutory Provisions and Guidance

2.5 Pursuant to Part VI of the Act, the FSA makes the Listing, Prospectus and Disclosure Rules[1] and is responsible for the official listing of securities in the UK. Disclosure rules under Part VI must require an issuer to publish specified inside information (section 96A of the Act). Between 20 December 2005 and 18 January 2006 (the "material time"), these rules set out the requirements for the admission of securities to the Official List and the continuing obligations of companies whose securities are so admitted.

2.6 For these purposes "inside information" is defined in section 118C of the Act (and in the Disclosure Rules) as:

"*(2) ... information of a precise nature which –*

(a) is not generally available,

(b) relates, directly or indirectly, to one or more issuers of the qualifying investments or to one or more of the qualifying investments, and

---

[1] On 20 January 2007 the Disclosure Rules were supplemented with additional rules and became the Disclosure and Transparency Rules.

(c) *would, if generally available, be likely to have a significant effect on the price of the qualifying investments or on the price of related investments. ...*

(5) Information is precise if it –

(a) *indicates circumstances that exist or may reasonably be expected to come into existence or an event that has occurred or may reasonably be expected to occur, and*

(b) *is specific enough to enable a conclusion to be drawn as to the possible effect of those circumstances or that event on the price of qualifying investments or related investments.*

(6) Information would be likely to have a significant effect on price if and only if it is information of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions."

2.7 The FSA is authorised under section 91(1) of the Act to exercise its power to impose a financial penalty where it is satisfied that an issuer has contravened any provision of the Part VI rules.

2.8 At the material time the Disclosure Rules ("DR") for listed companies were set out in the FSA's Handbook. DR 2.2.1 stated that: "*An issuer must notify a RIS [Regulatory Information Service] as soon as possible of any inside information which directly concerns the issuer unless DR 2.5.1 applies.*"[2]

2.9 At the material time the FSA had, pursuant to section 157 of the Act, published guidance on Disclosure Rule obligations in the Handbook which would have been available to Woolworths. In deciding to take the action set out in this notice, the FSA has had regard to specific guidance on the identification of inside information set out from DR 2.2.3G to DR 2.2.8G.

2.10 Chapter 7 of the Listing Rules sets out the Listing Principles which apply to every listed company with a primary listing of equity securities. The purpose of the Listing Principles is to ensure that listed companies pay due regard to the fundamental role they play in maintaining market confidence and ensuring fair and orderly markets.

2.11 Listing Principle 4 provides that "*a listed company must communicate information to holders and potential holders of its listed equity securities in such a way as to avoid the creation or continuation of a false market in such listed equity securities.*"

2.12 The FSA regards the continuing obligation requirements of the Disclosure Rules and Listing Principles as a fundamental protection for shareholders. These requirements are designed to promote full disclosure to the market of all relevant information on a timely basis to ensure that all users of the market have simultaneous access to the same information. Observance of these continuing obligations is essential to the maintenance of an efficient, fair and orderly market in securities and to maintaining confidence in the financial system.

---

[2] DR 2.5.1 is not relevant in this case.

3. FACTS AND MATTERS RELIED UPON IN THE WARNING NOTICE

Background

3.1 Woolworths is a listed issuer of securities on the London Stock Exchange Official List. Woolworths de-merged from Kingfisher plc in 2001 and was listed on the London Stock Exchange on 28 August 2001. At the material time its shares were included in the FTSE 250.

3.2 In the year ended 28 January 2006, Woolworths' principal activity was described as a general merchandise retailer operating through high street stores in small towns and city suburbs, targeted at meeting basic everyday shopping requirements, as well as larger stores located on prime shopping streets in major regional shopping centres. Woolworths had 821 stores (803 stores and 18 out-of-town stores). EUK is a wholly owned subsidiary of Woolworths and was the UK's largest wholesale distributor of home entertainment products (DVDs, CDs, videos, books and games software).

The Agreement with Tesco and the Ways of Working Discussions

3.3 EUK and Woolworths entered into the Agreement with Tesco on 9 August 2004 for the wholesale supply of entertainment products. The Agreement was envisaged to run for an initial period until 1 March 2007 although there was provision for early exit in specific circumstances.

3.4 In the financial year 2005/06 the Agreement generated operating profit of approximately £14 million which represented 45% of EUK's £31 million operating profit. This represented approximately 20% of Woolworths' adjusted operating profit of £73.5 million for that year. At the material time EUK was one of Tesco's five largest suppliers.

3.5 A condition of the Agreement was that the parties would work together in order to obtain supply chain efficiencies, which was a process known as the "Ways of Working". In the event that an agreement could not be reached under the Ways of Working, up until 21 December 2005, Tesco could terminate the contract on 6 months' notice. After that date a 12 month notice period would apply.

3.6 After a series of presentations under the Ways of Working initiative Tesco requested a meeting with EUK on 8 December 2005. During the meeting Tesco explained that, if EUK wished to work through the balance of the contract until 1 March 2007 and avoid being served with six months' notice on 21 December 2005, it required an increase in the retrospective discount paid by EUK to Tesco of £8 million.

3.7 At the same meeting Tesco also informed EUK that they were not their preferred supplier to continue the contract after 1 March 2007 and that, although it was not a final decision, it was unlikely that they would continue with EUK after that date.

3.8 The £8 million increase in the amount of retrospective discount paid to Tesco would reduce Woolworths' anticipated profits, which were expected to be approximately £68 million, by over 10% for the following financial year (2006/07).

3.9 Whilst the increased payment to Tesco would mean that the annual profit from the contract would reduce by nearly 60% it had the key benefit for EUK in that Tesco would then only be able to serve 12 months' notice. This would ensure that the business was retained for the important Christmas trading period in 2006 as well as giving EUK additional time to rebuild the business should Tesco ultimately decide not to renew the Agreement.

3.10 The details of the proposal by Tesco (including the likely impact on Woolworths' anticipated profits) were included in a presentation made to the Woolworths Board at a Group Directors Away Day on 12 and 13 December 2005. While the FSA accepts that the Woolworths Board might conclude that Woolworths did not need to disclose the Tesco proposal then, Woolworths did not consider (as it should have done) whether a disclosure obligation would arise if the Variation was executed.

Signing of the Deed of Variation

3.11 The proposal to increase the amount of retrospective discount paid by EUK to Tesco was accepted and documented in the Variation signed on 20 December 2005. A copy of the Variation was provided to senior company officers of Woolworths before the end of the following day. They did not however consider then (as they should have done) whether a disclosure obligation had now arisen.

3.12 The £8 million loss of profit arising from the Variation was, in the context of Woolworths' financial performance, inside information within the terms of DR 2.2.1 and should have been disclosed to the market immediately. Woolworths did not however do so.

Drafting of the Announcement

3.13 Woolworths were due to issue a scheduled Christmas trading update on 18 January 2006, this was considered by Woolworths to be the appropriate point to update the market in relation to the overall status of the EUK relationship with Tesco.

3.14 The drafting of the Announcement commenced on 10 January 2006 in conjunction with senior management and Woolworths' advisers. The advisers were not explicitly asked to comment on whether the Variation would constitute inside information and require a separate disclosure. At the time of drafting the advisers were not aware that the Variation had been entered into on 20 December 2005. In fact they were under the impression that the negotiations in relation to this matter were still ongoing with a target date for their completion being immediately prior to the scheduled announcement on 18 January 2006. On the basis of this one of the advisers did note that the profit effect of the Variation (i.e. the estimated £8 million) should be included within the Announcement.

The Announcement

3.15 On 18 January 2006 Woolworths issued a scheduled Christmas trading update announcement. Following the Announcement on that day, the share price fell from 36.75p to 32.25p, a fall of 12.24%. It is the view of the FSA that information documented in the Variation was a significant contributor to the fall in share price.

3.16 Amongst other information, the Announcement detailed that EUK had agreed new trading terms with Tesco and that this, together with other factors, would lead to reduced profits for EUK in the following financial year of approximately £10 million (of which £8m constituted the loss of profit from the Variation). The Announcement also noted that it was currently uncertain whether the contract would be renewed after 28 February 2007.

4. SUMMARY OF WOOLWORTHS' REPRESENTATIONS

4.1 Woolworths made written representations in a document dated 20 March 2008 and made oral representations on 29 April 2008. This section summarises the key representations made by Woolworths.

4.2 In Woolworths' view there has been no breach of Listing Principle 4 or DR 2.2.1. The central question is whether the (estimated) £8 million cost to EUK of the Variation constituted "inside information". Woolworths' position has always been (and remains) that it did not. The question turns on whether the information "*would, if generally available, be likely to have a significant effect*" on the price of the Woolworths' shares. Woolworths accept that the other criteria for determining whether the Variation was "inside information" are met.

4.3 Woolworths accept that the question has to be asked by the issuer (and its advisers) at the time and without the benefit of hindsight – for the purpose of reaching a decision whether to make an announcement. Woolworths argue that section 118C is to be viewed as a set of factors to take into account at that time, and is not the exclusive test to apply in identifying whether there has been a breach of the rules. Woolworths submit that the need to consider and analyse what caused the share price movement should be central to the determination of whether a piece of information is "inside information" for that latter purpose. That determination will, by the nature of things, take place after the event. Woolworths also suggest that this was in fact the approach adopted by the FSA through its investigation process.

4.4 Directors do not have the luxury of conducting such an *ex post facto* analysis. A company and its advisors have to make what are often fine judgments at the time in the midst of commercial pressures. In those circumstances, Woolworths contend that the facts should point very clearly to the information in question being "inside information" and having had a significant effect on the issuer's share price, before a finding of market abuse is made.

4.5 There is no set percentage or other figure which determines whether or not there is a "significant effect" on the share price and it will vary from issuer to issuer. Whether the price movement in Woolworths' shares of 12.24% amounts to a "*significant effect on the price*" should be considered against the backdrop of (a) the various factors in the Announcement which could have had an adverse impact on the price of Woolworths' shares and (b) the fact that Woolworths' share price fall is much lower than in other cases where action has been taken against issuers.

4.6 Woolworths do not consider that the FSA has taken proper account of the implications of the other factors in the Announcement. In particular, the uncertainty surrounding the renewal of the Tesco/EUK Supply Contract is given wholly insufficient weight. Woolworths' view is that the risk of the total loss of the Supply Contract was more significant than the Variation payment of £8m. The time available to rebuild the EUK

business to mitigate such a loss also applies to the time available to mitigate the impact of the Variation. The reaction of the analysts at the time and the views expressed by Woolworths and its advisors do not support the FSA's case.

4.7 Woolworths does not accept that there was no hint that there were any problems with the Tesco contract or that Tesco were going to change the terms. Information was known to the market at the time. Woolworths explained the "Ways of Working" process (WOW) and the fact that it was a condition of the Supply Contract continuing for the initial period (i.e. until March 2007) when it announced the signing of the Supply Contract on 9 August 2004. It was explained in similar terms in Woolworths' interim results presentation to analysts in September 2005. Woolworths continued to keep the market apprised of the WOW process and the challenges inherent in the Tesco relationship.

4.8 Woolworths does not dispute that, until the Announcement, the information regarding the (approximate) £8 million payment to Tesco pursuant to the Variation was not known within the market. However, this was simply because it formed part of a confidential process appropriate for a commercial negotiation.

4.9 Woolworths consider that the FSA places undue weight on the level of the £8m payment agreed by the Variation. Against the backdrop of a Group with a turnover in 2005/06 of £2.6 billion, there were plenty of ways in which Woolworths could look to mitigate the loss of that sum. The success of EUK in the succeeding years shows that, as Woolworths' management expressed at the time, being free of the Tesco contract opened up new opportunities for the company to develop elsewhere.

4.10 Woolworths does not accept that EUK was perceived by the market to be the "major" and/or "fastest" "growth area" for Woolworths prior to the Announcement. In Woolworths' view, its non-retail operations (which included 2Entertain as well as EUK) were not fully understood by the market at this stage. Rather, the focus of the market and the analysts' attention was on the turnaround of the main-chain retail business (i.e. Woolworths).

4.11 Indeed, all of the analyst reports in evidence in this case refer also to the uncertainty regarding renewal of the Supply Contract. In particular, analyst reports also refer to the uncertainty around renewal of the Tesco/EUK contract and (where they give profit expectations for the 2007/8 year) downgrade such expectations accordingly. Further one report only refers to the likelihood of the Tesco/EUK contract not being renewed and not to the Variation.

4.12 Woolworths contends that a proper and careful analysis of the factors which were at play (giving appropriate weight to the non-renewal of the Tesco/EUK contract and recognising some impact attributable to both the £11m International Financial Reporting Standards accounting adjustment and the 2005/06 Profit Before Tax downgrade), points, on a conservative approach, to a share price fall attributable to the Variation of less than 5%. It is not uncommon for a share price movement of this size to happen during the course of a normal trading day.

4.13 The FSA's expert's view is that a significant share price movement is one of 10%. To be precise about the percentage figure relating to the Variation is impossible, as the exercise is, inevitably speculative to some extent. However, not to engage in such an analysis at all amounts to turning a blind eye to the obvious.

4.14 A finding that a single figure share price fall satisfies the test of having a "significant effect on the price" of qualifying investments sets a dangerous precedent. In Woolworths' submission, the FSA as the UK financial markets regulator should be slow to set the bar in a case of this nature at such a low level. The approach taken in other cases where action has followed significant share price movements, in the range of 36% to 67%, is the correct one. To do otherwise in this case, would not be the well-judged consistency of action expected of a leading financial markets regulator.

4.15 Woolworths does not consider that the proposed sanction is justified. It contends that the FSA has not made out the case of a failure to disclose inside information. Further, Woolworths considers that a financial penalty at the level proposed in the Warning Notice is an inappropriate and disproportionate response. If there was a breach it was not deliberate and Woolworths has no previous disciplinary record. It has in each of 2004/05 and 2006/07 made RNS announcements around its Christmas trading period in compliance with its disclosure obligations. It has also co-operated fully with the investigation, at considerable cost, through an extended period of over two years. It has also accepted (in the course of its oral representations) that it may have overlooked the need to consider the signing of the Variation in isolation.

5. CONCLUSIONS

5.1 The key question is for the FSA to decide whether it is satisfied that, as at 20 December 2005, the signing of the Variation and its financial consequences amounted to "inside information". Woolworths accept that this is the crux of the matter.

5.2 The FSA is satisfied that the Act specifies a single definition of "inside information", and this is the one set out above. Section 118C is set out in the Act as a key part of that definition – it is not included merely as a set of factors to take into account. The FSA is also satisfied that "likely to have a significant effect on price" must be assessed against the test in section 118C(6) only. An analysis of actual price movements and the matters contributing to it can be relevant to the question of penalty, and is inevitably likely to be the starting point for an investigation. However, it is the wrong approach to seek to analyse the amount of an actual fall that might be attributed to a particular piece of information in order to determine whether it was "inside information". Indeed it is an unworkable test if the relevant piece of information was not in fact disclosed. This is entirely consistent with the guidance in the Disclosure Rules to the effect that there is no set percentage or other figure to determine whether there is a "significant effect on price".

5.3 It follows that the FSA does not accept Woolworths' suggestion that a share price fall of 10% or more attributable to the particular piece of information is needed for there to have been a "significant effect on price" from that piece of information. The materials available to the FSA, including the views of an appropriate market professional, do not support Woolworths' suggestion. The FSA is satisfied that the Variation resulted in a profit reduction of more than 10% and that this is, on any view, information of a type that a reasonable investor would be likely to use as part of his investment decisions.

5.4 The FSA is therefore satisfied that no later than 20 December 2005 (the date on which the Variation was executed, and therefore became a legally binding commitment) the £8m reduction in profit resulting from the Variation was inside information as defined under section 118C of the Act – that is precise information, not generally available,

relating directly to Woolworths, and information (if generally available) likely to have a significant effect on the price of Woolworths' shares. This information is of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions.

5.5 A disclosure obligation therefore arose under DR 2.2.1 on 20 December 2005. Failure to disclose this information was a breach of this rule, continuing until 18 January 2006 when it was announced. In addition, the failure to disclose this information led to the creation of a false market in Woolworths' shares from 20 December 2005 to 18 January 2006. As a result there was also a breach of Listing Principle 4.

6. SANCTION

6.1 The FSA's policy on the imposition of financial penalties and public censures is set out in Decision Procedure & Penalties and Enforcement Guide at DEPP 6. As this matter relates to events prior to the introduction of DEPP (28 August 2007), the FSA has also had regard to the relevant policies set out in the Enforcement Manual (which preceded DEPP) at ENF 21.7. The principal purpose of financial penalties is to promote high standards of market conduct by deterring those who have committed breaches from committing further breaches, helping to deter others from committing similar breaches and demonstrating generally the benefits of compliant behaviour.

6.2 The FSA considers that the seriousness of Woolworths' breach of DR 2.2.1 and Listing Principle 4 merits a financial penalty. The factors which have been taken into account in determining the financial penalty to be imposed on Woolworths include:

(a) at the material time Woolworths' shares formed part of the FTSE 250 and contravention of DR 2.2.1 and Listing Principle 4 impacted on the orderliness of the capital markets and public confidence in those markets;

(b) the delay in announcing the Variation was extensive, i.e. from 20 December 2005 to 18 January 2006, a period of 29 days, during which time there was a false market in Woolworths' shares;

(c) Woolworths failed adequately to take professional advice in relation to its disclosure obligations;

(d) Woolworths' internal processes failed to identify in a timely fashion the need to consider itself whether the effect of the Variation was inside information, even though its Board was made aware of the potential impact shortly before the Variation was executed, and senior company officers received a copy of it on the day it was signed; Woolworths have acknowledged that this was so;

(e) the breach was not deliberate;

(f) Woolworths has co-operated with the FSA's investigation; and

(g) no previous disciplinary action has been taken against Woolworths.

6.3 In determining the financial penalty the FSA has considered the need to deter Woolworths and others from engaging in this type of activity. The FSA has also had

regard to penalties in other similar cases. The FSA considers that a financial penalty of £350,000 is appropriate.

7. DECISION MAKER

7.1 The decision which gave rise to the obligation to give this Final Notice was made by the Regulatory Decisions Committee.

8. IMPORTANT

8.1 This Final Notice is given to Woolworths in accordance with section 390 of the Act.

Manner of and time for Payment

8.2 The financial penalty must be paid in full by Woolworths to the FSA by no later than 25 June 2008, 14 days from the date of the Final Notice.

If the financial penalty is not paid

8.3 If all or any of the financial penalty is outstanding on 26 June 2008, the FSA may recover the outstanding amount as a debt owed by Woolworths and due to the FSA.

Publicity

8.4 Sections 391(4), 391(6) and 391(7) of the Act apply to the publication of information about the matter to which this notice relates. Under those provisions, the FSA must publish such information about the matter to which this notice relates as the FSA considers appropriate. The information may be published in such manner as the FSA considers appropriate. However, the FSA may not publish information if such publication would, in the opinion of the FSA, be unfair to you or prejudicial to the interests of consumers.

8.5 The FSA intends to publish such information about the matter to which this Final Notice relates as it considers appropriate.

FSA contacts

8.6 For more information concerning this matter generally, you should contact Helena Varney on 020 7066 1294 or Jeremy Parkinson on 0207 066 0224 of the Enforcement Division of the FSA.

.....

Tracey McDermott
Head of Department
FSA Enforcement Division

Financial Services Authority

FINAL NOTICE

To: **Wolfson Microelectronics plc**
Of: **Westfield House**
26 Westfield Road
Edinburgh
EH11 2QB

Date: **19 January 2009**

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS ("the FSA") gives you final notice about a requirement to pay a financial penalty.

1. THE PENALTY

1.1 The FSA gave Wolfson Microelectronics Plc ("Wolfson") a Decision Notice on 19 January 2009 which notified Wolfson that pursuant to section 91(1) of the Financial Services and Markets Act 2000 ("the Act"), the FSA had decided to impose a financial penalty of £200,000 on Wolfson. This penalty was discounted by 30% pursuant to the stage 1 early settlement discount scheme. Therefore the total penalty was reduced to £140,000.

1.2 This penalty is in relation to breaches of Disclosure and Transparency Rule 2.2.1 and Listing Principle 4, namely the obligation to release price sensitive information as soon as possible and to avoid the creation or continuation of a false market in listed securities.

1.3 Wolfson confirmed on 19 November 2008 that it will not be referring the matter to the Financial Services and Markets Tribunal.

1.4 Accordingly, for the reasons set out below and having agreed the facts and matters relied on with Wolfson, the FSA imposes a financial penalty on Wolfson in the amount of £140,000.

2. REASONS FOR THE ACTION

Background

2.1 The FSA has imposed a penalty as a result of Wolfson's delay in releasing news concerning the loss of a design slot ('supply arrangement') with a Major Customer for 16 days.

2.2 The Major Customer generated approximately 18% of Wolfson's revenue in 2007, more than any other client. On Monday 10 March 2008, at approximately 23:00 GMT (16:00 PST) Wolfson met the Major Customer and were told that they would not be supplying parts for future editions of Products A and B, two of the Major Customer's products (the "Negative News"). This represented a loss of $20m to Wolfson, or 8% of Wolfson's forecast revenue for the year.

2.3 At the same meeting Wolfson were advised to expect increased demand for the supply of parts for the Major Customer's Product C and that Wolfson's overall revenues from the Major Customer in 2008 should be "flat year on year" (the "Positive News").

2.4 On Wednesday 12 March, Wolfson sought advice on whether they were required to make an announcement from Makinson Cowell, their Investor Relations advisors. On Thursday 20 March the Wolfson board of directors ("the Board") requested that a legal opinion was sought as to whether Wolfson was required to announce the Negative News. On Thursday 27 March 2008 at 07:00 Wolfson announced the Negative News and their share price closed at approximately 18% lower than the previous day.

2.5 On the basis of the facts and matters described below the FSA is satisfied that:

a) Due to the significance of the business relationship with the Major Customer, the loss of the Products A and B business and the related impact on revenue, the Negative News constituted inside information and as a result a disclosure obligation arose under Disclosure and Transparency Rules 2.2.1 ("DTR 2.2.1") when Wolfson became aware of the Negative News on 10 March 2008. The failure to disclose until 27 March 2008 resulted in a breach of this rule.

b) The failure to disclose led to the creation of a false market in Wolfson's shares from 10 March 2008 until 27 March 2008. As a result there was also a breach of Listing Principle 4.

Relevant Statutory Provisions and Guidance

2.6 Pursuant to Part VI of the Act, the FSA makes the Listing, Prospectus and Disclosure and Transparency Rules and is responsible for the official listing of securities in the UK. Disclosure rules under Part VI require an issuer to publish specified inside information (section 96A of the Act). Between 10 March 2008 and 27 March 2008 ("the Material Time"), these rules set out the requirements for the admission of securities to the Official List and the continuing obligations of companies whose securities are so admitted.

2.7 For purposes of the Disclosure and Transparency Rules, "inside information" is defined in section 118C of the Act as:

"*(2) ... information of a precise nature which –*

(a) is not generally available,

(b) relates, directly or indirectly, to one or more issuers of the qualifying investments or to one or more of the qualifying investments, and

(c) would, if generally available, be likely to have a significant effect on the price of the qualifying investments or on the price of related investments. ...

(5) Information is precise if it –

(a) indicates circumstances that exist or may reasonably be expected to come into existence or an event that has occurred or may reasonably be expected to occur, and

(b) is specific enough to enable a conclusion to be drawn as to the possible effect of those circumstances or that event on the price of qualifying investments or related investments.

(6) Information would be likely to have a significant effect on price if and only if it is information of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions."

2.8 The FSA is authorised under section 91(1) of the Act to exercise its power to impose a financial penalty where it is satisfied that an issuer has contravened any provision of the Part VI rules.

2.9 The Disclosure and Transparency Rules for listed companies are set out in the FSA's Handbook. DTR 2.2.1 states that: "*An issuer must notify a RIS [Regulatory Information Service] as soon as possible of any inside information which directly concerns the issuer unless DTR 2.5.1 applies.*"[1]

2.10 At the Material Time the FSA had, pursuant to section 157 of the Act, published guidance on Disclosure Rules obligations in the Handbook which would have been available to Wolfson. In deciding to take the action set out in this notice, the FSA has had regard to specific guidance on the identification of inside information set out in guidance DTR 2.2.3G to DTR 2.2.8G.

2.11 Chapter 7 of the Listing Rules sets out the Listing Principles which apply to every listed company with a primary listing of equity securities. The purpose of the Listing Principles is to ensure that listed companies pay due regard to the fundamental role they play in maintaining market confidence and ensuring fair and orderly markets.

2.12 Listing Principle 4 provides that "*a listed company must communicate information to*

---

[1] DR 2.5.1 is not relevant in this case.

holders and potential holders of its listed equity securities in such a way as to avoid the creation or continuation of a false market in such listed equity securities."

2.13 The FSA regards the continuing obligation requirements of the Disclosure and Transparency Rules and Listing Principles as a fundamental protection for shareholders. These requirements are designed to promote full disclosure to the market of all relevant information on a timely basis to ensure that all users of the market have simultaneous access to the same information. Observance of these continuing obligations is essential to the maintenance of an efficient, fair and orderly market in securities and to maintaining confidence in the financial system.

3. FACTS AND MATTERS RELIED UPON IN THE FINAL NOTICE

Background

3.1 Wolfson listed on the London Stock Exchange in 2003. Wolfson describes its business as follows: *"Wolfson supplies high performance mixed-signal semiconductors to the consumer electronics market in digital consumer goods. Our semiconductors (or chips) are found at the heart of many consumer products including mobile phones, portable media players, gaming devices, digital still cameras and satellite navigation devices".*

Summary Timeline

3.2 There was a 16 day delay (10 trading days) by Wolfson in announcing the Negative News.

3.3 The earliest that Wolfson could have announced the Negative News was Tuesday 11 March 2008 (Day 1). Wolfson disclosed the Positive News and Negative News to its investor relations advisers (Makinson Cowell) on Day 2; to the Wolfson Chairman of the board of directors ("the Chairman") on Day 2; to other members of the Board on Day 4 in a Board memo which was distributed in advance of the Board meeting held on Day 9; to its legal advisers (Heller Ehrman (Europe) LLP ("Heller")) on Day 10; and to its corporate brokers (Citigroup Global Markets Limited ("Citigroup") and JPMorgan Cazenove Limited ("Cazenove")) on Day 16. On Day 17 (Thursday 27 March 2008) at 07:00 Wolfson announced the Negative News and their share price closed at approximately 18% lower than the previous day.

Wolfson's Initial Reaction

3.4 On Tuesday 11 March 2008, Wolfson analysed internally the impact of the Negative News and the Positive News on their forecast revenue and considered their obligations under the DTR. Wolfson's understanding was that the *"current view of the revenue hit [in relation to the Negative News] for 2008 is in the region of ... $20m all H2 08 [second half of 2008]".* After increasing the forecast revenue attributable to Product C, and revenues expected from other clients, Wolfson calculated that they would still meet 2008 market revenue expectations.

3.5 In relation to whether an announcement should be made, an email from a senior Wolfson employee on 11 March 2008 (13:58) stated: *"My view is we need to say something fairly soon";* the same employee's email of 12 March 2008 (12:01) stated:

"I think the [Product A] news on its own, regardless of forecast, is inside information. Question then becomes do we soften any announcement by still forecasting solid growth".

Makinson Cowell Advice

3.6 On Wednesday 12 March, Wolfson asked their Investor Relations advisor, Makinson Cowell, whether they should make an announcement. Makinson Cowell were not Wolfson's legal advisors or corporate brokers. Citigroup and Cazenove were the corporate brokers at the time but were not consulted by Wolfson. Makinson Cowell state that their advice was that, given that they understood that Wolfson's revised 2008 revenue forecast remained close to the average of market expectations and that there would be no material change to the source or make-up of the revenue, no obligation of disclosure under the Disclosure and Transparency Rules had arisen. Wolfson's summary of Makinson Cowell's advice was set out in an email from a Wolfson senior employee to other senior Wolfson employees on 12 March 2008 (18:13) and in a memorandum from a senior Wolfson employee to the Board issued on 14 March 2008 ("the Board Memo"). Makinson Cowell did not see the e-mail, but were sent a copy of the Board Memo on 18 March. Makinson Cowell reviewed and briefly commented on the Board Memo the next day.

3.7 Wolfson's summary of Makinson Cowell's advice, as set out in the email from a Wolfson senior employee to other senior Wolfson employees on 12 March 2008 (18:13) stated the reasons for non-disclosure as follows:

Spoke with [2 employees at Makinson Cowell]. [Makinson employee] has done more research and has now seen DTR 2.2 and the 'reasonable investor' test. I sent around those guidelines earlier.

He noted that one could certainly make a case that given the market in which we currently operate in being pretty negative at the moment, and the fact that it is a significant customer at issue, and with a significant design loss on the face of it, that a reasonable investor would use the new information in their investment decisions and therefore the news could be viewed as price sensitive information which we should announce.

But on balance, he feels that there is a flip side which more than outweighs the argument above:

- revenues from other customers and from [Product C] are now expected to be significantly higher than the market anticipates .....mitigating the lost revenues from [Products A and B]

- still have a reasonable degree of confidence over revenue consensus -$247/248m having reviewed the data at a senior level

- all companies work within the constraints of customer confidentiality arrangements as we have with the Major Customer so there is a delicate balance between practically announcing something to do with the Major Customer when on the other hand we are constrained to do so by NDA's

- the market in its current state is bound to over-react on the negative which in turn creates a false market- ie consensus sales would likely fall and this is not useful for a reasonable investor

- finally we don't announce positive news which could be price sensitive on the up-side

3.8 The justifications for initial non-disclosure in the Board Memo prepared in advance of the Board Meeting are:

"Disclosure of inside information (DTR 2.2)

The disclosure of inside information is regulated by the FSA, and DTR (2.2) deals with requirements to disclose inside information to RNS.

Broadly, an issuer is required to determine if inside information could be deemed as price sensitive and whether the information in question would be used by a reasonable investor in assessing their investment choices. The information that is likely to be considered relevant includes that which effects, interalia [sic]:

The performance or the expectation of performance of the issuer's business
The financial condition of the issuer
Major new developments in the business

It is also worth noting that given the negative sentiment towards the tech sector in the market at the moment, and with the question of the Tier1 relationships/ retention raised quite frequently by shareholders and analysts, and indeed noted by many of them as a material factor which could result in downgrades if there was a design loss, then a reasonable investor would take into account the information about loss of next gen [generation] [of Products A and B] (being a major new development in the business) in their investment decisions. Therefore the news could be viewed as price sensitive information which we should announce.

But there are commercial reasons to not announce which more than outweigh the argument above:

- *Wolfson never announces design wins or losses to the market and has not done so in its history*
- *revenues from other customers and [Product C] are now expected to be significantly higher than the market anticipates mitigating the lost revenues from [Products A and B]*
- *Wolfson still have confidence at this time in meeting the average of the sell side analyst forecast for 2008 being circa $248m*
- *we are required to work within the constraints of customer confidentiality arrangements that we have with the Tier1 Customer so there is a delicate balance between practically announcing a design loss now, and potentially providing price sensitive information as to [The Major Customer's] future product line up/revenue plans ([Major Customer] are also a listed company with obligations of their own)*
- *the market in its current state will most certainly over-react on the negative*

which in turn creates a false market - i .e. consensus sales would likely fall and this is not useful for a reasonable investor given our current confidence at $245 - $250m revenues

- *we don't announce positive news which could be price sensitive on the up-side. Up-side price sensitive information is also useful to a reasonable investor as a reasonable investor has other opportunities to "maximise his economic self interest"*

Conclusion

Based on the above, having considered requirements to disclose information, but taking into account up to date forecasts and financial data, the recommendation is not to disclose at this juncture.

However, there is some risk of a leak from sources not linked to Wolfson, and therefore it is advised that a draft form of words is agreed in advance with [the Major Customer] which is held (and updated as required) and can be used immediately if there is a leak which starts to directly impact upon the share price)

(Board information – Makinson Cowell advised and agree with the above; Citigroup, Cazenove, Corfin & Heller Ehrman have not yet been asked for their view and have not advised)"

3.10 Concerning the Board Memo quoted above, Wolfson states that the use of the words "commercial reasons" was a reference to the reasons for non-disclosure set out in the email of 12 March and not intended to mean that business reasons outweigh regulatory obligations to disclose inside information.

3.11 Concerning the Board Memo quoted above, Wolfson states that it considers its regulatory obligations to disclose information with respect to all design wins or losses as evidenced by the fact that Wolfson considered its regulatory obligations in this instance. Wolfson states that, to the extent language in the Board Memo suggests otherwise, this must be taken in the context of the fact that Wolfson had no previous design wins or losses that required disclosure.

Advice From Other Advisors

3.12 Following the advice from Makinson Cowell, Wolfson decided not to announce the Negative News and to discuss the issue at a board meeting on Thursday 20 March ("the Board Meeting"). In the meantime, Wolfson drafted an announcement to be released if the market became aware of the Negative News and Wolfson's share price fell as a result.

3.13 At the Board Meeting all but one of the Board agreed that, based on the Wolfson summary of the advice that had been provided by Makinson Cowell, an announcement of the Negative News was not required. One member of the Board thought Wolfson should announce the Negative News immediately because of the importance the market placed on the relationship between Wolfson and the Major Customer. The Board therefore decided to seek a legal opinion.

3.14 On Thursday 20 March at 17:00, Wolfson sent a memo to their legal advisor, Heller. Wolfson requested a telephone conference with Heller on the morning of Tuesday 25 March (the first working day after the Easter break).

3.15 On Tuesday 25 March at 09:00, Heller advised Wolfson to make an announcement. Wolfson state that "*Heller Ehrman advised that Wolfson should announce, noting the [Major Customer] relationship as the key factor despite the fact that revenue would not be significantly below market consensus for 2008. Heller Ehrman referred to the FSA decision regarding MyTravel. Heller Ehrman noted that the brokers' views should be sought on the likely impact on the share price.*"

3.16 On Wednesday 26 March 2008 at 12:00, Cazenove and Citigroup were consulted for the first time during a conference call; both agreed with Heller's advice. Cazenove stated that the Negative News should be announced "*as a matter of urgency*". Wolfson state that they did not seek advice from their brokers earlier because they were concerned the Negative News may leak due to "*inherent conflicts that exist in such businesses. Citigroup and Cazenove act as both brokers and market makers in Wolfson shares.*"

3.17 Cazenove state that during this conference call they advised Wolfson that the Negative News was likely to be price sensitive because: "*We were aware from conversations with investors and from attending Wolfson's results presentations over a number of years of the importance the market placed on Wolfson's relationship with the Major Customer.*

3.18 *Notwithstanding the message from the Major Customer that revenues from the Design Loss would be replaced by higher volumes in its next generation product, we felt that investors would be likely to view the Design Loss as significant in terms of (i) Wolfson's status with the Major Customer; (ii) implications for potential market share loss with other customers or with the Major Customer in the future; and (iii) implications for revenues post 2008 even if the previously anticipated level of 2008 revenues could be achieved.*"

3.19 Citigroup state that: "*The 12pm conference call lasted approximately 1 hour and helped clarified [sic] a number of elements of the draft announcement that had been received at 11.14am; namely 1) that [the Major Customer] was the company identified as the Tier 1 customer, 2) that [the Major Customer] were indicating that chip revenues with Wolfson would be broadly unaffected by this development as additional volume was required on other [the Major Customer] products,..., 4) that it was unclear as to why Wolfson had been de-selected from this particular product, 5) that at this stage the longer term financial effects were difficult to quantify, 6) that the rest of the Wolfson business was performing well, and 7) that management saw no need for any change to FY08 revenue consensus forecasts for the group.*

3.20 *Nevertheless, given the importance that the market places on [the Major Customer] as a customer of Wolfson, our view was that, on balance, the development did constitute price-sensitive information and therefore required announcement. This was not a straightforward judgement given that the company did not believe the development warranted a change to forecasts, but rather revolved around an assessment of the possible impact on market sentiment.*"

3.21 On Wednesday 26 March, Wolfson sought the Board and the Major Customer's approval for the release.

The Announcement

3.22 On Thursday 27 March at 07:00, Wolfson announced the Negative News and their share price closed approximately 18% lower than the previous day.

Analysis of the Breaches

3.23 By 11 March 2008, Wolfson were aware they would not be supplying parts for future editions of Products A and B. For the reasons set forth in the responses of Citigroup and Cazenove (detailed above), this was information that would, if generally available, be likely to have a significant effect on the Wolfson share price and was information which a reasonable investor would be likely to use as part of the basis of his investment decisions. The information was inside information and Wolfson therefore had an obligation to notify a Regulatory Information System (RIS) as soon as possible. By not releasing the information until Thursday 27 March at 07:00, Wolfson breached DTR 2.2.1 in that Wolfson failed to release inside information as soon as possible and Listing Principle 4 in that Wolfson failed to communicate information in such a way as to avoid the creation or continuation of a false market.

4. CONCLUSIONS

Inside information

4.11 The loss of the arrangement to supply parts for future editions of Major Customer's Products A and B was inside information as defined under section 118C of the Act:

(a) The information was precise. The loss of the supply arrangement was certain. The impact of the loss of the supply arrangement was capable of calculation and had been calculated by Wolfson. The information was specific enough to enable a conclusion to be drawn that it was likely to have a negative effect on Wolfson's share price and Wolfson recognised this.

(b) The information was not generally available. There is no evidence that the market was aware of the loss of the supply arrangement.

(c) The information related directly to Wolfson.

(d) The information was likely to have a significant effect on the price of Wolfson shares. It was information of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions. The loss of the contract would reduce Wolfson's forecast revenue by 8%. The business relationship with the Major Customer was regarded as a significant relationship for Wolfson by the market. Wolfson recognised that the information was likely to have a significant price effect.

4.12 The FSA is therefore satisfied that the loss of the arrangement to supply parts for future editions of Products A and B was inside information as defined under section 118C of the Act.

The justification for non-disclosure

4.13 The key issue in this case is the failure to disclose price sensitive information as soon as possible. Some of the reasons used to justify the decision to withhold the Negative News are that: (a) Wolfson was concerned about possible "over reaction" by the market; (b) Wolfson offset the Negative News with revised revenue forecasts; and (c) Wolfson was prohibited from releasing related Positive News pursuant to a non-disclosure agreement with the Major Customer. Each of these justifications and why they are unacceptable is addressed in turn.

4.14 Concern about market over reaction to the news. The Board Memo indicates that Wolfson were aware that the Negative News would be likely to cause Wolfson's share price to fall but chose not to announce as Wolfson believed that a reduced share price would not accurately represent the value of the company. Companies cannot refuse to disclose negative price sensitive information because it would cause a fall in the share price or result in the share price not representing the 'true' value of the company.

4.15 Offsetting. The Board Memo states: *"revenues from other customers and from [Product C] are now expected to be significantly higher than the market anticipates."* This statement indicates that Wolfson believed that previously unavailable or unidentified revenues would offset the loss and therefore negate the need to announce. The FSA has made clear in the April 2004 UKLA List! Publication ("List!") and in past Enforcement cases that justifying non-disclosure of information by offsetting negative and positive news is not acceptable. Companies should disclose both types of information and allow the market to determine whether they cancel each other out.

4.16 Confidentiality agreements. The Board Memo states: *"we are required to work within the constraints of customer confidentiality arrangements that we have with [the Major Customer] so there is a delicate balance between practically announcing a design loss now, and potentially providing price sensitive information as to [the Major Customer]'s future product line up/ revenue plans ([Major Customer] are also a listed company with obligations of their own)".* One of Wolfson's initial reasons for not announcing the negative news was that non-disclosure agreements with the Major Customer meant they could not announce the increased demand in parts for Product C. We note that the announcement was ultimately drafted to refer anonymously to balancing positive factors and the Major Customer approved the announcement. In any event, however, companies must not withhold price sensitive information due to confidentiality agreements with their clients.

The advice from Makinson Cowell

4.17 Wolfson state that they relied on the advice of Makinson Cowell in deciding not to announce the Negative News. However:

(a) Primary responsibility for compliance with the requirements of DTR lies with Wolfson as the issuer;

(b) The advice was wrong, for the reasons set out above; and

(c) The advice was not legal advice, nor was it from Wolfson's corporate brokers.

4.18 Accordingly, it was not appropriate for Wolfson to rely upon the advice given by Makinson Cowell.

Conclusion on the breaches

4.19 A disclosure obligation arose under DR 2.2.1 on 10 March 2008. Failure to disclose this information until 27 March 2008 was a breach of this rule. The failure to disclose this information led to the creation of a false market in Wolfson's shares from 10 March to 27 March 2008. As a result there was also a breach of Listing Principle 4.

5. SANCTION

5.11 The FSA's policy on the imposition of financial penalties and public censures is set out in Chapter 6 of the Decision Procedure and Penalties Manual. The principal purpose of financial penalties is to promote high standards of market conduct by deterring those who have committed breaches from committing further breaches, helping to deter others from committing similar breaches and demonstrating generally the benefits of compliant behaviour. The FSA considers that the seriousness of Wolfson's breach of DR 2.2.1 and Listing Principle 4 merits a financial penalty.

Mitigating Factors

5.12 The mitigating factors which have been taken into account in determining the financial penalty to be imposed on Wolfson include the following:

(a) Wolfson has fully co-operated with the FSA's investigation.

(b) No previous disciplinary action has been taken against Wolfson.

(c) Wolfson considered the impact of the Negative News on their revenue in a timely fashion.

(d) Wolfson considered their obligations under the DTR in a timely fashion.

(e) Wolfson's initial reaction appears to have been that they should announce the Negative News.

(f) Wolfson sought the advice of Makinson Cowell in good faith and followed it.

(g) Wolfson appear to have genuinely believed that they would meet the 2008 revenue expectations despite the Negative News.

(h) Wolfson discussed the Negative News at the Board Meeting and then decided to take legal advice.

(i) Wolfson followed the legal advice and released an announcement.

(j) There was no intention deliberately to mislead the market.

Aggravating Factors

5.13 The aggravating factors which have been taken into account in determining the financial penalty to be imposed on Wolfson include the following:

(a) At the Material Time Wolfson's shares formed part of the FTSE Small Cap Index and FTSE techmark 100 Index and contravention of DTR 2.2.1 and Listing Principle 4 impacted on the orderliness of the capital markets and public confidence in those markets;

(b) The delay was extensive, from 11 - 26 March 2008, a period of 16 days in total and 10 trading days, during which time there was a false market in Wolfson shares;

(c) The initial justifications for non-disclosure were inappropriate for the reasons outlined above under the headings "Concern about market over reaction to the news", "Off-setting", and "Confidentiality agreements";

(d) The impact of the Negative News on Wolfson's revenue was significant as the estimated $20m reduction represented a loss of 8% of Wolfson's total forecast revenue for 2008;

(e) Wolfson had been told frequently by shareholders and analysts that the relationship with the Major Customer was significant and that a loss such as that which occurred could result in downgrades; and

(f) There appears to have been a lack of urgency in Wolfson making the announcement, for example:

(i) Wolfson failed to bring forward the Board Meeting;

(ii) Wolfson did not disclose the Negative News to their legal advisors for 10 days;

(iii) Wolfson did not disclose the Negative News to their brokers for 16 days; and

(iv) Wolfson were advised to release an announcement in the conference call with Heller at 09:00 on Tuesday 25 March; they did not release the announcement until 07:00 on Thursday 27 March, almost 2 days later.

Penalty Amount

5.14 In determining the financial penalty the FSA has considered the need to deter Wolfson and others from engaging in this type of activity. The FSA has also had regard to penalties in other similar cases. The FSA considers that a financial penalty of £200,000 is appropriate. This penalty is discounted by 30% pursuant to the stage 1 early settlement discount scheme. Therefore the total penalty will be reduced to £140,000.

6. DECISION MAKERS

6.1 The decision which gave rise to the obligation to give this Final notice was made by the Settlement Decision Makers on behalf of the FSA.

7. IMPORTANT

7.1. This Final Notice is given to Wolfson in accordance with section 390 of the Act.

Manner of and time for Payment

7.2. The financial penalty must be paid in full by Wolfson to the FSA by no later than 2 February 2009, 14 days from the date of the Final Notice.

If the financial penalty is not paid

7.3. If all or any of the financial penalty is outstanding on 2 February 2009, the FSA may recover the outstanding amount as a debt owed by Wolfson and due to the FSA.

Publicity

7.4. Sections 391(4), 391(6) and 391(7) of the Act apply to the publication of information about the matter to which this notice relates. Under those provisions, the FSA must publish such information about the matter to which this notice relates as the FSA considers appropriate. The information may be published in such manner as the FSA considers appropriate. However, the FSA may not publish information if such publication would, in the opinion of the FSA, be unfair to you or prejudicial to the interests of consumers.

7.5. The FSA intends to publish such information about the matter to which this Final Notice relates as it considers appropriate.

FSA contacts

7.6. For more information concerning this matter generally, you should contact Kevin K. Batteh on 020 7066 0176 or Aidan O'Conaill on 0207 066 4248 of the Enforcement Division of the FSA.

.....

Tracey McDermott
Head of Department
FSA Enforcement Division

Wolfson fined £140,000 for delaying disclosure of inside information

FSA/PN/011/2009
20 January 2009

The Financial Services Authority (FSA) today fined Wolfson Microelectronics plc (Wolfson) £140,000 for failing to reveal price sensitive information to the market as soon as possible. The delay led to a false market in Wolfson shares for 16 days.

On 10 March 2008, a major customer informed Wolfson that it would not be required to supply parts for future editions of two of its products (the "negative news"). Wolfson estimated that this represented a loss of $20 million or 8% of its forecast revenue for 2008. Wolfson also expected, based on other more positive information, that its 2008 forecast revenue would remain the same. The negative news was such that it constituted inside information and should have been disclosed as soon as possible.

On 12 March, Wolfson discussed the matter with its investor relations advisors who wrongly recommended that there was no need to disclose the negative news. Consequently, Wolfson delayed making an announcement. Wolfson had not contacted its corporate brokers or legal advisors at this point.

At its board meeting on 20 March, Wolfson reconsidered the earlier advice received. Following the meeting, Wolfson sought legal and corporate broking advice which recommended disclosing the negative news. On 27 March, the company announced the negative news and its share price closed at about 18% lower than the previous day.

Sally Dewar, managing director of wholesale and institutional markets at the FSA said:

"Listed companies must carefully consider what could be inside information and their obligations to disclose it. It is unacceptable for a company not to disclose negative news because it believes other matters are likely to offset it. Doing this hampers an investor's ability to make informed investment decisions and risks distorting the market value of a company's shares.

"Companies have the primary responsibility for meeting their disclosure obligations. While they may benefit from seeking advice from those in a position to comment on their regulatory requirements, they cannot rely, without due consideration, on such advice."

In determining the final penalty for Wolfson's actions, the FSA took into account a number of mitigating factors, in particular that the company had sought advice. Wolfson co-operated fully with the FSA investigation, and received a 30% discount of the £200,000 fine for early settlement.

Notes for editors

1. The Final Notice for Wolfson Microelectronics plc includes the background to the case, details of the principle and rule breaches and factors taken into account when setting the level of the fine.
2. In the last four years, the FSA has taken action against Woolworths Group plc; Eurodis Electron plc; MyTravel Group plc; Pace Micro Technology plc; Universal Salvage plc and Martin Christopher Hynes; and Sportsworld Media Group plc and Geoffrey Brown for similar listing rules breaches.
3. In his speech on 20 November 2008, Mike Knight, manager of company monitoring at the FSA set out the FSA's role in the continuing obligation regime.
4. The Disclosure Rules, (now known as the Disclosure and Transparency Rules), and Listing Principles provide a fundamental protection for shareholders by requiring full disclosure to the market of all relevant information on a

timely basis. This ensures that all users of the market get the same information at the same time.

5. Disclosure Rule 2.2.1 states that an issuer must notify a RIS [Regulatory Information Service] of any inside information which directly concerns the issuer unless disclosure rule 2.5.1 applies as soon as possible. Listing Principle 4 states that a listed company must communicate information to holders and potential holders of its listed equity securities in such a way as to avoid the creation or continuation of a false market in such listed equity securities.
6. The FSA regulates the financial services industry and has four objectives under the Financial Services and Markets Act 2000: maintaining market confidence; promoting public understanding of the financial system; securing the appropriate degree of protection for consumers; and fighting financial crime.
7. The FSA aims to promote efficient, orderly and fair markets, help retail consumers achieve a fair deal and improve its business capability and effectiveness.

More **Press releases**:

2009 2008 2007 2006 2005 2004 2003 2002 2001 2000 1999

FINAL NOTICE

To: **MyTravel Group plc**

Of: **Parkway One**
Parkway Business Centre
300 Princess Road
Manchester M14 7QU

Date: **14 July 2005**

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS ("the FSA") gives notice about its decision to take the following action

ACTION

1. The FSA gave MyTravel Group plc ("MyTravel") a Revised Further Decision Notice dated 12 July 2005. For the reasons set out below and pursuant to section 91 of the Financial Services and Markets Act 2000 ("the Act"), the FSA has decided to impose a financial penalty of £240,000 on MyTravel in respect of a contravention of the Listing Rules made by the FSA under Part VI of the Act ("the Listing Rules") as specified in paragraph 2 below.

Delay in announcing change in expectation as to performance

2. On or about 31 July 2002, MyTravel became aware of certain balance sheet exposures that were to be charged to profit for the financial year ending 30 September 2002 ("FY02"). It therefore changed its expectation as to its performance, specifically as to the source, composition and timing of its profits for FY02. That change, if made public, would have been likely to lead to substantial movement in the price of its listed securities. An obligation therefore arose to notify a Regulatory Information Service without delay of all relevant information which was not public knowledge concerning that change.

MyTravel did not announce this information until 28 November 2002. By failing to make that notification without delay, MyTravel contravened Listing Rule 9.2(c).

REASONS FOR THE ACTION

The Facts

Background

3. MyTravel is a fully integrated group of businesses that operates in the travel industry packaging and selling travel products. Before a change of name announced on 27 November 2001 (and effected on 8 February 2002) MyTravel was known as Airtours PLC. Operations are conducted under the MyTravel brand and a number of other established tour operator and travel retailer brand names, including Airtours, Going Places, Direct Holidays, Bridge, Cresta, Late Escapes, Manos, Panorama, Aspro and Escapades. Products and services are offered through a range of retail networks including its own branded outlets and via the internet.

4. The operating business units of MyTravel are organised into different divisions based on geography. One of these divisions is MyTravel UK ("MTUK") which consists of the business units located in the United Kingdom.

5. MyTravel's shares were admitted to the London Stock Exchange Official List on 31 March 1983. Currently the shares are a component of the FTSE 250 index.

6. On 27 November 2001 MyTravel announced record operating profit for the financial year ended 30 September 2001 ("FY01") of £147.4 million. At the same time MyTravel gave guidance at its annual results presentation that operating profit for FY02 would be broadly similar. The market consensus for FY02 was £145 million with analysts' predictions ranging from £86.7 million to £217 million.

7. Entering FY02 MyTravel was confronted with the acutely challenging business conditions that followed the events of 11 September 2001. In particular, the deferral of bookings and travel decisions by MyTravel customers posed the threat of significant losses in the first quarter of FY02 and this led to uncertainty and risk to the profit forecast.

8. The poor trading and business conditions were confirmed when MyTravel reported a poor first quarter on 7 February 2002. MyTravel announced that it would see significantly increased losses for the first half of FY02, although it reported that it continued to be cautiously optimistic for the full year.

9. The significantly increased losses were confirmed when MyTravel reported operating losses of £122.3 million for the six months ending 30 March 2002 (2001: £77.4 million) on 22 May 2002. Owing to the seasonal nature of its business, it was normal for MyTravel to make losses in the first quarter of the financial year, but not of this order. MyTravel also made clear in the announcement of results that the loss had not yet been recovered and that its full

year results were dependent on the recovery of bookings at a sufficient margin during the remainder of the year. As a result of a continued deferral in bookings, MyTravel explained that it could no longer be confident of recovering all the increased first quarter losses.

10. MyTravel announced on 23 July 2002 that group trading across all divisions was in line with expectations.

11. By the year end, at 30 September 2002, MyTravel was confronted by a difficult and complex environment exacerbated by ongoing change. Accounting policies previously relied on by MyTravel were subject to scrutiny and challenge, and trading and business risks brought about by the dependence on the volatile and uncertain market in late sales of package holidays materialised. Furthermore, and as a result, in the period after the year end, there were changes in the senior management.

12. In the event, on 28 November 2002, MyTravel announced a loss in FY02 of £72.8 million before tax but after e-commerce costs, exceptional items and goodwill amortisation.

Prior Years Exposures

13. During the early part of FY02 MTUK carried out a review of the accounting records and balance sheets of certain MTUK business units.

14. As a result of the review work MTUK identified a number of different balances totalling £24.3 million (the "Prior Years Exposures") that were not accounted for in the closing balance sheet and accounting records of MyTravel for FY01. These amounts were included in a schedule given to the Group Finance Director on 31 July 2002, eight days after the announcement referred to at paragraph 10 above. At about this time, the Group Finance Director discussed the Prior Years Exposures with the Chief Executive Officer.

15. Analysis by MTUK revealed that the Prior Years Exposures were the result of accounting or reconciliation errors that had occurred in a number of years prior to FY02. MyTravel (acting through its Group Finance Director and its Chief Executive Officer) agreed with MTUK that, as the value of these balances was known and certain, they should be written-off with a charge on the profits for FY02, as these balances represented an inadvertent cumulative overstatement of the profits for FY0l and previous years. This was the approach which had been taken by MTUK in compiling its profit forecasts.

Change in expectations

16. MyTravel's profit forecast calculations were based on a composite of year-to-date profit and the profit expected from future performance in the remaining part of the year.

17. At the time that MyTravel's Group Finance Director and its Chief Executive Officer became aware of the Prior Years Exposures (at the end of July 2002) they took the view that, because those balances sheet exposures had been

reflected in MTUK's internal (and therefore MyTravel's) profit forecasts, MyTravel's overall profit forecast remained unaffected by these factors.

18. This view was based on their expectations that there would be certain other non-recurring gains which would off-set these non-recurring losses. Nonetheless, MyTravel had changed its expectations as to the source, composition and timing of the factors which made up its forecast profit.

19. On behalf of MyTravel, its Group Finance Director and its Chief Executive Officer took the decision on or about 31 July 2002 that no announcement of this matter needed to be made. This decision was based on an understanding that, in circumstances in which MyTravel's profit forecast was unaffected, no announcement was required. They took this decision, however, without recourse to the Board of MyTravel and without the benefit of professional advice from their external advisers.

Announcement of 28 November 2002

20. On 28 November 2002, when announcing its results for FY02, MyTravel made an announcement though a Regulatory News Service that made reference to the Prior Years Exposures, describing them as cumulative errors from prior years amounting in total to £26.0m and explaining they had been charged in the 2002 year- end results as exceptional items.

Relevant statutory provisions, rules and guidance

21. Section 91(1) of the Act provides that: *"If the competent authority considers that-*

(a) an issuer of listed securities, or

(b) an applicant for listing,

has contravened any provision of listing rules, it may impose on him a penalty of such amount as it considers appropriate."

22. Pursuant to Part VI of the Act, the FSA makes the Listing Rules and is responsible for the official listing of securities in the UK. The Listing Rules set out the requirements for the admission of securities to the Official List and the continuing obligations of companies whose securities are so admitted.

23. Listing Rule 9.2 states that:

"A company must notify a Regulatory Information Service without delay of all relevant information which is not public knowledge concerning a change:

(a) in the company's financial condition;

(b) in the performance of its business; or

(c) in the company's expectation as to its performance;

which, if made public, would be likely to lead to substantial movement in the price of its listed securities."

24. The FSA regards the continuing obligation requirements of Chapter 9 of the Listing Rules as a fundamental protection for shareholders. These requirements are designed to promote full disclosure to the market of all relevant information on a timely basis to ensure that all users of the market have simultaneous access to the same information. Observance of these continuing obligations is essential to the maintenance of an orderly market in securities and of confidence in the financial system.

25. Compliance with Listing Rule 9.2(c) involves the assessment of the issuer's (subjective) expectation and the (objective) assessment of the likely market impact of any change in that expectation. A listed company (together with, if necessary, its advisers) is normally best placed to assess whether an announcement under Listing Rule 9.2(c) is required. Even in the absence of a change to the "headline" full year profit expectation, if there is a change in the expectation as to the source of that profit and/or the phasing of that profit through the financial year and/or the composition of that profit, the company must consider whether such a change would, if made public, be likely to lead to substantial movement in its share price.

26. A company's belief that a decision to write off a large amount can be compensated by offsetting balances in its forecast is not a sufficient basis in itself for the company to conclude that no announcement is necessary; the company must consider whether the market should be given the opportunity to assess the reasonableness of that belief for itself, through an announcement by the company.

Price sensitivity and delay

27. The FSA is satisfied that the information concerning the Prior Years Exposures was known to MyTravel, through its then Group Finance Director and its then Chief Executive Officer, on or about 31 July 2002. Had that information been made known to the market, it would have been likely to lead to substantial movement in the price of MyTravel's listed securities. Although MyTravel had announced on 23 July 2002 that group trading across all divisions was in line with expectations, the market was aware that the prevailing business conditions were challenging. The FSA considers that, in the context of investor nervousness concerning this sector, and market sensitivity to accounting issues, such an announcement would have come as an unwelcome surprise to investors. The market would have been concerned that further bad news arising out of problems with MyTravel's accounting systems may have been to come.

28. Although the FSA accepts that MyTravel genuinely believed the Prior Years Exposures had been reflected in its profit forecasts to date, it is nevertheless the case that it changed its expectation as to the forecast source, composition and timing of its profits. Given the high risk business environment and the large amounts concerned, the market should have been given the information promptly. MyTravel, however, by failing to notify the market until the full year results

were announced in November 2002, caused a serious delay in announcing price sensitive information.

SANCTIONS

29. The FSA's policy on the imposition of financial penalties and public censures is set out in Chapter 8 of the UKLA Guidance Manual. The principal purpose of financial penalties is to promote high standards of regulatory conduct by deterring those who have breached regulatory requirements from committing further contraventions and by demonstrating generally the benefits of compliant behaviour. The criteria for determining whether it is appropriate to issue a public censure are similar to those for financial penalties.

30. The FSA considers that MyTravel's failure to deal with the Prior Years Exposures appropriately, once they had been discovered, merits a financial penalty of £240,000. The Prior Years Exposures represented a significant percentage (16.7%) of analysts' consensus view of MyTravel's estimated profits before tax at the beginning of FY02[1]. By the end of July 2002, when the existence of the Prior Years Exposures became known, they represented 22.4% of analysts' consensus view of MyTravel's estimated profits before tax[2].

31. Factors that have been taken into account in determining the penalty imposed on MyTravel are:

- the delay in announcing the Prior Years Exposures was extensive;
- the size of the Prior Years Exposures was significant compared to forecasted profit for 2002;
- MyTravel was aware from about 31 July 2002 of the Prior Years Exposures and did not fully announce them until 28 November 2002;
- MyTravel did not take advice until after the year end;
- MyTravel is a sophisticated issuer with large resources;
- The breach concerns a one-off, non-recurring item not related to MyTravel's fundamental business.
- There was no intention deliberately to mislead or with-hold information from the market;
- no previous disciplinary action has been taken against MyTravel; and
- MyTravel has co-operated fully with the FSA's investigation.

[1] Based on Multex consensus figure at 2 November 2002 of £145m.

[2] Based on Multex consensus figure at 1 August 2002 of £108.1m

DECISION MAKER

The decision which gave rise to the obligation to give this Notice was made by the Regulatory Decisions Committee.

IMPORTANT

This Final Notice is given to MyTravel in accordance with Section 390 of the Act.

Manner of payment

The penalty must be paid to the FSA in full.

Time for payment

MyTravel must pay to the FSA the full amount of the penalty specified above no later than 28 July 2005.

If the penalty is not paid

If all or any part of the penalty is outstanding after the required date of payment, the FSA may recover the outstanding amount as a debt due to the FSA.

Publicity

Sections 391(4), 391(6) and 391(7) of the Act apply to the publication of information about the matter to which this Final Notice relates. Under those provisions, the FSA must publish such information about the matter to which this Final Notice relates as the FSA considers appropriate. The information may be published in such manner as the FSA considers appropriate. However, the FSA may not publish information if such publication would, in the opinion of the FSA, be unfair to MyTravel or prejudicial to the interests of consumers.

The FSA intends to publish such information about the matter to which this Final Notice relates as it considers appropriate.

FSA contacts

For more information concerning this matter generally, you should contact James Symington at the FSA (direct line: 020 7066 1256).

Carlos Conceicao

Head of Wholesale

FSA Enforcement Division

FINAL NOTICE

To:	**Universal Salvage PLC**	**Martin Chrisopher Hynes**
Of:	**c/o Messrs CMS Cameron McKenna Solicitors Mitre House 160 Aldersgate Street London EC1A 4DD**	**c/o Messrs Stephenson Harwood Solicitors One, St Paul's Churchyard London EC4M 8SH**

Date: **19 May 2004**

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS ("the FSA") gives Universal Salvage PLC and Martin Christopher Hynes final notice about a requirement to pay a financial penalty:

Summary

1. For the reasons set out below and pursuant to section 91 of the Financial Services and Markets Act 2000 ("the Act") the FSA takes action against Universal Salvage PLC ("UVS") and Martin Christopher Hynes ("Mr Hynes"), who was at the material time Chief Executive Officer of UVS, in respect of a contravention of the Listing Rules made by the FSA under Part VI of the Act ("the Listing Rules") as follows:

    - the FSA imposes a penalty in the amount of £90,000 on UVS in respect of the contravention of Listing Rule specified in paragraph 2; and

- the FSA imposes on Mr Hynes a penalty of £10,000 for being knowingly concerned in that contravention.

2. By 16 April 2002 a major new development had occurred in UVS's sphere of activity which, by virtue of its effect on its financial position or on the general course of its business, was likely to lead to a substantial movement in the price of its listed securities. An obligation therefore arose to notify a Regulatory Information Service without delay of all relevant information which was not public knowledge concerning that change. By not making that notification until 3.45pm on 23 April 2002, UVS contravened Listing Rule 9.1(a).

3. Mr Hynes was aware of this development and was the director best placed to take the appropriate steps in order to ensure that UVS complied with its obligations under the Listing Rules. By failing to do so, Mr Hynes was knowingly concerned in UVS's contravention.

REASONS FOR ACTIONS

The facts

4. UVS was incorporated in 1979 and admitted to the London Stock Exchange Official List in 1995. It is involved in the vehicle salvage business. Its clients are primarily insurance companies and local authorities.

5. At the material time, the Board had four members. These were Alexander Foster (Chairman, non-executive), Martin Hynes (Chief Executive Officer), Jonathan Cook (Finance Director) and Edmund Bruegger (Director, non-executive).

6. At the material time, UVS retained the professional services of WestLB Panmure ("WestLB") as financial advisers and stockbrokers.

7. One of UVS's contracts was with Direct Line Insurance. This contract had been won in 1998 and, since December 1999, had continued on a rolling basis, with a three-month notice period. Since February 2001, it had been open to tender but UVS had continued to work for Direct Line as before. By March 2002, the Direct Line contract accounted for approximately 40% of the vehicles handled by UVS.

8. On 18 March 2002, at a meeting attended by, among others, Mr Hynes, Direct Line informed UVS that UVS had lost the tender. The Board of UVS was advised of this at a Board Meeting on 20 March. Direct Line wrote to confirm the contract loss in a letter, received by UVS on 25 March, in which the contract termination date was set as 30 June 2002.

9. UVS took the view that the contract termination was a negotiating ploy by Direct Line in an ongoing tender process and accordingly wrote to Direct Line on 25 March 2002, raising a number of arguments as to why they should retain the contract. An

acknowledgment was received on 3 April 2002, in which Direct Line undertook to investigate the issues raised and to reply.

10. In the meantime, UVS conducted analysis as to the likely financial impact of the contract being terminated and explored options for cost savings. The intention was to present the outcome of this analysis at the next scheduled Board Meeting on 18 April 2002. Meanwhile, UVS took no steps to obtain advice from WestLB or any other preparatory measures that would enable timely action to be taken in the event of termination.

11. On Tuesday 16 April 2002, UVS received a letter from Direct Line confirming that, having considered the arguments raised by UVS, the contract was still to terminate as specified in its letter of 25 March 2002.

12. Despite the fact that UVS had already been on notice since late March that the contract was in danger of being terminated, it was decided not to bring forward the scheduled Board Meeting or to take any other measures such as obtaining advice, in anticipation of the need to make an announcement.

13. At the Board Meeting on Thursday 18 April, it was agreed to seek advice from WestLB as to whether to make an announcement to the market regarding the loss of the Direct Line contract and also poor trading figures in the final quarter of the then current financial year. Mr Hynes was given the responsibility of consulting with WestLB.

14. Although the Board Meeting ended just before 1.00pm, Mr Hynes did not telephone WestLB until 4.30pm. He telephoned again shortly after 5.00pm but his usual contact at WestLB was not available.

15. Mr Hynes spoke to his usual contact at WestLB the next morning and it was agreed that Mr Hynes would attend a meeting at WestLB's offices on the afternoon of Monday, 22 April 2002.

16. At that meeting WestLB advised that UVS should make an announcement to the market as to the loss of the Direct Line contract and the trading figures for the final quarter of the financial year.

17. After the meeting, UVS instructed its public relations advisers to draft an announcement to be sent to a Regulatory Information Service. They also had not previously been involved in the situation.

18. In the event, the announcement was released through the Regulatory Information Service at 3.45pm on 23 April 2002.

19. Before the announcement the UVS share price was stable and the volumes of shares traded (220,000 between 16 and 22 April, inclusive) were relatively low. On 23 April

2002, the date of the announcement, the share price fell from 468p to 215p, a fall of 55%.

20. The FSA notes that the announcement also reported news of UVS's poorer than expected trading figures. While it is not possible to evaluate precisely to what extent the news of the contract loss caused the fall in share price, the FSA nevertheless considers that it was the major factor.

Relevant Statutory Provisions, Rules and Guidance

21. The Listing Rules set out the requirements for the admission of securities to the Official List and the continuing obligations of companies whose securities are so admitted.[1]

22. Listing Rule 9.1 states that:

"A company must notify a Regulatory Information Service without delay of any major new developments in its sphere of activity which are not public knowledge which may:

(a) by virtue of the effect of those developments on its assets and liabilities or financial position or on the general course of its business, lead to substantial movement in the price of its listed securities;"

23. Listing Rule 16.2 states that:

"A listed company must ensure that its directors accept full responsibility, collectively and individually, for the company's compliance with the Listing Rules."[2]

24. The FSA regards the continuing obligation requirements of Chapter 9 of the Listing Rules as a fundamental protection for shareholders.[3] These requirements are designed to promote full disclosure to the market of all relevant information on a timely basis to ensure that all users of the market have simultaneous access to the same information. Observance of these continuing obligations is essential to the maintenance of an orderly market in securities and of confidence in the financial system.

25. A listed company has a continuing obligation to consider carefully whether developments in its sphere of activity may be such that, if made public, they would be likely to lead to substantial movement in the price of its listed securities and so require disclosure without delay under the Listing Rules. This is an overriding obligation and listed companies, where appropriate, should make use of their advisers to assist in

---

[1] Pursuant to Part VI of the Act, the FSA makes the Listing Rules and is responsible for the official listing of securities in the UK.

[2] The responsibility of directors in this regard is reinforced by Section 91(2): if the FSA considers that a director of the issuer was knowingly concerned in the issuer's contravention, it may impose on him a penalty of such amount as it considers appropriate.

[3] The relevant guidance on the disclosure obligations in the Listing Rules is contained in the *UKLA's Guidance on the Dissemination of Price Sensitive Information* in the UKLA Guidance Manual at Appendix 2, in particular at section 3, published in December 2001.

determining whether information is potentially price sensitive when such developments and changes are in prospect. Further, where the board of a company delegates the responsibility for obtaining such advice and making an announcement to a particular individual or individuals, it nevertheless remains the responsibility of the board to ensure that that responsibility is carried out effectively and without delay.

26. In assessing an issuer's compliance with Listing Rule 9.1 with respect to a major new development in its sphere of activity, the primary issue is whether, objectively, there has been such a development. This may take many forms depending on the circumstances but will include the loss of a major contract. The likely price sensitivity of any such change must then be assessed.

Contravention - price sensitivity and delay

27. The FSA is satisfied that, if the information known to UVS on 16 April 2002 concerning the loss of the Direct Line contract had been known to the market, it would have been likely to lead to substantial movement in the price of UVS's listed securities.

28. The Direct Line contract accounted for about 40% of the vehicles handled by UVS. Although the percentage of cash turnover was somewhat lower, it remained very significant.

29. The loss of this amount of business meant that, in order to maintain previous levels of turnover and profit, UVS would have had to obtain a large amount of new business. It is likely that the market would have reacted materially and adversely to the information that, in order to maintain its previous turnover, UVS would have to locate and win significant new business, rather than just retaining existing contracts.

30. All relevant information should, therefore, have been made the subject of an announcement without delay. UVS's failure to do so until 23 April 2002 therefore constituted a continuing breach of its obligations under Listing Rule 9.1.

Mr Hynes – knowingly concerned in the contravention

31. The FSA considers that Mr Hynes was knowingly concerned in UVS's contravention for the following reasons:

- he was at all material times a director of UVS and its Chief Executive Officer;
- he was personally involved at all stages, from the meeting with Direct Line on 18 March 2002 to the meeting with WestLB on 22 April 2002 and therefore had complete knowledge of all relevant matters;
- he was the principal point of contact with WestLB;
- at the Board Meeting on 18 April 2002, he was given personal responsibility for seeking the advice of West LB but did not fulfil that task with appropriate urgency.

SANCTIONS

32. The FSA's policy on the imposition of financial penalties and public censures is set out in Chapter 8 of the UKLA Guidance Manual. The principal purpose of financial penalties is to promote high standards of regulatory conduct by deterring those who have breached regulatory requirements from committing further contraventions and by demonstrating generally the benefits of compliant behaviour. The criteria for determining whether it is appropriate to issue a public censure are similar to those for financial penalties.

33. Factors that have been taken into account in determining the penalties imposed on UVS and Mr Hynes are:

- the contravention of the Listing Rules was serious in view of the length of the delay and the potential impact on the market;
- the delay could have been avoided entirely by the taking of responsible preparatory measures when the danger to the Direct Line contract emerged;
- when the announcement was eventually made, the effect on the UVS share price was considerable;
- although the interests of investors were prejudiced, the volumes of UVS shares traded during the period when the announcement was delayed were small;
- there was no intention deliberately to mislead the market;
- there was full co-operation with the FSA's investigation and, following the investigation, both parties engaged in constructive dialogue to resolve this matter expeditiously.

34. With regard to UVS, further factors taken into account are:

- UVS's market capitalisation at the time of the contravention was approximately £130 million. It is now less than £30 million. It has recently reported an expected loss for its 2003-4 financial year;
- UVS has taken subsequent appropriate steps to prevent a recurrence of the contravention;
- UVS has not previously been disciplined for any contravention of the Listing Rules.

35. With regard to Mr Hynes, further factors taken into account are:

- his personal involvement was continuous throughout all significant stages leading to the contravention;
- he is an individual and may not have the resources of a body corporate to pay a financial penalty;
- no previous disciplinary action has been taken against him.

36. In all the circumstances and having regard to the factors set out in paragraphs 27 to 35 the FSA considers that the imposition of a financial penalty on each of UVS and Mr Hynes is the appropriate sanction and that the amount imposed in each case is proportionate.

IMPORTANT NOTICES

This Final Notice is given to UVS and Mr Hynes in accordance with section 390 of the Act.

Manner of payment

The amounts of £90,000 and £10,000 must be paid to the FSA in full.

Time for payment

The penalty must be paid to the FSA no later than 2 June 2004, being not less than 14 days beginning with the date on which this Notice is given to you.

If the penalty is not paid

If all or any part of the penalty is outstanding on 2 June 2004, the FSA may recover the outstanding amount as a debt owed by you and due to the FSA.

Publicity

Sections 391(4), 391(6) and 391(7) of the Act apply to the publication of information about the matter to which this Notice relates. Under these provisions, the FSA must publish such information about the matter to which this Notice relates as the FSA considers appropriate. The information may be published in such a manner as the FSA considers appropriate. However, the FSA may not publish information if such publication would, in the opinion of the FSA, be unfair to UVS or to Mr Hynes or prejudicial to the interests of consumers.

The FSA intends to publish such information about the matter to which this Final Notice relates as it considers appropriate.

FSA contacts

For more information concerning this matter generally, you should contact James Symington (direct line: 020 7066 1256) of the Enforcement Division of the FSA.

Carlos Conceição
Head of Market Integrity
Enforcement Division

SB1 E2 - Capital connect

Annex 1

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~~ purported 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;

material

"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;

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.".

STARLITE
升岡國際有限公司
Starlight International Holdings Ltd.
(incorporated in Bermuda with Limited Liability)

香港香港仔大道232號成都工業大廈五樓
5/F., Shing Dao Industrial Building
232 Aberdeen Main Road, Hong Kong

Tel: (852) 2554 6303
Fax: (852) 2873 0230
E-mail: starlite@starlight.com.hk
Website: www.starlight.com.hk

Date : 25 June, 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

By fax: 2529 2075

Dear Sirs,

Re: Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

This letter states our views towards the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

We were given the impression that Codification was taking existing HKEx rules and making them the jurisdiction of the SFC. However, from the Consultation paper, it appears that there will be joint jurisdiction which does not ameliorate our concern but exacerbate it even further.

Under this proposed regime, the SFC will be able to trigger an investigation even where there is no suspected breach of price sensitive information. The SFC could investigate for lack of safeguards.

According to the draft guidelines published by the SFC, it is proposed that once a potential deal is "leaked" even by third parties, the directors of the company are responsible to make the relevant disclosures. This guideline is made by people who are not familiar with business practices. Third parties, or even potential partners could benefit from "potentially ruining" a deal by selective leakage. This requirement would put listed companies at a disadvantage in contract and other business negotiations, resulting in losing business opportunities. Hence, the disclosure may disadvantage to our company and putting our business in a less competitive position and giving less return to our shareholders. This is just an example of the types of restrictions listed companies will have to face under such a regime.

What was set out and advertised as beneficial to Hong Kong's community is in effect putting our businesses in a less competitive position. We are protecting stock speculators and not protecting the actual businesses, the ones creating value in the economy and not those who are looking for quick gains.

In addition, we have the following overall views on the Consultation Paper:

1) We support the introduction of civil remedies, not criminal, for this legislation.

2) Both elements of the *mens rea* (the "guilty mind") and *actus reus* (the "guilty act") must be present if a disclosure obligation is deemed to be breached, hence the strict liability concept must not be applied here. A corporation and its directors that could show they had duly and carefully considered a piece of information and made a non-disclosure decision based on prevailing circumstances and information should not be held liable even if the information had eventually caused material effect to share price.

Our response to specific questions listed in the Consultation Paper as follows:

Q.1a 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?

We agree.

Q.1b 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?

We agree a listed corporation should disclose inside information promptly but feel that the SFC should provide more guidance on how long is "practicable" in its view and their definition of "immediate". A corporation needs to verify the information, make necessary internal review, and assess its impact and this may take time.

For a large corporation with a large number of officers, it is difficult for the corporation to ensure all directors or officers would report inside information instantly that has come to their knowledge. It is our view that if a corporation has established and maintained appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable.

Further, the existing definition of "officer" which includes directors, secretaries and managers is too wide. Under the UK regime, only directors who *knowingly* breach the disclosure requirement would be held liable. We concur with this and recommend Hong Kong follows the UK approach. The definition of "officer" should include only "director" throughout this draft legislation.

The phrase "ought reasonably to have" in s.101B(2) of the "draft legislation" should be taken out. This phrase suggests that it is possible that the information may not have been actually known by the officers and thus it is impossible for the corporation to disclose information on this basis.

Q.1c *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?*

We agree and suggest that the submission through the Electronic Publication System operated by the SEHK or similar system suffice.

Q.2a *Do you agree to the provision of the four proposed Safe Harbours?*

We agree.

Q.2b *Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?*

We agree.

Q.2c *Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?*

We recommend an additional safe harbour which provides that if a corporation and its directors have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change -- due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show proper records of board deliberations leading to a reasonable conclusion that the information needed not to be disclosed at the time.

Q.2d *Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?*

We agree. We also think that other market participants should also be given the opportunity to suggest Safe Harbours to match with market developments.

Question 3

Q.3a *Do you agree to extend the jurisdiction of the MMT to handle breaches of the statutory disclosure requirements?*

We do not object.

Q.3b Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

We agree and would want to add that the proposed range of civil remedies is highly deterrent already. In particular, the proposed fine of up to HK$8 million is considered very high, especially for only negligence acts and we suggest to phrase out as the disqualification of directorship to barring from the market activities already have serious implication.

Q.3c Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

Allowing SFC direct access to the MMT lacks the checks-and-balances under the existing arrangement of having the cases referred to the Financial Secretary first. While we support a more efficient process, some checks-and-balances controls are important. Moreover, under the proposed legislation, the other proceedings that cover the six types of market misconduct would be referred to the MMT directly by the SFC. This is a major change. The Government must consider this with a view to balance the market's need for checks-and-balances and whether the resources of MMT can cope with the possible increase in the number of cases referred to it.

Q.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?

We agree and add that this should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new Safe Harbours that may be prescribed from time to time with a specified team of adequate experienced staff from the SFC to handle the issuers' enquiries in a timely manner.

Q.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?

The lines of authorities and responsibilities between the SFC and SEHK must be clearly defined without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by the Listing Committee.

We thank you for your attention.

Yours faithfully,
For and on behalf of
Starlight International Holdings Limited
(Stock Code : 485)

35th floor, Bank of China Tower
1 Garden Road, Central, Hong Kong
香港中环花园道1号中银大厦35楼
Telephone 电话 +852 2868 0789
Fax 传真 +852 2868 1504
DX 009225 Central 1

sh 罗夏信律师事务所
STEPHENSON HARWOOD

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18, Harcourt Road
Hong Kong

Email vkl@shlegal.com
Direct line +852 25332790
Direct fax +852 31503790
Our ref LVK/BH1068H

28 June 2010

Dear Sirs

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

We write in response to Question 3(b) of your consultation paper referred to above.

Given the difficulties listed companies and their officers often encounter in determining what is price sensitive information and when disclosure of such information should be made to the market, we generally welcome further clarity and guidance in the form of the SFC's draft Guidelines on Disclosure of Inside Information to assist listed companies to comply with their obligations under the proposed statutory disclosure requirements.

However, we have significant reservations about the introduction of regulatory fines as we believe there are sufficient sanctions available. In particular, we do not consider that it would be proportionate or effective for regulatory fines to be imposed on directors in cases where a director's behaviour has been neither intentional or reckless.

Q3(b) Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

We agree that a civil sanctions regime, rather than a criminal regime, is a practical and proportionate response.

Paragraph 2.25 of the consultation paper makes it clear that the purpose of the proposed civil sanctions regime is to promote "effective compliance" with the disclosure obligations and to allow "effective enforcement" of them, so as to create an "adequate deterrent" against breach. We take this as an acknowledgement that the sanctions regime needs to be effective and workable in practice, and the penalties no more severe than is necessary to deter non-compliance.

Under paragraph 2.30 of the consultation paper, an individual director or officer is proposed to be held personally liable for a listed corporation's failure to disclose PSI where:

- the failure to disclose is the result of any intentional, reckless or negligent act or omission on the part of that director or officer; or

- that director or officer has not taken all reasonable measures to prevent the corporation from breaching the PSI disclosure requirements.

The principle of individual liability for directors in breach of their duties is well established. However, we do object to directors being liable for regulatory fines up to HK$8 million, in particular in circumstances where a director's behaviour has been neither intentional or reckless.

As the consultation paper acknowledges, listed corporations constantly generate and come into possession of large volumes of complex information that may need to be disclosed under the PSI regime, and the judgements that need to be made about whether or not to disclose particular information will not always be straightforward. They may involve directors and officers having to second-guess how the financial markets will react to information, as well as the nature of the information itself, and so will often need to consult advisers in coming to a judgement. The definition of PSI is information which is likely to cause a price change "sufficient" to amount to a material change. No guidance is given about how to ascertain this, and this will rarely be clear in a constantly moving market. The test is stated to be a "hypothetical" test to be applied at the time the information becomes available. This is to be applied by directors but it is no more than a judgement call using such knowledge, foresight and professional advice as the directors have.

We think therefore that further thought needs to be given to how in applying these sanctions the MMT should place itself in the position of the director involved, having to make a judgement call and using foresight to gauge how the market might react to information. A sanction should not automatically follow in circumstances where the MMT (assuming it will hear these cases) decides that a listed corporation has failed to disclose PSI information and such decision of the MMT was made with the benefit of hindsight unavailable to the director at the time he had to decide the matter.

Paragraph 2.31

We note that the proposed sanctions set out in paragraph 2.31(b) to (f) of the consultation paper mirror sanctions that already exist for breach of directors' duties under existing legislation. We consider these would be sufficient to provide an adequate deterrent to non-compliance with the new PSI regime.

In contrast, the proposal in paragraph 2.31(a) to introduce regulatory fines of up to HK$8 million would be a new form of sanction. We do not believe that an ability to impose fines on individual directors or officers is necessary to provide a sufficient deterrent to non-compliance in view of the range of potential sanctions set out in paragraphs 2.31(b) to (f). There is no clear rationale or evidence base in the consultation paper to explain why financial penalties will be a greater deterrent than existing sanctions, for example disqualification or cold-shouldering of directors or officers in breach of their duties. We believe that if existing sanctions were effectively applied, such measures would be an adequate deterrent. Although the regulatory authorities may see regulatory fines as a convenient enforcement tool, we are not persuaded that the case has yet been made for the introduction of regulatory fines.

Paragraph 2.35

We believe that the introduction of a private right of action for those who have incurred loss on the lines of paragraph 2.35 needs greater thought as to the consequences and should be considered in the light of enforcement of the new regime before it is implemented .

Paragraph 2.36

We have no additional comments to make in relation to this paragraph.

Conclusion

For the reasons stated above, we agree with the general proposal to introduce a civil penalties PSI regime in Hong Kong. However, we think that it would be unnecessary and disproportionate if the penalties included the ability to impose regulatory fines on individuals.

If, however, regulatory fines are to be introduced then we suggest that they should be limited in scope to cases where there is clear evidence that an individual has intentionally or recklessly caused a breach of the duty to disclose PSI. We do not consider that it would be proportionate or effective for regulatory fines to be imposed on directors in cases falling short of recklessness or intentional behaviour.

Given the lack of evidence for the effectiveness of the introduction of regulatory fines, and the lack of certainty how they would affect listed corporations and corporate governance in Hong Kong, we would suggest that if regulatory fines are introduced at all they should be introduced temporarily and their operation reviewed for effectiveness and proportionality within a period of 2 to 3 years.

Should the FSTB decide to proceed with regulatory fines, we believe that it should provide greater clarity and transparency about the way in which the level of the fine should be ascertained to take account of different sets of circumstances in practice, besides identifying the upper limit.

In relation to existing sanctions, another approach might be to clarify section 391 of the SFO so that it also captures non-publication of information in circumstances where the market would be misled.

We should be happy to meet with you to discuss our concerns further. Please contact Voon Keat Lai at this office with any queries.

Yours faithfully

Stephenson Harwood

Stephenson Harwood

新鴻基有限公司
SUN HUNG KAI & CO. LIMITED

25 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs

Re: Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

This letter states our views towards the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

We have the following overall comments:

1) We support the introduction of civil remedies, not criminal, for this legislation.

2) Both elements of the *mens rea* (the "guilty mind") and *actus reus* (the "guilty act") must be present if a disclosure obligation is deemed to be breached, hence the strict liability concept must not be applied here. A corporation and its directors that could show they had duly and carefully considered a piece of information and made a non-disclose decision based on prevailing circumstances and information should not be held liable even if the information had eventually caused material effect to share price.

Our response to specific questions listed in the Consultation Paper as follows:

Q.1a 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?

We agree.

Q.1b 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?

總辦事處：
香港中環添美道1號中信大廈12樓
電話 : (852) 3920 2888 傳真 : (852) 3920 2789 網址 : http://www.SHKco.com
Head Office :
12/F, CITIC Tower, 1 Tim Mei Avenue, Central, Hong Kong
General Line : (852) 3920 2888 Fax : (852) 3920 2789 Website : http://www.SHKco.com

We agree a listed corporation should disclose inside information promptly but feel that the SFC should provide more guidance on how long is "practicable" in its view and their definition of "immediate". A corporation needs to verify the information, make necessary internal review, and assess its impact and this will take time.

For a large corporation with a large number of officers, it is difficult for the corporation to ensure all directors or officers would report inside information instantly that has come to their knowledge. It is our view that if a corporation has established and maintained appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable.

Further, the existing definition of "officer" which includes directors, secretaries and managers is too wide. Under the UK regime, only directors who *knowingly* breach the disclosure requirement would be held liable. We concur with this and recommend Hong Kong follows the UK approach. The definition of "officer" should include only "director" throughout this draft legislation.

The phrase "ought reasonably to have" in s.101B(2) of the "draft legislation" should be taken out. This phrase suggests that it is possible that the information may not have been actually known by the officers and thus it is impossible for the corporation to disclose information on this basis.

Q.1c *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?*

We agree.

Q.2a *Do you agree to the provision of the four proposed Safe Harbours?*

We agree.

Q.2b *Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?*

We agree.

Q.2c Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?

We recommend an additional safe harbour which provides that if a corporation and its directors have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect its share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change -- due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show clear and proper records of board deliberations leading to a reasonable conclusion that the information needed not to be disclosed at the time.

Q.2d Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?

We agree. We also think that other market participants should also be given the opportunity to suggest Safe Harbours to match with market developments.

Question 3

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

We do not agree. Current provision under S.252(2) of SFO is fair and adequate. It's advisable to seek independent legal advice from Department of Justice in deciding whether proceedings should be instituted.

Q.3b Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

We agree and would want to add that the proposed range of civil remedies is highly deterrent already.

Q.3c Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

We do not agree. Allowing SFC direct access to the MMT lacks the checks-and-balances under the existing arrangement of having the cases referred to the Financial Secretary first.

總辦事處：
香港中環添美道1號中信大廈12樓
電話 : (852) 3920 2888 傳真 : (852) 3920 2789 網址 : http://www.SHKco.com
Head Office :
12/F, CITIC Tower, 1 Tim Mei Avenue, Central, Hong Kong
General Line : (852) 3920 2888 Fax : (852) 3920 2789 Website : http://www.SHKco.com

Q.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?*

We agree and add that this should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new Safe Harbours that may be prescribed from time to time.

Q.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?*

The lines of authorities and responsibilities between the SFC and SEHK must be clearly defined without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by Listing Committee.

We thank you for your attention.

Yours sincerely,
For and on behalf of
SUN HUNG KAI & CO. LIMITED

Joseph TONG
Executive Director

新鴻基地產發展有限公司
SUN HUNG KAI PROPERTIES LTD.

28 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs

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

We are sending this letter to indicate our views on the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations ("Consultation Paper").

Our overall comments:

1) The introduction of civil remedies, not criminal remedies, for this proposed legislation, is welcomed.

2) For a disclosure obligation to be deemed to have been breached, both the elements of *mens rea* (the "guilty mind") and *actus reus* (the "guilty act") must be present, thus the strict liability concept must not be applied here. When a corporation and its directors could show that they had duly and carefully considered a piece of information and made a decision not to disclose the information based on prevailing circumstances and information, they should not be held liable even if material effect on the share price had been caused by the information eventually.

We, in principle, agree to the issues raised in the Consultation Paper apart from the following views and comments on the specific questions listed below.

Q.1b 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?

We agree that a listed corporation should disclose inside information promptly. However, the SFC should provide more guidance on, in their view, how long "practicable" is referring to as well as their definition of "immediate". It is important to note that a corporation needs time to verify the information, make necessary internal review and assess the impact.

香港港灣道三十號新鴻基中心四十五樓
電話：二八二七 八一壹一　圖文傳真：二八二七 二八六二
網頁：http://www.shkp.com　電子郵件：shkp@shkp.com
45/F., SUN HUNG KAI CENTRE, 30 HARBOUR ROAD, HONG KONG.
TEL: 2827 8111 FAX: 2827 2862
WEBSITE: http://www.shkp.com E-MAIL: shkp@shkp.com

IA179/3000/P/3-04/CM

It is difficult for the corporation to ensure that all the directors or officers would instantly report inside information that has come to their knowledge when it comes to a large corporation with a large number of officers. If a corporation has established and maintained appropriate and effective systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, it is our view that the corporation should not be deemed to be at fault and should not be held liable.

The existing definition of "officer" is too wide for it includes directors, secretaries and managers. It is our understanding that only directors who *knowingly* breached the disclosure requirement would be held liable under the UK regime, with which we concur and recommend Hong Kong follows the UK approach. In other words, the definition of "officer" should include only "director" throughout this proposed legislation.

The phrase "ought reasonably to have" in section 101B(2) of the proposed legislation, which suggests it is possible that the information may not actually be known to the officers, should be taken out as it is impossible for the corporation to disclose information on this basis.

Q.2c Do you think that the legislation should provide for additional safe harbours? If so, what are these additional safe harbours?

The legislation should provide for an additional safe harbour when a corporation and its directors have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change, for example, due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors should not be held liable as long as it can show clear and proper records of board deliberations leading to a reasonable conclusion that the information needed not be disclosed at the time.

Q.2d Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?

We agree. Opportunities should also be given to other market participants to suggest additional safe harbours to correspond with market developments.

Q.3b Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

We agree and we add that the proposed range of civil remedies is already highly deterrent.

Q.3c *Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?*

If direct access to the MMT is granted to the SFC, this will take away the checks-and-balances under the existing arrangement of having the cases firstly referred to the Financial Secretary. Some checks-and-balances controls are important although we support a more efficient process. Moreover, under the proposed legislation, it is noted that the other proceedings that cover the six types of market misconduct would also be referred to the MMT directly by the SFC. For this proposed major change, the Government must consider balancing the market's need for checks-and-balances as well as whether the resources of MMT can cope with the possible increase in the number of cases referred to it.

Q.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?*

We agree. In fact, informal consultation should be provided on a continuing basis instead of just in the first 12 months so as to deal with changing market developments and newly prescribed safe harbours in the future.

Q.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?*

The SFC and the SEHK, without duplication, must have its own clearly defined lines of authorities and responsibilities. Listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both the MMT proceedings and disciplinary hearings by the Listing Committee of the SEHK.

Thank you for your attention.

Yours sincerely,
For and on behalf of
Sun Hung Kai Properties Limited

Patrick CHAN Kwok-wai
Executive Director and Chief Financial Officer

Submitted by: Swire Pacific Limited
Stock Codes: 19 and 87
Date: 18th June 2010

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

Responses to Questions for Consultation

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?*

Yes.

(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?*

Yes, subject to the company secretary being substituted for an officer. Given the serious consequences of non-disclosure, the knowledge of those who are not responsible for the governance of the listed corporation should not be attributed to those who are.

(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?*

Yes.

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

Yes, subject to two points. First, safe harbour A should not be lost by disclosure by a third party, if the legislation still prohibits disclosure by the listed corporation notwithstanding the disclosure by the third party (see paragraphs 47 and 48 of the draft SFC Guidelines). Second, we see no reason why foreign law (or foreign court) prohibitions on disclosure should not be within safe harbour A. If the concern is that the SFC will not have the knowledge of the relevant foreign law in order to check whether the prohibition is genuine, the listed corporation could be required (if so requested by the SFC) to provide a legal opinion issued by a law firm practising in the relevant jurisdiction to the effect that the prohibition is genuine.

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

Yes, but (see answer to 2(a) above) a waiver should not be necessary where disclosure is prohibited by a foreign law or court order.

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

Yes.

Additional safe harbours include:

(i) when trading of the securities of the listed corporation on the Hong Kong Stock Exchange is suspended.

(ii) when the listed corporation has responded to enquiries from the Stock Exchange under Rule 13.10 of the Listing Rules, following which the Stock Exchange does not exercise its power to suspend trading of the securities of that listed corporation.

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

Yes.

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

Yes.

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

We have no comment on this question.

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

We think that the decision to institute proceedings should be taken by the Department of Justice, in order to provide an independent review of the case by a party which has not investigated it. We think that the safeguard of an independent review is desirable in view of the lower burden of proof required in civil matters and the possibility of civil claims being made by third parties.

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?*

   Yes.

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?*

   The division of work and responsibilities between the SFC and SEHK should be set out clearly in order to avoid duplication and gaps and particularly to enable listed corporations to promptly respond to any enquiries in relation to unusual movements in share price or share trading volume.

   It is submitted that the SEHK should issue enquiries, on behalf of itself and the SFC (under the dual filing regime), to listed corporations in relation to unusual movements in share price or share trading volume and that the listed corporations only need to respond to such enquiries to the SEHK (and therefore the SFC under the dual filing regime).

- END -

24 June, 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs

Re: Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

This letter states our views towards the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

We have the following overall comments:

1) We support the introduction of civil remedies, not criminal, for this legislation.

2) Both elements of the *mens rea* (the "guilty mind") and *actus reus* (the "guilty act") must be present if a disclosure obligation is deemed to be breached, hence the strict liability concept must not be applied here. A corporation and its directors that could show they had duly and carefully considered a piece of information and made a non-disclose decision based on prevailing circumstances and information should not be held liable even if the information had eventually caused material effect to share price.

Our response to specific questions listed in the Consultation Paper as follows:

Q.1a 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?

We agree.

Q.1b 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?

We agree a listed corporation should disclose inside information promptly but feel that the SFC should provide more guidance on how long is "practicable" in its view and their definition of "immediate". A corporation needs to verify the information, make necessary internal review, and assess its impact and this may take time.

For a large corporation with a large number of officers, it is difficult for the corporation to ensure all directors or officers would report inside information instantly that has come to their knowledge. It is our view that if a corporation has

established and maintained appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable.

Further, the existing definition of "officer" which includes directors, secretaries and managers is too wide. Under the UK regime, only directors who *knowingly* breach the disclosure requirement would be held liable. We concur with this and recommend Hong Kong follows the UK approach. The definition of "officer" should include only "director" throughout this draft legislation.

The phrase "ought reasonably to have" in s.101B(2) of the "draft legislation" should be taken out. This phrase suggests that it is possible that the information may not have been actually known by the officers and thus it is impossible for the corporation to disclose information on this basis.

Q.1c *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?*

We agree.

Q.2a *Do you agree to the provision of the four proposed Safe Harbours?*

We agree.

Q.2b *Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?*

We agree.

Q.2c *Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?*

We recommend an additional safe harbour which provides that if a corporation and its directors have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change -- due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show clear and proper records of board deliberations leading to a reasonable conclusion that the information needed not to be disclosed at the time.

Q.2d *Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?*

We agree. We also think that other market participants should also be given the opportunity to suggest Safe Harbours to match with market developments.

Question 3

Q 3a *Do you agree to extend the jurisdiction of the MMT to handle breaches of the statutory disclosure requirements?*

We do not object.

Q.3b *Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?*

We agree and would want to add that the proposed range of civil remedies is highly deterrent already.

Q.3c *Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?*

Allowing SFC direct access to the MMT lacks the checks-and-balances under the existing arrangement of having the cases referred to the Financial Secretary first. While we support a more efficient process, some checks-and-balances controls are important. Moreover, under the proposed legislation, the other proceedings that cover the six types of market misconduct would be referred to the MMT directly by the SFC. This is a major change. The Government must consider this with a view to balance the market's need for checks-and-balances and whether the resources of MMT can cope with the possible increase in the number of cases referred to it.

Q.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?*

We agree and add that this should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new Safe Harbours that may be prescribed from time to time.

Q.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?*

The lines of authorities and responsibilities between the SFC and SEHK must be clearly defined without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by Listing Committee.

We thank you for your attention.

Yours sincerely,
For and on behalf of
TECHTRONIC INDUSTRIES COMPANY LIMITED

.....
Authorised Signature(s)

For and on behalf of
Techtronic Industries Company Limited (Stock code: 669)

Unity Investments Holdings Limited
合一投資控股有限公司
(Listed on The Stock Exchange of Hong Kong Limited)

25 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I, Admiralty Centre,
18 Harcourt Road,
Hong Kong

To Whom it May Concern,

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

I, the representative of Unity Investments Holdings Limited would like to express my great disappointment and stern **OBJECTION** to the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

Listed companies like us want to help give Hong Kong greater transparency and make things fair for the financial markets. However, the new Codification will only make things difficult for listed companies, especially to the smaller companies. Larger companies have the money and manpower to handle the additional workload but smaller companies would suffer additional burden who are already operating on thin margins especially in this weak economy.

Also, the new Codification will not contribute to greater transparency as said but will only create greater confusion for our investors. In fact, it will create greater market turbulence because of a myriad of half-baked information that will be submitted to the market by the companies as a means to drive up their stock prices. Everyday investors will be blinded to what really is important, reducing the trust in listed companies' disclosures.

I had high hopes when the Government gave promise that the Codification of Certain Requirements to Disclose Price Sensitive Information will make things more transparent and create a fair financial community. However, it is just the Hong Kong Government overreacting to populist overtures and creating legislation without looking at the big picture. Along with a majority of directors of listed companies, we want to help give Hong Kong greater transparency and greater international trust of its financial market, but the Codification is unnecessarily changing how listed companies operate.

Yours Sincerely

KITCHELL Osman Bin
Director

Room 2206, 22/F., China United Centre, 28 Marble Road, North Point, Hong Kong.
Tel: (852) 3106 0929 Fax: (852) 3106 0629 Website: www.unity913.com

WILLIE INTERNATIONAL
Listed Since 1972

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I
Admiralty Centre
18, Harcourt Road
Hong Kong
25th June, 2010

Re: Consultation on the Proposed Statutory Codification of Certain Requirements to Disclosure Price Sensitive Information by Listed Corporations

To Whom It May Concern:

As the director/ representative of Willie International Holdings Limited, I understand that the Disclosure of Price Sensitive Information (PSI) policy will increase transparency in the financial markets. However, I would like to express my disappointment about the vagueness in the proposal and subsequent guidelines proposed by the SFC.

Along with the majority of the listed companies, I detest any abuse of insider information, however, I believe the new policy can also cause abusive uses that directly links to market turbulence.

Market turbulence and overreaction become the more prevailing phenomenon because when PSI is released, half-baked information will be announced especially by the companies which are afraid of violating the law. As a result, many incomplete projects and achievements are used as s means to pump up their stock prices.

Since the general public is bombarded with massive relevant and irrelevant data, it blinds investors' reason to distinguish important information which hinders the stock transactions.

Furthermore, the new Codification creates inefficient use of time and resources in listed corporations and it may cause financial detriment especially to the smaller listed companies.

Additional employees will be hired so as to file and to evaluate the price sensitivity of data. Corporation directors are monopolized by paperwork to approve or disapprove the disclosure of information, which all these times could be better spent on strategic decision at the first place.

Last but not least, more guidance and clarification need to be provided by the SFC. There are confusion about the terms in the proposal such as the phrase "the corporation should immediately take all necessary steps... the public", the word "immediate" is hard to define which SFC should stance clearly about the limit the time required. And the definition of "officer" is vague that it can include directors, secretaries and managers.

Having high hopes in the Government, I believe there are sufficient laws and regulations in SFC and the Listing Rules of the HKEX such that the Electronic Publication System already served the purpose for public access to information disclosed. Therefore, being a responsible company, we support the introduction of disclosure of PSI while we suggest civil sanction is far more suitable than criminal.

Yours faithfully,
On and behalf of Willie International Holdings Limited

Wong Ying Seung, Asiong
Director

Willie International Holdings Limited
32/F., China United Centre, 28 Marble Road, North Point, Hong Kong
Tel: (852) 3198 0111 Fax: (852) 2520 6123

渝太地產集團有限公司
Y. T. REALTY GROUP LIMITED

June 23, 2010

To Whom it May Concern:

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

I object to the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations..

This Codification will grant a statutory body unlimited power over listed companies and be heavily influenced by political whims. The SFC, unlike HKEx, does not have appropriate checks and balances, and can prosecute actions that are only deemed illegal after the fact.

The SFC will be under pressure by the media and politicians to "perform" and will give pressure to listed companies to announce EVERY DECISION. While non-business people will undoubtedly cheer at such an event, there are practical reasons this will be problematic.

- Directors, not willing to take risks, will make every announcement on every half-baked proposal and any event that may have even a remote chance of being "price sensitive".
- Important strategic planning to achieve competitive advantage over rivals will be moot as they will have to be announced "immediately."
- Talented directors, especially non-executive and independent directors, will not be willing to take this risk, leaving a talent gap for smaller listed companies.

We want to help give Hong Kong greater transparency and greater international trust of its financial market, but this Codification is not the way to do it.

Yours faithfully,
Y. T. Realty Group Limited

Dickie Wong
Managing Director

香港灣仔港灣道26號華潤大廈33樓
33rd Floor, China Resources Building, 26 Harbour Road, Wan Chai, Hong Kong.
Telephone: (852) 2500-5555 Facsimile: (852) 2507-2120

YUGANG INTERNATIONAL LIMITED
渝港國際有限公司

June 23, 2010

To Whom it May Concern:

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

I, the director of Yugang International Limited would like to voice my OBJECTION to the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations..

At the onset, we were given the impression that Codification would help ease the restrictions set upon us by HKEx and provide greater clarity as to what information we need to provide in order to meet our obligations as listed companies. We ARE responsible companies who want to maximize returns to our investors as well as compete on a level playing field.

However, after reading through your consultation as well as the subsequent "Guidelines on Disclosure of Inside Information" published by the SFC, I am of the opinion that this Codification not only creates an additional burden to listed companies, it does not add transparency to our investors. In fact, it will create greater market turbulence because of a myriad of half-baked information that will be submitted to the market by the companies afraid of running afoul of the law. This Codification, in effect, will make Hong Kong the laughing stock of the financial community world wide.

Yours faithfully,
Yugang International Limited

Cheung Chung Kiu
Chairman

33rd FLOOR, CHINA RESOURCES BUILDING, 26 HARBOUR ROAD, WANCHAI, HONG KONG
香港灣仔港灣道26號華潤大廈33樓
TEL電話：(852) 2827 2268 FAX傳真 (852) 2827 5549

YUGANG INTERNATIONAL LIMITED
渝港國際有限公司

June 23, 2010

To Whom it May Concern:

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

As a director of a listed company, I had high hopes when the Government said that the Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Companies will make things more transparent and good for the financial markets.

However, I am severely disappointed that the proposal and the subsequent SFC Guidelines on Disclosure of Inside Information.

I, along with a super-majority of directors of listed companies vehemently detest the abuse of insider information. Market practitioners who abuse the trust given to them by their companies and investors to profit for themselves are selfish and deserve to be punished. As such, we have rules and regulations in place to prosecute and bring these people to justice.

However, the new Codification is not about bringing these criminals to justice, but making life difficult for listed companies.

These new rules are detriment to smaller listed companies because:

1) We will need to hire additional people in the company secretariat to file more announcements, many of which will not be relevant for investors. This is to cover the bases so that directors and management won't be prosecuted.
2) We will have to hire more lawyers to evaluate what items are price sensitive or not.
3) Directors' time will be monopolized by paper work to approve or disapprove the disclosures of the most minute business deals and operational activities whereas their time could be better spent with strategic directions of the company.
4) Create a team of internal risk management people to monitor every aspect of the business and potential "news leaks" by middle management.

Larger listed companies have the money and manpower to handle the additional workload. Smaller companies who are already operating on thin margins can ill afford such extravagancies especially in this weak economy.

Yours faithfully,
Yugang International Limited

Yuen Wing Shing
Managing Director

33rd FLOOR, CHINA RESOURCES BUILDING, 26 HARBOUR ROAD, WANCHAI, HONG KONG
香港灣仔港灣道26號華潤大廈33樓
TEL電話：(852) 2827 2268 FAX傳真：(852) 2827 5549

YUGANG INTERNATIONAL LIMITED
渝港國際有限公司

June 23, 2010

To Whom it May Concern:

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

I object to the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations..

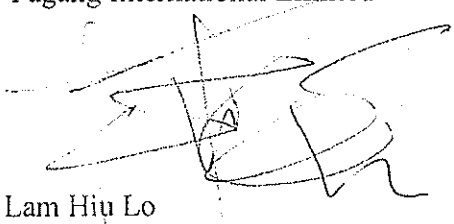
This Codification will grant a statutory body unlimited power over listed companies and be heavily influenced by political whims. The SFC, unlike HKEx, does not have appropriate checks and balances, and can prosecute actions that are only deemed illegal after the fact.

The SFC will be under pressure by the media and politicians to "perform" and will give pressure to listed companies to announce EVERY DECISION. While non-business people will undoubtedly cheer at such an event, there are practical reasons this will be problematic.

- Directors, not willing to take risks, will make every announcement on every half-baked proposal and any event that may have even a remote chance of being "price sensitive".
- Important strategic planning to achieve competitive advantage over rivals will be moot as they will have to be announced "immediately."
- Talented directors, especially non-executive and independent directors, will not be willing to take this risk, leaving a talent gap for smaller listed companies.

We want to help give Hong Kong greater transparency and greater international trust of its financial market, but this Codification is not the way to do it.

Yours faithfully,
Yugang International Limited



Lam Hiu Lo
Executive Director

33rd FLOOR, CHINA RESOURCES BUILDING, 26 HARBOUR ROAD, WANCHAI, HONG KONG
香港灣仔港灣道26號華潤大廈33樓
TEL電話：(852) 2827 2268 FAX傳真：(852) 2827 5549

YUGANG INTERNATIONAL LIMITED
渝港國際有限公司

June 23, 2010

To Whom it May Concern:

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

I, the director of Yugang International Limited would like to voice my OBJECTION to the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations..

At the onset, we were given the impression that Codification would help ease the restrictions set upon us by HKEx and provide greater clarity as to what information we need to provide in order to meet our obligations as listed companies. We ARE responsible companies who want to maximize returns to our investors as well as compete on a level playing field.

However, after reading through your consultation as well as the subsequent "Guidelines on Disclosure of Inside Information" published by the SFC, I am of the opinion that this Codification not only creates an additional burden to listed companies, it does not add transparency to our investors. In fact, it will create greater market turbulence because of a myriad of half-baked information that will be submitted to the market by the companies afraid of running afoul of the law. This Codification, in effect, will make Hong Kong the laughing stock of the financial community world wide.

Yours faithfully,
Yugang International Limited

Zhang Qing Xin
Executive Director

33rd FLOOR, CHINA RESOURCES BUILDING, 26 HARBOUR ROAD, WANCHAI, HONG KONG
香港灣仔港灣道26號華潤大廈33樓
TEL電話 (852) 2827 2268 FAX傳真 (852) 2827 5549

YUGANG YUGANG INTERNATIONAL LIMITED
渝港國際有限公司

June 23, 2010

To Whom it May Concern:

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

The Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations is not well thought out and is flawed in many areas.

I object on the grounds that the Codification will not contribute to greater transparency of listed companies, but will create greater confusion as "announcements" become a means for companies to drive up their stock prices by "disclosing" achievements/partnerships/deals that are in the works but not yet completed. This will reduce the trust in listed companies' disclosures and flood the financial community with frivolous announcements, all made in the name of "greater transparency". This will have the exact opposite effect of the making more information open, but inundate the market with so much frivolous information that everyday investors will be blinded to what is really important.

Once again, the Hong Kong Government is overreacting to populist overtures and creating legislation without looking at the big picture. By looking to ameliorate short-term "noise" from parties with vested-interests, Hong Kong is fundamentally changing how listed companies operate.

Listed companies like us want to play by the rules because it's in our best interest to do so. With good corporate governance, we can more easily raise funds, reward investors with dividends and endear ourselves to our customers.

However, the proposal by the Government is not creating a referee for a fair game, but a referee who creates the rules depending on how the fans/audience reacts. This is unfair to the game participants and unfair to fans who want a fair match.

Yours faithfully,
Yugang International Limited

Ng Kwok Fu
Independent Non-Executive Director

33rd FLOOR, CHINA RESOURCES BUILDING, 26 HARBOUR ROAD, WANCHAI, HONG KONG
香港灣仔港灣道26號華潤大廈33樓
TEL電話：(852) 2827 2268 FAX傳真：(852) 2827 5549

YUGANG INTERNATIONAL LIMITED
渝港國際有限公司

June 23, 2010

To Whom it May Concern:

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

I object to the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations..

This Codification will grant a statutory body unlimited power over listed companies and be heavily influenced by political whims. The SFC, unlike HKEx, does not have appropriate checks and balances, and can prosecute actions that are only deemed illegal after the fact.

The SFC will be under pressure by the media and politicians to "perform" and will give pressure to listed companies to announce EVERY DECISION. While non-business people will undoubtedly cheer at such an event, there are practical reasons this will be problematic.

- Directors, not willing to take risks, will make every announcement on every half-baked proposal and any event that may have even a remote chance of being "price sensitive".
- Important strategic planning to achieve competitive advantage over rivals will be moot as they will have to be announced "immediately."
- Talented directors, especially non-executive and independent directors, will not be willing to take this risk, leaving a talent gap for smaller listed companies.

We want to help give Hong Kong greater transparency and greater international trust of its financial market, but this Codification is not the way to do it.

Yours faithfully,
Yugang International Limited

Wong Yat Fai
Non-Executive Director

33rd FLOOR, CHINA RESOURCES BUILDING, 26 HARBOUR ROAD, WANCHAI, HONG KONG
香港灣仔港灣道26號華潤大廈33樓
TEL電話：(852) 2827 2266 FAX傳真：(852) 2827 5549

就〝有關擬將上市法團披露股價敏感資料的若干規定納入法例的諮詢文件〞 的意見書

問題 1

(a) 採用股價敏感資料定義

答: 無意見

(b) 是否贊成盡快披露

答:贊成，但爲防止有人繞過無明確時限的法例，延遲披露，我們建議加入披露時限，例如有關資料應於三個營業日內披露。

(c) 是否贊成平等、適時及有效披露

答: 贊成

問題 2

(a) 是否贊成建議的四個安全港

答: 贊成安全港 A(如披露，即違犯):

關於安全港 B(未完成磋商或建議)，爲防濫用此條例，我們建議安全港 B 加入以下條件，使適用範圍收窄:

(i)如該資料對外披露，將很可能對該磋商或建議結果有重大影響;

(ii)獲證監會事先同意該不須披露資料屬於安全港 B 範圍; 及

(iii)獲知該未披露資料的關連人士如在資料披露前進行有關證券及衍生工具交易，即被視爲內幕交易。

關於安全港 C(商業秘密)，爲防濫用此條例，我們建議安全港 C 加上以下條件，使適用範圍收窄:

(i)如該資料對外披露，將對公司營運有重大形響；及

(ii)獲證監會事先同意該不須披露資料屬於安全港 C 範圍。

關於安全港 D(中央流動資金支援)，爲防濫用此條例，我們建議安全港 D 須獲證監會及金管局事先同意該不須披露資料屬於安全港 D 範圍。

問題 3

(a) 市場失當行爲審裁處處理法定披露個案

答: 贊成

(b) 是否贊成民事補救措施

(i)關於 2.31，我們贊成對上市法團及個別董事及高級人員實施建議的民事制裁，但要求增加刑罰至以下劃線罰則:

(甲)向該上市法團及/或董事及/或高級人員施加罰款，最高限額以過往三年該法團或從該法團職位獲取的平均每月收入(包括紅利、股權、房津等)計的二十四個月收入，上限一億元；
(乙)取消該董事或高級人員擔任上市法團董事或以其他方式參與上市法團管理事務的資格，爲期最多十年，及向世界各地主要交易所建議相同制裁;
(丙)向該董事或高級人員發出〝冷淡對待〞令，即在不超過十年的期間內，他們不得使用市場設施，及向世界各地主要交易所建議相同制裁；及
(丁)向該董事或高級人員施與刑事罰則，上限爲入獄十年。

(ii)我們贊成 2.35 及 2.36 建議，但就上市公市違例披露，引致小股東錯誤賣買或繼續持有公司股票的財務損失，法例並無明確介定適用範圍。如仍以現行法規爲索償標準，恐怕小股東仍得不到應有保障。就此情況下，我們有以下意見:
(甲)由於上市公司數目膨脹，小股東(就算是專業投資者)管理私人證券投資，不可能閱讀所有公司披露，很多時只依賴分析員報告及傳媒所提供公司資訊以作投資決定，而分析員就很全面閱讀及分析公司披露來作投資評估。但根據現行法規，這種小股東間接依賴不實披露引致投資損失，申索多數都不獲受理。例如最近一名中信泰富小股東在小額錢債審裁處，向公司前主席追討數萬元因公司公布誤導的買股損失，裁判官就因小股東只曾參考報章投資專欄分析以作投資，而並沒有閱讀有關涉事披露，所以不能以間接依賴失實披露，追討投資損失(小額錢債審裁處案件編號 SCTC49452/2009 的覆核裁決)。但美國小投資者很多時如在公司失實披露情況下引致投資損失，卻無須曾閱讀及依賴有關披露亦獲賠償。香港作爲國際金融中心，我們強烈希望在違例披露的賠償上亦能與美國市場接軌。故此，**爲反影現時市場實況及切實保障小股東權益，我們強烈促請貴局完善法例，立法確定小股東在何種範圍內可獲違例披露的補償：就此我們大力建議披露資料如是合理預期將被一般專業投資分析員所依賴以作投資評估的，小股東均可無須閱讀或依賴有關披露，亦能以違例披露進行索償。我們相信這種索償準則是公平、公正及合理，因爲證券的市場價格大抵已反影所有公司披露。而公司董事及高層亦可簡單地以專業投資分析員爲本，進行依法披露。**（乙)另一方面，在公司實時披露也很難執行。所以我們建議公司股價較上日收市價變動超過正負 25%後，應立即強制停牌，待公司澄請所須披露後，可即給予復牌買賣。這樣做就較能減少因披露延遲而產生的潛在內幕交易。

(c)我們贊成證監會直接提起在市場失當行爲審裁處前進行研訊程序。但這並不能解決現行保障小投資者不足的一些根本問題，我們建議政府應考慮向證監會或其他法定機構，加入以下職能：
(甲)小股東是分散個體，受影響人數眾多。現時證監會一般並沒有收集受害小股東的資料，包括損失數目、人數、姓名、聯絡方法等等，以作日後跟進。現時證監會大大落後其他法定機構如消委會及勞工處，它們分別主動收集受害消

費者及勞工資料，以作退進。所以我們提議證監會加入有關職能，主動收集小股東損失及其他資料，以提供日後申索平台。
(乙)證監會現時並沒有交待個別調查個案進度，而小股東向證監會查詢，亦因法例所限，證監會不能作答。但市場失當往往涉及冗長的調查，而小股東卻蒙在鼓中，不知應採取何種行動追討。而時間拖長後，涉案人士或公司的資產亦可能流失，就算最後被判市場失當，要作民事賠償，亦未必有餘錢可供賠償。故此我們提議應修例，付予證監會在不影響調查下，向小股東及公眾定期撮要交侍進度。
(丙)小股東投資每隻上市股票價值涉及一般由幾萬至幾十萬元不等，因披露失實、誤導或其他市場失當行爲，損失幾萬元或低六位數字，這形成單一小股東實無足夠誘因向法團，董事及/或高層於較高級法院追討賠償。最典形的例子莫如最近三名中信泰富小股東雖然在小額錢債審裁處，每人向公司前主席追討數萬元因公司公布誤導的買股損失，卻被審裁處轉介至高院審理。小股東因無財力在高院追討，而最終被迫放棄(小額錢債審裁處案件編號 SCT49450/2009 至 SCT49452/2009)。況且在一般情況下，法援亦不會受理小額索償，而大多數小股民既有股票資產，多數亦難與滿足法援財務條件限制。坦白說，小股東權益在香港市場實際上保障相對其他國際市場是很有限。故此我們建議政府除加強披露監管外，應考慮在證券及期貨條例內加入調解機制、集體訴訟基金及/或私人集體訴訟，使小股東能以較低追索成本，追討損失。作爲小投資者，我們絕對贊成以市場交易徵費或其他用家自付模式支持上述有關運作。

問題 4
贊成證監會就法定披露要求提供非正式諮詢服務，但建議諮詢期可縮短至 6 至 9 個月，使有關披露要求能較快落實。

其他
最後，我們希望貴局除(根據此諮詢文件說明)已參考歐盟、英國及澳洲法規外，亦能參照世界最大的美國證券市場涉及法規，及香港主要競爭對手新加坡證券市場的法規，尤其是關乎違例披露及補償小投者損失的法規。我們極之渴望香港將來有關披露及補償法規，相對上述兩個市場提供小股東的保障具競爭能力，以發展及穩固香港作爲國際金融中心的領導地位。

中信泰富小股東關注組上
二０一０年六月二十五日

中国光大集团有限公司

光港执函〔2010〕13号

对“股价敏感资料披露立法”的意见及建议

香港中国企业协会:

中国光大集团有限公司在香港拥有两家上市公司，中国光大控股有限公司（“光大控股”，上市编号165）和中国光大国际有限公司（“光大国际”，上市编号257）。根据贵会6月3日“关于征求对‘股价敏感披露立法’意见和建议的通知”的要求，我们对香港政府财经事务及库务局公布的《有关拟将上市法团披露股价敏感资料的若干规定纳入法例的咨询文件》（“咨询文件”）进行了讨论和研究，有关意见和建议如下:

一、支持特区政府对现有监管制度进行修改

香港现有规范上市公司披露股价敏感资料的监管架构已沿用多年，根据现行的香港交易所有限公司（“联交所”）证券上市规则（“上市规则”）的规定，上市公司披露敏感资料的责任由联交所通过上市规则来监管，违规者只会遭公开谴责等轻微处分，阻吓力不大。由于近几年发生的几次事件，如有的上市公司投资外币衍生工具而涉嫌延迟公布敏感资料的事件，令投资者损失惨重，显示现有监管的确有所不足，小股东及市场投资者的利益没

有得到全面的保护。因此，香港政府此次提出的对现有监管制度的修改建议，原则上是可以更有利于香港股票市场的健康发展，更保障投资者，进一步提高香港上市公司的企业管治水平，方向及动机都是正面的。我们作为上市公司也理应对投资者负责任，因此，我们原则上支持此次香港特区政府的建议。

二、赞成建议中把披露资料责任纳入正式法例

由证监会负责调查，如发现证据便交由市场失当行为审裁处裁决。由于联交所本身也是一家上市公司，权力较证监会为低，且证监会是法定监管机构，由证监会进行有关调查工作是合理的。另外，市场失当行为审裁处日后将以查讯的方式作出裁决，程序上较一般法院的审讯程序灵活，有助缩短处理个案的时间，也可以让那些因他人违反披露要求而蒙受金钱损失的人，可依赖市场失当行为审裁处的研讯结果，以民事方式向违反披露要求者追讨赔偿。

三、股价敏感资料的界定可能产生的问题

现有上市规则对有关股价敏感资料的定义很广阔，几乎任何一件与上市公司有关的事件，只要可以影响股价，都有机会成为股价敏感资料。而咨询文件内对此也没有更具体的定义，只是建议有 4 个安全港可以豁免遵守有关披露股价敏感资料规则，即：（A）披露资料会违反法例或法庭命令、（B）有关资料过早披露会影响未完成交易的谈判、（C）有关资料是商业秘密和（D）外汇基金或中央银行向上市公司提供资金支援。遇到这 4 种情况，

上市公司可以不披露信息。

我司赞成提供建议的四个安全港。问题是咨询文件的建议中同时要求上市公司要对市场流传的消息作出澄清，当市场流传一些不真实的消息，上市公司可以选择不回应；但如果市场流传消息是真的，根据咨询文件中的建议，只要不涉及上述 4 种情况，就必须回应市场消息，尽快公布有关消息内容。在这种安排下，将对上市公司产生新的困扰和问题：

（一）通常上市公司与合作伙伴会就拟进行的交易签订保密协议，确保消息保密，但由于在推进交易的过程中，往往涉及多方面的人士，包括上市公司与其合作伙伴的董事、管理层及员工、专业人士如律师、会计师、独立财务顾问等，所以原拟保密的内幕消息有可能外泄。在这种情况下，上市公司须按法例规定披露该等内幕消息，而上市公司在披露中可能会揭露了交易的金额及条款等，以致竞争者有机会从中作梗，导致交易最终“胎死腹中”。

（二）新规定出台后，上市公司的竞争对手或一些别有用心的人可能会在市场散布假消息，要上市公司回应。例如上市公司如果有意配售新股，如果有些人想试探公司动向，可以先放出公司会配售新股的消息，如果公司真的有意这样做，根据建议内的最新规定，须对外披露，如果公司没有这打算，则不用回应。对手可根据上市公司的回应情况判断配股的真伪，这极可能扰乱上市公司的正常运作及市场部署。

（三）对于光大控股、光大国际这类处于高速发展及经常在

内地经营业务的上市公司，需要同时遵守内地相关部门的相关规定及政策规定，如果内地打算实施新的政策，有关政策可能会影响公司的盈利，从而成为股价敏感资料。根据最新的建议，上市公司是否也要对外公布？如果新规定没有清晰说明具体要求，上市公司董事们会经常要面对两难局面：要不被内地有关部门指泄露国家政策，要不被香港证监会指违反上市规则而须承担民事责任。

（四）有市场人士对于证券商发出的分析报告有如下的意见：证券商会不时就上市公司的业务情况及前景预测公司的财务业绩及发出分析报告，导致上市公司的股价波动，但该等分析员作出的报告未必与上市公司的实际情况相符，倘公司作出澄清的话，可能会触发股价敏感资料，但不作澄清的话，又似乎与实际情况不符，对投资者不负任，此外，市场对公司的预测也可能很参差，增加上市公司回应的困难。

四、建议明确界定“盈喜”或“盈警”的下限

在建议中没有设定上市公司在某一个特定的下限就公司盈利或亏损预测就作出“盈喜”或“盈警”的公布，这使上市公司很难厘定在什么的情况下发出有关公布。现时有些国家的监管机构会制定一个下限，如在上市公司的盈利较去年增幅或下降某一个百分点或以上，则该上市公司必须作出“盈喜”或“盈警”的公布，香港的监管机构是否也需要把这点考虑在建议的文件中呢？

五、关于制裁方面的建议

虽然在新法例之下，罚则较以往的重，但仍然没有刑事检控条款，成为新法例最具争议之处。一方面市场上有些人士认为最高罚款额仅为港币 800 万元，对一些大型上市公司来说，并没有足够阻吓力，加上没有引入有刑事检控条文，所以未能达到阻吓作用。此外，建议中其中一项的民事制裁—向违法者发出“冷淡对待”令，即在不超过五年的期间内，该等违法者不得使用市场设施，阻吓力不足，因为该等违法者仍然可透过其他途径（如通过亲友等）使用市场设施。另一方面市场上亦有人士极力反对以刑事检控违法者，认为如果引入刑事检控条文会增加担任上市公司董事的压力，上市公司亦会因此较难寻觅适合的董事。由于市场上对于罚则的各持不同的意见，倘一开始新法例便过于严苛的话，可能会导致 2009 年有关“延长禁止买卖期(Extension of Black Out Period)”市场大力反对下最终香港特区政府要作出让步的情况。所以我们认为新法例不宜过严，待落实新法例之后，让上市公司及市场适应后，如发现有需要引入更多罚则，届时再作检讨。

目前上市公司遵守上市规则属于私人合约，上市公司违反规则，联交所没有调查权利，不能查明上市公司未能及时披露股价敏感资料的原因。所以新规则建议给予证监会的调查权，把个案交“市场失当行为审裁处”研讯，若被裁定违法，涉案的上市公司或董事须负上民事责任，会受到最高罚款 800 万，及取消董事资格最多 5 年等制裁行动。建议实施的新规则把此形成一套正式的法律责任，上市公司及董事均需要负上法律责任，而非目前单

纯的私人合约责任。这是对上市公司及董事有更高的监察作用，但也无可置疑会增加上市公司遵守规则的成本，对于一些规模较小的上市公司，也无形之中加重了股东的成本， 其中是需要有所平衡。

六、建议延长非正式咨询服务期限

建议中证监会将会就法定的披露要求，为上市公司提供一个为期 12 个月的非正式咨询服务，我们认为上市公司可能会就不时发生的情况需要寻求证监会的意见，例如上市公司会不时就其发生的交易去函及致电联交所寻求意见或作出澄清，若这咨询服务能持续进行，更能有效地协助上市公司就不时发生的个别事件作出咨询后作出适当的披露。

总括来说，进一步加强股价敏感资料披露机制的方向是正确的，问题是上市公司如何在短时间内清晰拟定什么是需要披露的股价敏感资料，及对外披露的详细内容深度，联交所需要提出进一步清晰、具体的指引，最重要的是新的措施也需要考虑到内地来港的上市公司及经常从事内地业务的上市公司须严格遵守内地相关法规的处境。

以上仅供贵会参考。

中国光大集团有限公司

董事会执行委员会办公室

CHINA EVERBRIGHT HOLDINGS CO., LTD. 中国光大集团有限公司 董事會 執行委員會辦公室 EXECUTIVE COMMITTEE OFFICE

二〇一〇年六月十七日

28 June 2010

By fax: 2529 2075

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I
Admiralty Centre
18, Harcourt Road
Hong Kong

Dear Sirs,

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

We refer to the proposed statutory codification of the obligation to disclose price sensitive information by listed corporations (the "Proposed Codification") and would like to voice out our objection to its implementation.

Whilst it remains to be seen whether the Proposed Codification will help sustain Hong Kong as a leading international financial centre and the premier capital formation centre in the region as suggested, such proposal would undoubtedly impose significantly disproportionate compliance burden and costs on listed corporations.

The proposal to borrow 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 the proposal) to define price sensitive information is flawed. Whilst one could easily avoid making use of "inside information" for insider dealing by not dealing in the securities, it would be difficult for listed corporations to decide whether or not to disclose the same set of information under the Proposed Codification. One immediate and likely result of the Proposed Codification would be that listed corporations would be far more "willing" to make disclosure of information which might not even be price sensitive because of the disproportionate range of sanctions for non-compliance. In the circumstances, it is more likely than not that the intended purpose of the Proposed Codification to enhance our market transparency and quality would be defeated.

The proposal that the SFC should promulgate guidelines to provide guidance on what constitutes "inside information" and when the safe harbours would be applicable only serves to suggest that the market is simply not familiar with the concept of "inside information" as claimed in the consultation and that compliance

with the Proposed Codification would not be straightforward. If non-compliance would attract a range of sanctions acting as a serious deterrent, then the Proposed Codification must be in clear and precise terms without any ambiguity. However, the indicative draft legislative provisions are far from being clear and precise as shown by SFC's proposed guidelines. For instance, when citing some common examples of inside information, the guidelines emphasize that the list is a "non-exhaustive and purely indicative" list. Further, whilst it is the materiality of the information in question that needs to be considered, the guidelines concede that such materiality will "vary widely from entity to entity".

We understand that market transparency and quality will help sustain Hong Kong as a leading financial centre in the region. However, the Proposed Codification, at this stage, may not for the above reasons be able to serve such purposes. Accordingly, we ask that the Proposed Codification be withdrawn.

By fax: 2529 2075

25 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I, Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs,

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

As a director of , I would like to voice out my objection to the proposed statutory codification of the obligation to disclose price sensitive information by listed corporations (the "Proposed Codification") on the basis that such proposal would undoubtedly impose significantly disproportionate compliance burden and costs on listed corporations.

The proposal to borrow 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 the proposal) to define price sensitive information is flawed. It would be difficult for listed corporations to decide whether or not to disclose the same set of information under the Proposed Codification. Listed corporations would rather "willingly" to make disclosure of information which might not even be price sensitive because of the disproportionate range of sanctions for non-compliance. In the circumstances, it is more likely than not that the intended purpose of the Proposed Codification to enhance our market transparency and quality would be defeated.

The indicative draft legislative provisions are far from being clear and precise as shown by SFC's proposed guidelines. For instance, when citing some common examples of inside information, the guidelines emphasize that the list is a "non-exhaustive and purely indicative" list. Further, whilst it is the materiality of the information in question that needs to be considered, the guidelines concede that such materiality will "vary widely from entity to entity". If non-compliance would attract a range of sanctions acting as a serious deterrent, then the Proposed Codification must be in clear and precise terms without any ambiguity.

I understand that market transparency and quality will help sustain Hong Kong as a leading financial centre in the region. However, the Proposed Codification, at this stage, may not for the above reasons be able to serve such purposes. Accordingly, I ask that the Proposed Codification be withdrawn.

By fax: 2529 2075

25 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I, Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs,

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

As a director of , I would like to voice out my objection to the proposed statutory codification of the obligation to disclose price sensitive information by listed corporations (the "Proposed Codification") on the basis that such proposal would undoubtedly impose significantly disproportionate compliance burden and costs on listed corporations.

The proposal to borrow 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 the proposal) to define price sensitive information is flawed. It would be difficult for listed corporations to decide whether or not to disclose the same set of information under the Proposed Codification. Listed corporations would rather "willingly" make disclosure of information which might not even be price sensitive because of the disproportionate range of sanctions for non-compliance. In the circumstances, it is more likely than not that the intended purpose of the Proposed Codification to enhance our market transparency and quality would be defeated.

The indicative draft legislative provisions are far from being clear and precise as shown by SFC's proposed guidelines. For instance, when citing some common examples of inside information, the guidelines emphasize that the list is a "non-exhaustive and purely indicative" list. Further, whilst it is the materiality of the information in question that needs to be considered, the guidelines concede that such materiality will "vary widely from entity to entity". If non-compliance would attract a range of sanctions acting as a serious deterrent, then the Proposed Codification must be in clear and precise terms without any ambiguity.

I understand that market transparency and quality will help sustain Hong Kong as a leading financial centre in the region. However, the Proposed Codification, at this stage, may not for the above reasons be able to serve such purposes. Accordingly, I ask that the Proposed Codification be withdrawn.

By fax: 2529 2075

25 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I, Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs,

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

As a director of , I would like to voice out my objection to the proposed statutory codification of the obligation to disclose price sensitive information by listed corporations (the "Proposed Codification") on the basis that such proposal would undoubtedly impose significantly disproportionate compliance burden and costs on listed corporations.

The proposal to borrow 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 the proposal) to define price sensitive information is flawed. It would be difficult for listed corporations to decide whether or not to disclose the same set of information under the Proposed Codification. Listed corporations would rather "willingly" make disclosure of information which might not even be price sensitive because of the disproportionate range of sanctions for non-compliance. In the circumstances, it is more likely than not that the intended purpose of the Proposed Codification to enhance our market transparency and quality would be defeated.

The indicative draft legislative provisions are far from being clear and precise as shown by SFC's proposed guidelines. For instance, when citing some common examples of inside information, the guidelines emphasize that the list is a "non-exhaustive and purely indicative" list. Further, whilst it is the materiality of the information in question that needs to be considered, the guidelines concede that such materiality will "vary widely from entity to entity". If non-compliance would attract a range of sanctions acting as a serious deterrent, then the Proposed Codification must be in clear and precise terms without any ambiguity.

I understand that market transparency and quality will help sustain Hong Kong as a leading financial centre in the region. However, the Proposed Codification, at this stage, may not for the above reasons be able to serve such purposes. Accordingly, I ask that the Proposed Codification be withdrawn.

By fax: 2529 2075

25 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1, Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs,

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

As a director of , I would like to voice out my objection to the proposed statutory codification of the obligation to disclose price sensitive information by listed corporations (the "Proposed Codification") on the basis that such proposal would undoubtedly impose significantly disproportionate compliance burden and costs on listed corporations.

The proposal to borrow 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 the proposal) to define price sensitive information is flawed. It would be difficult for listed corporations to decide whether or not to disclose the same set of information under the Proposed Codification. Listed corporations would rather "willingly" make disclosure of information which might not even be price sensitive because of the disproportionate range of sanctions for non-compliance. In the circumstances, it is more likely than not that the intended purpose of the Proposed Codification to enhance our market transparency and quality would be defeated.

The indicative draft legislative provisions are far from being clear and precise as shown by SFC's proposed guidelines. For instance, when citing some common examples of inside information, the guidelines emphasize that the list is a "non-exhaustive and purely indicative" list. Further, whilst it is the materiality of the information in question that needs to be considered, the guidelines concede that such materiality will "vary widely from entity to entity". If non-compliance would attract a range of sanctions acting as a serious deterrent, then the Proposed Codification must be in clear and precise terms without any ambiguity.

I understand that market transparency and quality will help sustain Hong Kong as a leading financial centre in the region. However, the Proposed Codification, at this stage, may not for the above reasons be able to serve such purposes. Accordingly, I ask that the Proposed Codification be withdrawn.

By fax: 2529 2075

28th June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I, Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs,

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

As a director of , I would like to voice out my objection to the proposed statutory codification of the obligation to disclose price sensitive information by listed corporations (the "Proposed Codification") on the basis that such proposal would undoubtedly impose significantly disproportionate compliance burden and costs on listed corporations.

The proposal to borrow 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 the proposal) to define price sensitive information is flawed. It would be difficult for listed corporations to decide whether or not to disclose the same set of information under the Proposed Codification. Listed corporations would rather "willingly" make disclosure of information which might not even be price sensitive because of the disproportionate range of sanctions for non-compliance. In the circumstances, it is more likely than not that the intended purpose of the Proposed Codification to enhance our market transparency and quality would be defeated.

The indicative draft legislative provisions are far from being clear and precise as shown by SFC's proposed guidelines. For instance, when citing some common examples of inside information, the guidelines emphasize that the list is a "non-exhaustive and purely indicative" list. Further, whilst it is the materiality of the information in question that needs to be considered, the guidelines concede that such materiality will "vary widely from entity to entity". If non-compliance would attract a range of sanctions acting as a serious deterrent, then the Proposed Codification must be in clear and precise terms without any ambiguity.

I understand that market transparency and quality will help sustain Hong Kong as a leading financial centre in the region. However, the Proposed Codification, at this stage, may not for the above reasons be able to serve such purposes. Accordingly, I ask that the Proposed Codification be withdrawn.

28 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I, Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs,

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

As a director of , I would like to voice out my objection to the proposed statutory codification of the obligation to disclose price sensitive information by listed corporations (the "Proposed Codification") on the basis that such proposal would undoubtedly impose significantly disproportionate compliance burden and costs on listed corporations.

The proposal to borrow 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 the proposal) to define price sensitive information is flawed. It would be difficult for listed corporations to decide whether or not to disclose the same set of information under the Proposed Codification. Listed corporations would rather "willingly" make disclosure of information which might not even be price sensitive because of the disproportionate range of sanctions for non-compliance. In the circumstances, it is more likely than not that the intended purpose of the Proposed Codification to enhance our market transparency and quality would be defeated.

The indicative draft legislative provisions are far from being clear and precise as shown by SFC's proposed guidelines. For instance, when citing some common examples of inside information, the guidelines emphasize that the list is a "non-exhaustive and purely indicative" list. Further, whilst it is the materiality of the information in question that needs to be considered, the guidelines concede that such materiality will "vary widely from entity to entity". If non-compliance would attract a range of sanctions acting as a serious deterrent, then the Proposed Codification must be in clear and precise terms without any ambiguity.

I understand that market transparency and quality will help sustain Hong Kong as a leading financial centre in the region. However, the Proposed Codification, at this stage, may not for the above reasons be able to serve such purposes. Accordingly, I ask that the Proposed Codification be withdrawn.

By fax: 2529 2075

28 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I, Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs,

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

As a director of , I would like to voice out my objection to the proposed statutory codification of the obligation to disclose price sensitive information by listed corporations (the "Proposed Codification") on the basis that such proposal would undoubtedly impose significantly disproportionate compliance burden and costs on listed corporations.

The proposal to borrow 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 the proposal) to define price sensitive information is flawed. It would be difficult for listed corporations to decide whether or not to disclose the same set of information under the Proposed Codification. Listed corporations would rather "willingly" make disclosure of information which might not even be price sensitive because of the disproportionate range of sanctions for non-compliance. In the circumstances, it is more likely than not that the intended purpose of the Proposed Codification to enhance our market transparency and quality would be defeated.

The indicative draft legislative provisions are far from being clear and precise as shown by SFC's proposed guidelines. For instance, when citing some common examples of inside information, the guidelines emphasize that the list is a "non-exhaustive and purely indicative" list. Further, whilst it is the materiality of the information in question that needs to be considered, the guidelines concede that such materiality will "vary widely from entity to entity". If non-compliance would attract a range of sanctions acting as a serious deterrent, then the Proposed Codification must be in clear and precise terms without any ambiguity.

I understand that market transparency and quality will help sustain Hong Kong as a leading financial centre in the region. However, the Proposed Codification, at this stage, may not for the above reasons be able to serve such purposes. Accordingly, I ask that the Proposed Codification be withdrawn.

By fax: 2529 2075

28 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I, Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs,

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

As a director of , I would like to voice out my objection to the proposed statutory codification of the obligation to disclose price sensitive information by listed corporations (the "Proposed Codification") on the basis that such proposal would undoubtedly impose significantly disproportionate compliance burden and costs on listed corporations.

The proposal to borrow 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 the proposal) to define price sensitive information is flawed. It would be difficult for listed corporations to decide whether or not to disclose the same set of information under the Proposed Codification. Listed corporations would rather "willingly" make disclosure of information which might not even be price sensitive because of the disproportionate range of sanctions for non-compliance. In the circumstances, it is more likely than not that the intended purpose of the Proposed Codification to enhance our market transparency and quality would be defeated.

The indicative draft legislative provisions are far from being clear and precise as shown by SFC's proposed guidelines. For instance, when citing some common examples of inside information, the guidelines emphasize that the list is a "non-exhaustive and purely indicative" list. Further, whilst it is the materiality of the information in question that needs to be considered, the guidelines concede that such materiality will "vary widely from entity to entity". If non-compliance would attract a range of sanctions acting as a serious deterrent, then the Proposed Codification must be in clear and precise terms without any ambiguity.

I understand that market transparency and quality will help sustain Hong Kong as a leading financial centre in the region. However, the Proposed Codification, at this stage, may not for the above reasons be able to serve such purposes. Accordingly, I ask that the Proposed Codification be withdrawn.

By fax: 2529 2075

28 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I, Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs,

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

As a director of , I would like to voice out my objection to the proposed statutory codification of the obligation to disclose price sensitive information by listed corporations (the "Proposed Codification") on the basis that such proposal would undoubtedly impose significantly disproportionate compliance burden and costs on listed corporations.

The proposal to borrow 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 the proposal) to define price sensitive information is flawed. It would be difficult for listed corporations to decide whether or not to disclose the same set of information under the Proposed Codification. Listed corporations would rather "willingly" make disclosure of information which might not even be price sensitive because of the disproportionate range of sanctions for non-compliance. In the circumstances, it is more likely than not that the intended purpose of the Proposed Codification to enhance our market transparency and quality would be defeated.

The indicative draft legislative provisions are far from being clear and precise as shown by SFC's proposed guidelines. For instance, when citing some common examples of inside information, the guidelines emphasize that the list is a "non-exhaustive and purely indicative" list. Further, whilst it is the materiality of the information in question that needs to be considered, the guidelines concede that such materiality will "vary widely from entity to entity". If non-compliance would attract a range of sanctions acting as a serious deterrent, then the Proposed Codification must be in clear and precise terms without any ambiguity.

I understand that market transparency and quality will help sustain Hong Kong as a leading financial centre in the region. However, the Proposed Codification, at this stage, may not for the above reasons be able to serve such purposes. Accordingly, I ask that the Proposed Codification be withdrawn.

By fax: 2529 2075

June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I, Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs,

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

As a director of , I would like to voice out my objection to the proposed statutory codification of the obligation to disclose price sensitive information by listed corporations (the "Proposed Codification") on the basis that such proposal would undoubtedly impose significantly disproportionate compliance burden and costs on listed corporations.

The proposal to borrow 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 the proposal) to define price sensitive information is flawed. It would be difficult for listed corporations to decide whether or not to disclose the same set of information under the Proposed Codification. Listed corporations would rather "willingly" make disclosure of information which might not even be price sensitive because of the disproportionate range of sanctions for non-compliance. In the circumstances, it is more likely than not that the intended purpose of the Proposed Codification to enhance our market transparency and quality would be defeated.

The indicative draft legislative provisions are far from being clear and precise as shown by SFC's proposed guidelines. For instance, when citing some common examples of inside information, the guidelines emphasize that the list is a "non-exhaustive and purely indicative" list. Further, whilst it is the materiality of the information in question that needs to be considered, the guidelines concede that such materiality will "vary widely from entity to entity". If non-compliance would attract a range of sanctions acting as a serious deterrent, then the Proposed Codification must be in clear and precise terms without any ambiguity.

I understand that market transparency and quality will help sustain Hong Kong as a leading financial centre in the region. However, the Proposed Codification, at this stage, may not for the above reasons be able to serve such purposes. Accordingly, I ask that the Proposed Codification be withdrawn.

By fax: 2529 2075

28 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I, Admiralty Centre
18 Harcourt Road
Hong Kong

Dear Sirs,

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

As a director of , I would like to voice out my objection to the proposed statutory codification of the obligation to disclose price sensitive information by listed corporations (the "Proposed Codification") on the basis that such proposal would undoubtedly impose significantly disproportionate compliance burden and costs on listed corporations.

The proposal to borrow 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 the proposal) to define price sensitive information is flawed. It would be difficult for listed corporations to decide whether or not to disclose the same set of information under the Proposed Codification. Listed corporations would rather "willingly" make disclosure of information which might not even be price sensitive because of the disproportionate range of sanctions for non-compliance. In the circumstances, it is more likely than not that the intended purpose of the Proposed Codification to enhance our market transparency and quality would be defeated.

The indicative draft legislative provisions are far from being clear and precise as shown by SFC's proposed guidelines. For instance, when citing some common examples of inside information, the guidelines emphasize that the list is a "non-exhaustive and purely indicative" list.

..../2

Further, whilst it is the materiality of the information in question that needs to be considered, the guidelines concede that such materiality will "vary widely from entity to entity". If non-compliance would attract a range of sanctions acting as a serious deterrent, then the Proposed Codification must be in clear and precise terms without any ambiguity.

I understand that market transparency and quality will help sustain Hong Kong as a leading financial centre in the region. However, the Proposed Codification, at this stage, may not for the above reasons be able to serve such purposes. Accordingly, I ask that the Proposed Codification be withdrawn.

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

上市公司披露股價敏感資料若干規定的建議法定編纂的諮詢文件評論

Notes:

1. As to our comments in this paper, we do not wish our names to be referred to in any other documents.

2. We are of the view that the general approach throughout is that the approaches/policies adopted by other common law jurisdictions, such as UK and Australia should be taken into consideration since the regulatory regimes and rationale of such countries are of great similarities to ours. We believe that it is more sensible to keep Hong Kong's regulatory set-up in line with the parameters of such jurisdictions

附註：根據我們於本文所提出的意見，我們不希望我們的名稱在任何其他文件轉載。

Question 問題 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

你是否同意按證券及期貨條例內幕交易制度下「有關資料」的現有定義界定爲股價敏感資料的建議？

Comments: We do not agree with this proposal.

評論：我們不同意此項建議。

We believe the current legislative safeguards are sufficient for the governance of listed companies in terms of the disclosure of PSI. 我們認爲現有法例保障足以規管上市公司須就股價敏感資料作出的披露。

(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?

你是否同意上市公司須於可行情況下盡快向公眾人士披露所得悉的任何「內幕消息」，

而倘董事或高級職員於履行其職責時得悉有關內幕消息，則該上市公司亦應被視爲已知悉有關內幕消息？

Comments: We do not agree with this proposal.

評論：我們不同意此項建議。

We believe even with elaborate legislative provisions, in view of the complexity of business circumstances, it is hard to define and make it clear what is of the nature of inside information among the vast information flow in the daily operation of listed companies. Listed companies are in possession of large amounts of business information every day and are engaged in business discussion on a frequent basis. Practically it would be difficult for a director to evaluate every piece of information accurately and without delay, in order to avoid any possible misjudgement of inside information without costing significant amount of management time and legal and professional expenses in seeking relevant opinions. Whether information is inside information may only be proved with the benefit of hindsight. It would create obstacles for directors and officers to grasp business opportunities if they had to spend considerable time to comply with the ambiguous disclosure requirements.

我們相信，即使有詳盡的法律規定，鑑於業務複雜性，很難自上市公司日常運作的龐大資訊流中，界定及明確釐定內幕消息的性質。上市公司每天擁有大量商業訊息，並經常作出商業討論。董事實際上難以在毋須投放大量管理時間及就徵求有關意見支付法律及專業費用的情況下準確及時評估各項訊息，以避免錯誤判斷任何內幕消息的可能性，故此惟有靠事後檢討方可驗證是否屬內幕消息。倘董事及高級職員須投放大量時間以遵守含糊的披露規定，將令彼等難以捕捉商機。

Also it is possible that the investors would be overwhelmed by the numerous disclosures and be confused when making their investment decisions, once directors of listed companies decide to disclose indiscriminately in order to be on the safe side.

此外，倘上市公司董事爲安全起見決定隨意作出披露，投資者可能無法處理大量披露，並於作出投資決定時不知所措。

(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?

你是否同意須按公平、及時和有效向公眾人士提供披露訊息的方式作出披露的建議？

Comments: If the concerns in our comments above could be solved properly, we would agree with this proposal.

評論：倘我們評論中所述的事宜獲妥善解決，我們亦同意此項建議。

Question 問題 2:

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

你是否同意安全港的四項建議規定？

Comments: yes, we agree.

評論：是，我們同意。

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

你是否同意應賦予證監會權力就上述者授出豁免及附加條件？

Comments: We agree that once there are detailed regulations in relation to the disclosure of PSI, in view of various complicated circumstances, to avoid any negative effects of such legislative changes, there should be waivers available, or with certain conditions attached.

評論：鑑於各種複雜情況，倘有股價敏感資料披露的詳盡規定，以避免法例變動構成任何負面影響，我們同意應設有豁免或附加若干條件。

However, we do not think the power of granting waivers should be empowered to the SFC. There would be dual regulation which would induce the possibility of conflicting decisions between two regulators, namely the SFC and SEHK. Also, to understand and follow the functional division of the two regulators, the compliance cost of listed companies would increase. We suggest such power to be granted to the SEHK.

然而，我們不贊同應賦予證監會權力授出豁免，此舉將出現雙重監管，導致證監會及聯交所兩個監管機構可能出現決定上的衝突。此外，爲了解並遵守兩個監管機構的功能，上市公司的合規成本將有所增加。我們建議把有關權力授予聯交所。

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

你是否認爲該法例應提供額外的安全港？若是，此等額外安全港爲何？

Comments: Yes, we agree.

評論：是，我們同意。

Our suggestions in relation to the additional safe harbours are as follows:

我們建議有關額外安全港應如下：

1. When the circumstances are so complicated that it is not reasonable to expect that a listed company could soon indentify the information which would be of the nature of inside information, and once such information is disclosed, there is high possibility that the disclosure will be detrimental to the company's interest as a whole.

   當複雜情況出現，上市公司可於短期內分辨屬內幕消息的資料屬不合理預期，及倘披露該等資料後，該披露很可能將損害公司整體利益。

2. Once such information is disclosed, the reasonable business goal of listed companies would not be achieved due to the need for prompt response to transient business opportunities.

   倘披露該等資料，上市公司的合理商業目標因須迅速回應稍瞬即逝的商機而無法達成。

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

你是否同意應賦予證監會權力以規則形式於證券及期貨條例加設額外安全港規定？

As mentioned above, we believe it is SEHK rather than SFC, who would be the proper entity to be empowered to do so.

誠如上文所述，我們認爲香港聯交所（而非證監會）應爲獲賦予該項權力的正式實體。

Question 問題 3:

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

你是否同意擴大審裁處的管轄權，以處理違反法定披露規定？

Comments: we do not agree with this proposal.

評論：我們不同意此項建議。

We believe the MMT usually deals with misconduct of serious nature. It might be inappropriate for the MMT to deal with breaches of any reckless or negligent act or omission on the part of any individual director or officer without malicious intention. When there is misconduct with malicious intention, we believe it would be covered by the existing jurisdiction of the MMT.

我們認爲，審裁處一般處理嚴重不當行爲。倘由審裁處處理任何因個別董事或高級職員無惡觸犯任何魯莽或疏忽行爲或遺漏，則可能屬不恰當。當出現惡意行爲失當時，我們相信該情況應受到審裁處的現行管轄權規管。

(b) 你是否同意第 2.31、第 2.35 及第 2.36 段所載的建議民事補救方案？

評論：我們建議該等補救方案應用於惡意或嚴重不當行爲。

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

你是否同意授權證監會可直接向審裁處提出違反法定披露規定的訴訟？

Comments: Please refer to our answer to Question 3(a) above.

評論：請參閱上文問題 3(a)的答案。

Question 問題 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?

你是否同意證監會應就法定披露規定向上市公司作出初步爲期 12 個月的非正式諮詢？

Comments: Once the SFC is involved, in view of the complexity of the various business information listed companies possess, we suggest that, to make this new legislative structure clearer and practicable, the SFC should establish a permanent consultation body to provide clear guidance to listed companies.

評論：鑑於上市公司擁有各種業務訊息的複雜性，倘證監會介入，我們建議證監會應成立永久諮詢機構，以釐清及實施新立法結構及向上市公司提供明確指引。

Question 問題 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?

你認爲證監會及聯交所於第 3.8 至第 3.9 段提出的行政及實施安排是否恰當？你對證監會及聯交所各自爲進一步提高透明度的職能有何意見？

Comments: We do not agree that the SFC should be involved in the PSI regime, please refer to our answer to Question 2(b) above.

評論：我們不同意證監會應干預股價敏感資料範疇，請參閱上文問題 2(b)的答案。

Dear Sir/ Madam

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

We refer to the captioned consultation paper. Although we are not a listed company, albeit being a wholly owned subsidiary of HSBC Holdings plc, we would like to present our comments as a market participant in the securities industry.

In principal, we are supportive of the proposal aimed to ensure market transparency and fairness. In response to Question 3(b), we acknowledge the investor rights concept behind the proposal under paragraph 2.35 in allowing persons suffering from pecuniary loss as a result of others breaching the disclosure requirements to seek compensation from those having breached the disclosure requirements. However, we are concerned that such proposal would foster ground for numerous litigations in claiming loss or price difference by investors in case of late disclosure or non-disclosure of announcement leading to a significant potential financial exposure by listed companies.

We do not wish for our name to be disclosed in this consultation exercise although we have no objection to the content of our submission being published on a no-name basis.

23 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

By fax : 2529 2075

Dear Sirs

Re : Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

This letter states our views towards the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

We were given the impression that Codification was taking existing HKEx rules and making them the jurisdiction of the SFC. However, from the Consultation paper, it appears that there will be joint jurisdiction which does not ameliorate our concern but exacerbate it even further.

Under this proposed regime, the SFC will be able to trigger an investigation even where there is no suspected breach of price sensitive information. The SFC could investigate for lack of safeguards.

According to the draft guidelines published by the SFC, it is proposed that once a potential deal is "leaked" even by third parties, the directors of the company are responsible to make the relevant disclosures. This guideline is made by people who are not familiar with business practices. Third parties, or even potential partners could benefit from "potentially ruining" a deal by selective leakage. This requirement would put listed companies at a disadvantage in contract and other business negotiations, resulting in losing business opportunities. Hence, the disclosure may disadvantage to our company and putting our business in a less competitive position and giving less return to our shareholders. This is just an example of the types of restrictions listed companies will have to face under such a regime.

What was set out and advertised as beneficial to Hong Kong's community is in effect putting our businesses in a less competitive position. We are protecting stock speculators and not protecting the actual businesses, the ones creating value in the economy and not those who are looking for quick gains.

In addition, we have the following overall views on the Consultation Paper:

1) We support the introduction of civil remedies, not criminal, for this legislation.

2) Both elements of the *mens rea* (the "guilty mind") and *actus reus* (the "guilty act") must be present if a disclosure obligation is deemed to be breached, hence the strict liability concept must not be applied here. A corporation and its directors that could show they had duly and carefully considered a piece of information and made a non-disclosure decision based on prevailing circumstances and information should not be held liable even if the information had eventually caused material effect to share price.

Our response to specific questions listed in the Consultation Paper as follows:

Q.1a 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?

We agree.

Q.1b 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?

We agree a listed corporation should disclose inside information promptly but feel that the SFC should provide more guidance on how long is "practicable" in its view and their definition of "immediate". A corporation needs to verify the information, make necessary internal review, and assess its impact and this may take time.

For a large corporation with a large number of officers, it is difficult for the corporation to ensure all directors or officers would report inside information instantly that has come to their knowledge. It is our view that if a corporation has established and maintained appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable.

Further, the existing definition of "officer" which includes directors, secretaries and managers is too wide. Under the UK regime, only directors who *knowingly* breach the disclosure requirement would be held liable. We concur with this and recommend Hong Kong follows the UK approach. The definition of "officer" should include only "director" throughout this draft legislation.

The phrase "ought reasonably to have" in s.101B(2) of the "draft legislation" should be taken out. This phrase suggests that it is possible that the information may not have been actually known by the officers and thus it is impossible for the corporation to disclose information on this basis.

Q.1c *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?*

We agree and suggest that the submission through the Electronic Publication System operated by the SEHK or similar system suffice.

Q.2a *Do you agree to the provision of the four proposed Safe Harbours?*

We agree.

Q.2b *Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?*

We agree.

Q.2c *Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?*

We recommend an additional safe harbour which provides that if a corporation and its directors have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change -- due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show proper records of board deliberations leading to a reasonable conclusion that the information needed not to be disclosed at the time.

Q.2d *Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?*

We agree. We also think that other market participants should also be given the opportunity to suggest Safe Harbours to match with market developments.

Question 3

Q.3a *Do you agree to extend the jurisdiction of the MMT to handle breaches of the statutory disclosure requirements?*

We do not object.

Q.3b *Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?*

We agree and would want to add that the proposed range of civil remedies is highly deterrent already. In particular, the proposed fine of up to HK$8 million is considered very high, especially for only negligence acts and we suggest to phrase out as the disqualification of directorship to barring from the market activities already have serious implication.

Q.3c *Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?*

Allowing SFC direct access to the MMT lacks the checks-and-balances under the existing arrangement of having the cases referred to the Financial Secretary first. While we support a more efficient process, some checks-and-balances controls are important. Moreover, under the proposed legislation, the other proceedings that cover the six types of market misconduct would be referred to the MMT directly by the SFC. This is a major change. The Government must consider this with a view to balance the market's need for checks-and-balances and whether the resources of MMT can cope with the possible increase in the number of cases referred to it.

Q.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?*

We agree and add that this should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new Safe Harbours that may be prescribed from time to time with a specified team of adequate experienced staff from the SFC to handle the issuers' enquiries in a timely manner.

Q.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?*

The lines of authorities and responsibilities between the SFC and SEHK must be clearly defined without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by the Listing Committee.

BY FAX AND BY HAND

Fax. No. : 2529-2075

23rd June, 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F., Tower 1, Admiralty Centre,
18 Harcourt Road,
Hong Kong

Dear Sirs,

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

This letter illustrates our views towards the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

We were given the impression that Codification was taking the existing HKEx rules and making them the jurisdiction of the SFC. However, from the Consultation paper, it appears that there will be joint jurisdiction which does not ameliorate our concern but exacerbate it even further.

Under this proposed regime, the SFC will be able to trigger an investigation even where there is no suspected breach of the price sensitive information. The SFC could investigate for lack of safeguards.

According to the draft guidelines published by the SFC, it is proposed that once a potential deal is "leaked" even by third parties, the directors of the company are responsible to make the relevant disclosures. This guideline is made by people who are oblivious to business practices. Third parties, or even potential partners could benefit from "potentially ruining" a deal by selective leakage. This requirement would put the listed companies at a disadvantage in contract and other business negotiations, resulting in losing business opportunities. Hence, the disclosure may disadvantage to our company and putting our business in a less competitive position and giving less return to our shareholders. This is just an example of the types of restrictions listed companies will have to face under such a regime.

What was set out and advertised as beneficial to Hong Kong's community is in effect putting our businesses in a less competitive position. We are protecting the stock speculators and not protecting the actual businesses, the ones creating value in the economy and not those who are looking for quick gains.

Moreover, we have the following overall views on the Consultation Paper:

1. We support the introduction of civil remedies, not criminal, for this legislation.

2. Both elements of the *mens rea* (the "**guilty mind**") and the *actus reus* (the "**guilty act**") must be present if a disclosure obligation is deemed to be breached, hence the strict liability concept must not be applied here. A corporation and its directors that could show they had duly and carefully considered a piece of information and made a non-disclosure decision based on the prevailing circumstances and information should not be held liable even if the information had eventually caused material effect to the share price.

Our response to the specific questions listed in the Consultation Paper as follows:

Q.1a 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?

We agree.

Q.1b 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?

We agree a listed corporation should disclose inside information promptly but feel that the SFC should provide more guidance on how long is "practicable" in its view and their definition of "immediate". A corporation needs to verify the information, make necessary internal review, and assess its impact and this may take time.

For a large corporation with a large number of officers, it is difficult for the corporation to ensure all directors or officers would report inside information instantly that has come to their knowledge. It is our view that if a corporation has established and maintained appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable.

Further, the existing definition of "officer" which includes directors, secretaries and managers is too wide. Under the UK regime, only directors who *knowingly* breach the disclosure requirement would be held liable. We concur with this and recommend Hong Kong follows the UK approach. The definition of "officer" should include only "director" throughout this draft legislation.

The phrase "ought reasonably to have" in s.101B(2) of the "draft legislation" should be taken out. This phrase suggests that it is possible that the information may not have been actually known by the officers and thus it is impossible for the corporation to disclose information on this basis.

Q.1c 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?

We agree and suggest that the submission through the Electronic Publication System operated by the SEHK or similar system suffice.

Q.2a Do you agree to the provision of the four proposed Safe Harbours?

We agree.

Q.2b Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?

We agree.

Q.2c Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?

We recommend an additional safe harbour which provides that if a corporation and its directors have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change – due to the unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show proper records of board deliberations leading to a reasonable conclusion that the information needed not to be disclosed at the time.

Q.2d Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?

We agree. We also think that other market participants should also be given the opportunity to suggest the Safe Harbours to match with market developments.

Q.3a Do you agree to extend the jurisdiction of the MMT to handle breaches of the statutory disclosure requirements?

We do not object.

Q.3b Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

We agree and would want to add that the proposed range of civil remedies is highly deterrent already. In particular, the proposed fine of up to HK$8 million is considered very high, especially for only negligence acts and we suggest to phrase out as the disqualification of directorship to barring from the market activities already have serious implication.

Q.3c *Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?*

Allowing SFC direct access to the MMT lacks the checks-and-balances under the existing arrangement of having the cases referred to the Financial Secretary first. While we support a more efficient process, some checks-and-balances controls are important. Moreover, under the proposed legislation, the other proceedings that cover the six types of market misconduct would be referred to the MMT directly by the SFC. This is a major change. The Government must consider this with a view to balance the market's need for checks-and-balances and whether the resources of MMT can cope with the possible increase in the number of cases referred to it.

Q.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?*

We agree and add that this should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new Safe Harbours that may be prescribed from time to time with a specified team of adequate experienced staff from the SFC to handle the issuers' enquiries in a timely manner.

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

The lines of authorities and responsibilities between the SFC and the SEHK must be clearly defined without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both the MMT proceedings and disciplinary hearings by the Listing Committee.

Thank you very much for your kind attention.

24 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

By FAX: 2529 2075

Dear Sirs

Re : Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations

This letter states our views towards the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

We were given the impression that Codification was taking existing HKEx rules and making them the jurisdiction of the SFC. However, from the Consultation paper, it appears that there will be joint jurisdiction which does not ameliorate our concern but exacerbate it even further.

Under this proposed regime, the SFC will be able to trigger an investigation even where there is no suspected breach of price sensitive information. The SFC could investigate for lack of safeguards.

According to the draft guidelines published by the SFC, it is proposed that once a potential deal is "leaked" even by third parties, the directors of the company are responsible to make the relevant disclosures. This guideline is made by people who are not familiar with business practices. Third parties, or even potential partners could benefit from "potentially ruining" a deal by selective leakage. This requirement would put listed companies at a disadvantage in contract and other business negotiations, resulting in losing business opportunities. Hence, the disclosure may disadvantage to our company and putting our business in a less competitive position and giving less return to our shareholders. This is just an example of the types of restrictions listed companies will have to face under such a regime.

What was set out and advertised as beneficial to Hong Kong's community is in effect putting our businesses in a less competitive position. We are protecting stock speculators and not protecting the actual businesses, the ones creating value in the economy and not those who are looking for quick gains.

In addition, we have the following overall views on the Consultation Paper:

1) We support the introduction of civil remedies, not criminal, for this legislation.

2) Both elements of the *mens rea* (the "guilty mind") and *actus reus* (the "guilty act") must be present if a disclosure obligation is deemed to be breached, hence the strict liability concept must not be applied here. A corporation and its directors that could show they had duly and carefully considered a piece of information and made a non-disclosure decision based on prevailing circumstances and information should not be held liable even if the information had eventually caused material effect to share price.

Our response to specific questions listed in the Consultation Paper as follows:

Q.1a 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?

We agree.

Q.1b 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?

We agree a listed corporation should disclose inside information promptly but feel that the SFC should provide more guidance on how long is "practicable" in its view and their definition of "immediate". A corporation needs to verify the information, make necessary internal review, and assess its impact and this may take time.

For a large corporation with a large number of officers, it is difficult for the corporation to ensure all directors or officers would report inside information instantly that has come to their knowledge. It is our view that if a corporation has established and maintained appropriate and effective proper systems and procedures to require its directors, officers or any employees to report inside information, and should they fail to follow, the corporation should not be deemed to be at fault and should not be held liable.

Further, the existing definition of "officer" which includes directors, secretaries and managers is too wide. Under the UK regime, only directors who *knowingly* breach the disclosure requirement would be held liable. We concur with this and recommend Hong Kong follows the UK approach. The definition of "officer" should include only "director" throughout this draft legislation.

The phrase "ought reasonably to have" in s.101B(2) of the "draft legislation" should be taken out. This phrase suggests that it is possible that the information may not have been actually known by the officers and thus it is impossible for the corporation to disclose information on this basis.

Q.1c 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?

We agree and suggest that the submission through the Electronic Publication System operated by the SEHK or similar system suffice.

Q.2a Do you agree to the provision of the four proposed Safe Harbours?

We agree.

Q.2b Do you agree that the SFC should be empowered to grant waivers, and to attach conditions thereto?

We agree.

Q.2c Do you think that the legislation should provide for additional Safe Harbours? If so, what are these additional safe harbours?

We recommend an additional safe harbour which provides that if a corporation and its directors have duly and carefully considered a piece of inside information and come to a conclusion in good faith that the information would not materially affect the share price, and thereby made a non-disclosure decision, even if subsequently the information is found to be causing material price change -- due to unexpected market reaction or change in market circumstances that is unforeseeable at the time the non-disclosure decision was made, the corporation and its directors will not be held liable as long as it can show proper records of board deliberations leading to a reasonable conclusion that the information needed not to be disclosed at the time.

Q.2d Do you agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO?

We agree. We also think that other market participants should also be given the opportunity to suggest Safe Harbours to match with market developments.

Question 3

Q.3a Do you agree to extend the jurisdiction of the MMT to handle breaches of the statutory disclosure requirements?

We do not object.

Q.3b Do you agree with the proposed range of civil remedies as set out in paragraphs 2.31, 2.35 and 2.36?

We agree and would want to add that the proposed range of civil remedies is highly deterrent already. In particular, the proposed fine of up to HK$8 million is considered very high, especially for only negligence acts and we suggest to phrase out as the disqualification of directorship to barring from the market activities already have serious implication.

Q.3c Do you agree to grant the SFC direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements?

Allowing SFC direct access to the MMT lacks the checks-and-balances under the existing arrangement of having the cases referred to the Financial Secretary first. While we support a more efficient process, some checks-and-balances controls are important. Moreover, under the proposed legislation, the other proceedings that cover the six types of market misconduct would be referred to the MMT directly by the SFC. This is a major change. The Government must consider this with a view to balance the market's need for check-and-balances and whether the resources of MMT can cope with the possible increase in the number of cases referred to it.

Q.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?

We agree and add that this should be provided on a continual basis and not just in the first 12 months in order to cope with changing market developments and new Safe Harbours that may be prescribed from time to time with a specified team of adequate experienced staff from the SFC to handle the issuers' enquiries in a timely manner.

Q.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?*

The lines of authorities and responsibilities between the SFC and SEHK must be clearly defined without duplication, and listed companies must not be subject to dual regulation and duplicate investigation, and will not potentially face both MMT proceedings and disciplinary hearings by the Listing Committee.

We thank you for your attention.

Yours faithfully
For and on behalf of

22 June 2010

BY HAND
Financial Services Branch
Financial Services and the Treasury Bureau
Government of the Hong Kong Special
Administrative Region
18th Floor, Admiralty Centre
Tower 1
18 Harcourt Road
Hong Kong

Dear Sirs

RE: CONSULTATION PAPER FOR THE PROPOSED STATUTORY CODIFICATION OF CERTAIN REQUIREMENTS TO DISCLOSE PRICE SENSITIVE INFORMATION BY LISTED CORPORATIONS ("PSI CONSULTATION")

We refer to your letter dated 29 March 2010 in respect of the captioned subject and enclose our comments to the PSI Consultation for your attention.

Encl

CONSULTATION PAPER FOR THE PROPOSED STATUTORY CODIFICATION OF CERTAIN REQUIREMENTS TO DISCLOSE PRICE SENSITIVE INFORMATION BY LISTED CORPORATIONS

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?

Yes.

(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?

It is hard to interpret "as soon as practicable". It is also not fair to assume or to regard director or an officer to have knowledge of the inside information merely because he has (or ought reasonably to have – as stated in S.101B(2) of the SFO) come into possession of that information in the course of the performance of his duties. This is because it is possible that a director or an officer may not have access to the information for some specific reasons.

(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?

Yes.

Question 2

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

Yes.

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

Yes.

(c) Do you think that the legislation should provide for additional safe harbours?

No.

If so, what are these additional safe harbours?

N/A.

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

Yes.

Question 3

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

Yes.

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

The regulatory fine of HK$8 million is considered too heavy on a listed company and/or the director. It is recommended to lower the fine, say, to a maximum of HK$3 million since the breach may be a result of unintentional, reckless or negligent act or omission of individual director or officer. In addition, we wonder whether it is easy to implement the "cold shoulder" order on the director or an officer (i.e. the person is deprived of access to market facilities). Save as mentioned above, we agree to the other 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?

Yes.

Question 4

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

No, it should be a longer period of 24-month or even provide a permanent consultation service for the benefits of the issuers.

Question 5

Do you think the administration and enforcement arrangements proposed by the SFC and SEHK in paragraphs 3.8 – 3.9 are appropriate?

Yes.

Do you have any comments on the respective roles of the SFC and SEHK to further enhance clarity?

No.

25th June, 2010
Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I
Admiralty Centre
18, Harcourt Road
Hong Kong

Dear Sir/ Madam

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

The purpose of the captioned consultation paper is aimed to enhance our market transparency and quality which will help sustain Hong Kong as a leading international financial centre. After considering the pros and cons for this proposed statutory codification, we are of the view that the drawbacks outweigh the benefits and accordingly we object to the proposed statutory codification.

At present, The Stock Exchange of Hong Kong Limited ("Stock Exchange") has a set of clear and adequate rules and guidelines on the disclosure of price sensitive information, a copy of which is enclosed for your reference. **These rules and guidelines have been operating efficiently for a long period of time.** Stock Exchange can refer cases involving criminal offence to the Securities and Futures Commissioners and take further action with the police if it deemed necessary. In this context, we reckon that Hong Kong will continue to be a leading international financial centre under the existing rules and guidelines of the Stock Exchange.

The proposed enactment of law on the disclosure of price sensitive information by adopting the existing concept of "relevant information" as defined under the Securities and Futures Ordinance ("SFO") (Cap.571) is not appropriate. As a layman, we understand one will breach the SFO if he uses the "inside information" to make profit or avoid loss **intentionally**. However, a listed company will be liable to punishment under the proposed statutory codification if it fails to comply with the statutory disclosure requirement as a result of any intentional, **reckless** or **negligent act** or **omission** on the part of any individual director or officer. Again, a layman understands that the law is based on the fundamental principle of "intention". However, a listed company and/or its directors will commit a criminal offence under the proposed statutory codification in future if it/they unintentionally breach the statutory disclosure requirement due to omission or oversight which does not involve any profit making or loss avoidance. One will ask where the spirit of laws is. We do not believe this is what the law intends to do. In practice, listed companies which have overseas investments or investments in associated companies may have difficulty in obtaining timely information to inform the shareholders by means of announcements. If such information turns out to be price sensitive, then listed companies and their directors are in breach of the statutory disclosure requirement. Therefore, it is very easy to fall into this trap **unintentionally**.

Assuming the proposed statutory codification is in place, we believe that the primary objective and concern of listed companies and their directors will be focused on compliance with the statutory disclosure requirement. As a matter of course, time and effort will be spent on compliance with the statutory disclosure requirement instead of improving business and maximizing the return to the shareholders. We are sure that lawyers and financial advisors will benefit most at the expense of the shareholders. Overseas companies will also have a second thought when they consider to list their shares on the Stock Exchange. Therefore, we may defeat our purpose to help Hong Kong sustain as a leading financial centre.

Last but not least, we foresee that the announcements of listed companies will increase substantially because listed companies will tend to make more disclosure, which should not have been made at all, in order not to breach the statutory disclosure requirements. So, listed companies, directors, shareholders, lawyers and financial advisors are busy at dealing with the announcements and suddenly we discover our prime objective of doing business has been shifted.

We will support the statutory disclosure requirement if it can achieve the target objective. But it does not. Hong Kong is facing a lot of competition especially from Shanghai. In order to strengthen our competitive edge and remain as one of the leading financial centres in the world, it is not the appropriate time to pass the proposed statutory codification which will suffocate the incentive of businessmen to focus their time and effort on improving business. Instead, we waste our resources in complying with statutory disclosure requirement of price sensitive information to which we already have a good and sound mechanism. It is dangerous to assume that listed companies will manipulate the "inside information" in the absence of the proposed statutory requirement. This assumption is wrong because we only have few cases in this aspect in the past. Actually, most listed companies have been making contribution to the economic prosperity and help Hong Kong sustain as a leading international financial centre. We do not want Hong Kong to copy what The European Union (which consists of various countries and thus various stock exchanges) is doing and believe that it can help Hong Kong look like a counterpart to the European Union. This is inappropriate and too superfluous. We should think whether it really accommodates our requirements. At present, we do not think so.

We put on record that we do not want our name to be disclosed in any form or media in relation to the captioned consultation paper.

Guide on disclosure of

Hong Kong Exchanges and Clearing Limited
香港交易及結算所有限公司

Hong Kong Exchanges and Clearing Limited
12/F., One International Finance Centre
1 Harbour View Street
Central
Hong Kong
Tel: (852) 2522 1122
Fax: (852) 2295 3106
Email: info@hkex.com.hk
Website: www.hkex.com.hk

January 2002

Contents

Introduction

1. The principal function of The Stock Exchange of Hong Kong Limited (the "Exchange"), a wholly-owned subsidiary of Hong Kong Exchanges and Clearing Limited, is to provide a fair, orderly and efficient market for the trading of securities. To this end, the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (the "Main Board Rules") and the Rules Governing the Listing of Securities on the Growth Enterprise Market of the Stock Exchange of Hong Kong Limited (the "GEM Rules") (collectively, the "Listing Rules") require issuers to make, among other things, timely public disclosure of price-sensitive information[1]. Further, all disclosure of information must be made in such a way that it does not place any person in a privileged dealing position and allows time for the market to price the concerned security to reflect the latest available information.

2. The disclosure required under the Listing Rules is only the minimum mandatory standard. In order to promote fairness, transparency, accountability and responsibility, which are the core principles of good corporate governance, directors should consider the issuers' own circumstances when deciding whether any information is material and should be disclosed properly to the public. Disclosure by issuers should be aimed at providing shareholders and the public with appropriate data and information on a timely and even basis, and not at merely meeting the minimum regulatory requirements. Timely disclosure of accurate and quality information is in the issuer's interest for investors often give premium ratings to the most transparent companies.

3. This guide is intended to help issuers and their directors fulfil their obligations under the Listing Rules while allowing them to actively inform the market of company developments. This guide does not form part of the Listing Rules and does not in any way amend or vary an issuer's obligations under the Listing Rules, nor does it remove the need for issuers to make their own judgment as to what is price-sensitive information and when disclosure is required. In case of doubt, issuers are encouraged to consult with the Exchange. The principles and elaboration in this guide reflect some of the criteria that the Exchange will consider in its interpretation of the Listing Rules to determine whether certain information is price-sensitive.

1 See paragraph 2 of Appendix 7 of the Main Board Rules (the "Listing Agreement") and Rule 17.10 of the GEM Rules

Summary

4. The guiding principles and criteria in disclosing price-sensitive information are summarised in this paragraph, and explained in more detail in the paragraphs that follow:

(a) Information which is expected to be price-sensitive should be announced promptly[2] after it becomes known to a director or senior management of the issuer and/or is the subject of a decision by the directors or senior management of the issuer.

(b) Until an announcement in relation to such information is made, directors of issuers must ensure that such information is kept strictly confidential.

(c) Where it is felt that the necessary degree of security cannot be maintained or that security may have been breached, an announcement must be made.

(d) If price-sensitive information is inadvertently divulged to outside parties or it is believed that such information may have been inadvertently divulged, the issuer must immediately issue an announcement so that the relevant information is disseminated to the market as a whole.

(e) Information should be disclosed to the market as a whole and all users of the market have simultaneous access to the same information. It is important that price-sensitive information should not be divulged selectively outside the issuer and its advisers in such a way as to place in a privileged dealing position any person or class or category of persons.

(f) Price-sensitive information may include positive and negative information.

2 See definition for "promptly" in paragraph 10

What is "price-sensitive information"?

5. Under paragraph 2 of Appendix 7 of the Main Board Rules (the "Listing Agreement") and rule 17.10 of the GEM Rules, an issuer shall keep the Exchange, members of the issuer and other holders of its listed securities informed as soon as reasonably practicable of any information relating to the group (including information on any major new developments in the group's sphere of activity which is not public knowledge) which:

(a) is necessary to enable them and the public to appraise the position of the group

(b) is necessary to avoid the establishment of a false market in its securities

(c) might be reasonably expected materially to affect market activity in and the price of its securities.

However, it is important to note that in determining whether certain information is price-sensitive or otherwise, one should look at the information set out in (a) to (c) independently rather than conjunctively.

6. An issuer may face unexpected and significant events and there are many events which can affect prices and market activity. It is thus vital for the issuers to make a prompt assessment of the likely impact of these events on their share price/ activities and decide consciously whether the relevant information would be price-sensitive and need to be disclosed. If necessary, issuers should request a suspension in the trading of its securities until a formal announcement can be made. Some common examples of such events include:

- *regularly recurring matters (such as financial results and dividends);*
- *exceptional matters (such as acquisitions, realisations transactions with connected persons);*
- *signing an important contract;*
- *entering into a significant joint venture;*
- *fund-raising exercises;*
- *comments on the prospects for future earnings or dividends;*
- *release of any projected profits of the group by issuers or their directors;*
- *entering into an agreement for the issue of options convertible into securities;*
- *a large foreign exchange loss;*
- *major market upheaval in the industries, countries or regions where the issuer has significant operations or transactions;*

- *premature removal of auditors before end of their term in office;*
- *cancellation of an agreement which was previously the subject of an announcement;*
- *resignation of chief executive;*
- *the issuer being aware that its auditors will issue a qualified report on its results;*
- *any change of accounting policy that may have a significant impact on the accounts; or*
- *events beyond the control of the issuer and is of material significance to the issuer's business, operations or financial performance.*

7. However, no definitive list can be given. What may be price-sensitive information to one party to a contract may be immaterial to the counterparty. A fund-raising that may be material to an issuer facing liquidity problems may be immaterial to the same company in better times. Later in this guide examples of situations are discussed to reflect some of the criteria that the Exchange will consider in its interpretation of the Listing Rules. It is important to note that "price-sensitive information" includes potentially price-sensitive information. Thus, references in this guide to "price-sensitive information" should be construed accordingly.

8. Deciding on what information is price-sensitive is a matter of judgement. In considering whether the decision or information is price-sensitive, directors should make reference to paragraph 5.

9. The Listing Rules seek to ensure the efficient functioning of the market through timely and accurate public disclosure of price-sensitive information. They also seek to ensure that any such disclosure must be made to the market generally (and not just to a section of the public). Paragraph 2 of the Listing Agreement and rule 17.10 of the GEM Rules impose an obligation on issuers to keep the Exchange, their shareholders and other holders of their listed securities informed, as soon as reasonably practicable, of any price-sensitive information relating to the issuer's group. This is often referred to as the "general disclosure obligation".

When and how should price-sensitive information be disclosed?

10. The guiding principle is that information which is expected to be price-sensitive should be announced promptly after it becomes known to a director or senior management of the issuer and/or is the subject of a decision by the directors or senior management of the issuer. In cases where a decision by the directors or senior management of the issuer is pending or in cases of incomplete negotiations, issuers should refer to the guidelines set out in paragraphs 15 to 17. For this purpose, "promptly" means as soon as reasonably practicable after the senior management of the issuer learns (or when any reasonable issuer should have been aware) that the information is both material and non-public. Until such an announcement is made, the directors must ensure that such information is kept strictly confidential. Where it is felt that the necessary degree of security cannot be maintained or that security may have been breached, an announcement must be made.

11. The general disclosure obligation will be satisfied by the issuer publishing the relevant information in the newspapers by means of a paid announcement in one Chinese language and one English language newspaper or other means and manner as stipulated in the Listing Rules.

12. Issuers may consider implementing additional means of broad communication such that the news will be disseminated to the shareholders and the public in a timely and uniform manner. Such means might include a press release through widely disseminated news or wire services and/or directly sent to international and local media, an announcement of a conference of which the public has notice and may have personal or electronic access, or direct email or fax to shareholders whose address is known. Posting the announcement on an issuer's website is an appropriate action, but cannot be regarded of itself as an announcement of information.

Unusual movements in price or trading volume

13. The Exchange will usually contact an issuer if it notices unusual movements in the price or trading volume of its securities, or in response to press reports or market rumours which may affect market activity in or the price of its securities. In those circumstances, the issuer must promptly respond to any enquiries from the Exchange and, if appropriate, issue a statement authorised by the board as to whether the issuer is aware of any matter or development that is or may be relevant to the unusual price movement or trading volume of its listed securities (including any negotiations or discussions in relation to a price-sensitive matter).

Establishing a communications policy and procedure

14. The systematic dissemination of price-sensitive information is greatly assisted by having a communications policy and procedure in place. In particular:

(a) while the board is generally responsible for the proper dissemination of price-sensitive information, the actual implementation is usually delegated to one or more executive directors and/or other authorised senior executives of the issuer. A procedure should be put in place to ensure that the information to be disclosed does not constitute unpublished price-sensitive information. Such procedure may include clearance with a compliance officer before disclosure of the information. The board of directors of the issuer should approve the procedure before it is implemented;

(b) responsibility for communication with parties outside the issuer should be clearly defined. Specific directors or senior officers who are aware of the issuer's business and the relevant regulatory requirements should be assigned for such purpose and all communication should be made through such directors or officers. Other directors and/or staff should be prohibited from communicating information unless they are nominated;

(c) issuers should consider making their internal policies on communication known outside the company. This could be a useful tool to assist issuers in withstanding pressure to disclose prematurely confidential price-sensitive information;

(d) the directors of an issuer should put in place appropriate procedures to keep price-sensitive information confidential until a formal announcement is made. Information must not be allowed to leak (to selected groups, or otherwise) in order to "test" the market. If confidentiality cannot be maintained, or is in fact breached, the directors of the issuer have a responsibility to notify the Exchange and, if necessary, request a suspension in the trading of its securities until a formal announcement is made; and

(e) where appropriate, issuers should consult their professional advisers who can assist in determining whether information is price-sensitive.

Guidance on particular situations and issues

Incomplete negotiations

15. Issuers are sometimes confronted with the problem of how long to keep an issue confidential and what constitutes the proper time for its release. The overriding principle is that information which is expected to be price-sensitive should be announced promptly[3] after it becomes known to a director or senior management of the company and/or it is the subject of a decision by the directors or senior management of the issuer. Until it is released, it is essential to maintain confidentiality. Issuers should consider implementing procedures to maintain the confidentiality of information such as: the use of codenames in correspondence, the use of private fax lines and e-mail accounts, limiting dissemination of the information to those who "need to know", and reminding parties involved of the need to keep all such information strictly confidential.

16. If negotiations or discussions regarding a potentially price-sensitive matter are extended to include more than a small group of people or if it becomes difficult to ensure the confidentiality of the information, an announcement should be made as soon as practicable.

17. If negotiations have reached a delicate stage or major elements have not been finalised, the issuer should consult the Exchange as soon as possible. It may be necessary for the securities to be suspended from trading pending a formal announcement.

Inadvertent dissemination of information

18. If an issuer becomes aware that price-sensitive information has inadvertently been given to a third party, it should immediately issue an announcement disclosing the relevant information and, if necessary, request a suspension in the trading of its securities pending a formal announcement.

Sharing of information amongst board members

19. There may be circumstances where one director has information about a price-sensitive information but does not disclose it to the rest of the board members. Directors should have an understanding between themselves that information on business developments or otherwise that may be price-sensitive be shared with each other and an announcement should be made if such information is considered to be price-sensitive.

3 See definition for "promptly" in paragraph 10

Profit forecasts

20. If an issuer has made a public forecast and subsequently becomes aware that any of the assumptions upon which the forecast is based may not be correct, or that the outcome will be materially different from the forecast figure, an announcement should be made as soon as possible. In such an announcement, the issuer should state the likely impact of the incorrect assumption on the profit forecast, the extent to which any intervening event will affect the profit, or how the actual outcome will differ from the original forecast.

Profit warning statement

21. Where an issuer becomes aware that its results may be significantly worse than generally accepted market expectation, the issuer should publish an announcement "warning" investors of the likely impact.

The annual report and general meeting

22. Issuers are encouraged to communicate with investors. An issuer may reinforce its corporate messages and provide indicators of its future direction through its annual report, or through the Chairman's address at the annual general meeting.

23. Arrangements must be made for any price-sensitive information that is to be discussed at the meeting to be announced simultaneously as described in this guide.

Questions from analysts and correction of analysts' forecasts

24. Issuers should have their own policy on the extent to which analysts' questions should be answered. Issuers should decline to answer analysts' questions where individually or cumulatively the answers would provide unpublished price-sensitive information. Directors should resist pressure from analysts to provide or comment on data that may involve the dissemination of unpublished price-sensitive information.

25. Where any information is wrongly interpreted by analysts and is materially incorrect, issuers should ask the analysts to correct it immediately.

Draft reports from analysts

26. Under normal circumstances, issuers should make no comment on an analyst's financial projections or opinions. If an analyst sends an issuer a draft report for its comments the issuer can, of course, refuse to respond. Where the report

contains inaccurate information already in the public domain or not price-sensitive, issuers should inform the analyst for there is no advantage to any party having inaccurate information being circulated. If an issuer is aware of unpublished price-sensitive information that would correct a fundamental misconception in the report, it should consider making public disclosure of such data and at the same time correcting the report.

Conduct of meetings with analysts

27. Some issuers are concerned that they may be misinterpreted or mistakenly accused of providing price-sensitive information following meetings with analysts. Such risk can be reduced by having appropriate internal procedures. These procedures could, for example, include ensuring that more than one company representative and the compliance officer, if any, are present during these meetings and that accurate records of all discussions are kept. Alternatively, issuers could consider opening up such meetings to the press and the public, or announcing in advance the fact of an analysts' meeting and, where price-sensitive information is to be made public, publishing at the same time the information to be disclosed as required by the Listing Rules.

28. Issuers should also be aware of the possibility of analysts obtaining price-sensitive information during visits to the issuer's premises. Employees meeting the analysts during the visit should be briefed as to the extent and nature of information that can be communicated (see paragraph 14 above).

Questions from journalists

29. Relationships with the press and other media, though often contributing to a well-informed market, need particularly careful management in instances where price-sensitive information is involved. In the case of inaccurate reporting, the issuer should consider clarifying the situation by issuing an announcement and, if necessary, seeking a suspension of trading in the company's securities until the announcement is made.

30. When confronted with questions by journalists about rumours circulating in the market, issuers should be prepared to give a "no comment" answer where journalists are pressing for unannounced price-sensitive information. However, issuers are reminded that, to be credible, "no comment" statements must be used consistently and must be maintained. Where sufficient price-sensitive information has been leaked for the reported story to be broadly accurate, an issuer should ensure that an announcement is made to guarantee that the correct information is widely available. This is preferable to attempting to refute or play down the story by making counter-comments to sections of the press or by writing a letter to or granting an interview with the press in question. Issuers will find it helpful to have established internal procedures for handling these queries (see paragraph 14 above).

31. Issuers are reminded that it is contrary to the principle of fair disclosure to release negative news by way of press release in weekend newspapers or on public holidays in an attempt to soften its impact. Disclosure of price-sensitive information must be made in accordance with the Listing Rules.

Dealing in the issuer's shares

32. Directors must also not deal in the relevant securities at any time when they are in possession of unpublished price-sensitive information[4].

Making parties "insiders"

33. At certain times, issuers may need to give information in confidence to, for example, prospective financiers, potential business partners, underwriters or other parties with whom they are negotiating. Before a meeting at which price-sensitive information is to be given, an established procedure should be followed unless the relationship with the participants is automatically one of confidentiality. The relevant party should be told that, if he attends the meeting, he must keep the relevant information strictly confidential and that he will not be able to deal in the issuer's securities before the information is made public. He should give consent to being made an 'insider' and this should be recorded. No one should be made an insider without his consent or for a longer period than necessary.

Employees

34. Employees may have access to unpublished price-sensitive information. Some employees have regular access to price-sensitive information because of their duties. Employees must be made aware of the need at all times to keep confidential all unpublished price-sensitive information given to them. Issuers should have a policy for employees such as limiting their access to price-sensitive information and providing information to employees on a "need-to-know" basis.

35. Increasingly, issuers publish "in-house" publications or publish information on its intranet. Issuers must ensure that their "in-house" publications of personal presentations to employees do not inadvertently include unpublished price-sensitive information.

4 There are other dealing restrictions contained in the Listing Rules, see "Model Code for Securities Transactions by Directors of Listed Companies", Appendix 10 of the Main Board Rules and "Securities transactions by directors", Rules 5.40 to 5.59 of the GEM Rules.

Takeovers and mergers

36. Issuers which are or may become involved in a takeover or merger should also have regard to the Code on Takeovers and Mergers when considering the content and timing of announcements. In particular, an announcement may be required where the target company is the subject of rumour or speculation about a possible offer or where negotiations between the offeror and the target are about to be extended to include more than a very restricted number of people. In all cases of doubt, the Securities and Futures Commission should be consulted and the Exchange informed.

Announcements by third parties

37. Announcements by industry regulators, government departments and other bodies may affect the share price of an issuer or market activity in its shares. If such announcement is expected to have a particularly significant impact on an issuer, an announcement should be made by the issuer providing the issuer's view on the impact of the relevant announcement.

Issuer listed on more than one exchange

38. If the securities of an issuer are listed on more than one stock exchange, the issuer should co-ordinate the release of information so that the Exchange is simultaneously informed of any information released to any such other exchanges and that such information is released to each of the markets at the same time. If a price-sensitive announcement is made in another market while the Hong Kong market is closed, the issuer should ensure that a corresponding announcement is published in Hong Kong before the Hong Kong market opens for trading, and, if necessary, request a suspension of trading of its securities on the Exchange pending the publication of the announcement in Hong Kong.

The Internet

39. In order to promote good corporate governance practice and transparency, issuers are increasingly using the Internet as a medium for disseminating information about themselves, for example, by maintaining a web page. Issuers are reminded that any unpublished price-sensitive information that it intends to publish on the Internet should first be made the subject of an announcement in accordance with the Listing Rules. Issuers should implement appropriate procedures to vet information which is to be put on its website. Issuers should also regularly monitor their own websites to ensure that all published information is up-to-date and accurate.

HANNY HOLDINGS LIMITED
錦興集團有限公司
(Incorporated in Bermuda with limited liability)

HANNY
VISIONS AHEAD

BY FAX (2529 2075)

To Whom it May Concern:

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

I, the director of Hanny Holdings Limited would like to voice my OBJECTION to the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.

At the onset, we were given the impression that Codification would help ease the restrictions set upon us by HKEx and provide greater clarity as to what information we need to provide in order to meet our obligations as listed companies. We ARE responsible companies who want to maximize returns to our investors as well as compete on a level playing field.

However, after reading through your consultation as well as the subsequent "Guidelines on Disclosure of Inside Information" published by the SFC, I am of the opinion that this Codification not only creates an additional burden to listed companies, it does not add transparency to our investors. In fact, it will create greater market turbulence because of a myriad of half-baked information that will be submitted to the market by the companies afraid of running afoul of the law. This Codification, in effect, will make Hong Kong the laughing stock of the financial community world wide.

Yours sincerely,

Chan Kwok Chuen, Augustine

香港中環夏慤道12號美國銀行中心31樓
31/F, Bank of America Tower, 12 Harcourt Road, Central, Hong Kong
Tel: (852) 3151-0300 Fax: (852) 2372-0620 (Company Secretarial) / 2803-5574 (Accounts)

To : the Fnancial Services and the Treasury Bureau 28 June 2010
Via : online submission/email.

Submission re : Consultation Paper on the
Proposed Statutory Codification of certain Requirements to
Disclose Price Sensitive Information (***PSI***) by Listed Corporations (***LISTCO***)
by the Financial Services & Treasury Bureau in March 2010

---

1. It is wrong to put non-disclosure of information on the same footing as the market misconduct of insider dealing.

2. Insider dealing is a conscientious act, driven invariably by personal greed[1] to make profit. In the context of S.270, a board definition of "relevant information" is required because it is there to deal with the case of people dealing in, or counseling or procuring others to deal in, listed securities. A failure to disclose information can be the result of a simple management oversight, internal communication breakdown, or a mere judgmental error, when neither securities-dealing, nor any personal profit element, is involved. Why should LISTCO and its officers be under same culpability in such scenario? Copying the same definition as in the S.245 is inept as failure to disclose PSI should not be viewed in the same context as insider dealing under S.270 of the Securities & Futures Ordinance (***SFO***), Cap. 571.

3. A corporation acts through its officers, <u>collectively</u>. Information knew by a single director, *per sec*, should not be regarded as information of the LISTCO. Why should PSI known only to the Chairman or shared only between him and his son/daughter (who happens also to be a director) during breakfast be regarded as information known to the LISTCO when no other (non-family) director is even aware of the same? What if the other directors have different views? Not until the directors appraise of the PSI, how can they react to the question of disclosure or not? It makes sense to affix knowledge to LISTCO only when all or, at least, a majority of its executive directors have appraised of the PSI in question.

4. One must bear in mind the commercial reality of the Chinese business community is that business often is generated or negotiated during private social occasions. Would PSI learnt during a drink at a pub after office or a dinner at restaurant in Shanghai be regarded as info coming into a director's possession in performance of his duties? If it is PSI in nature, then it should not matter when and where it is gathered and whether the

---

[1] In fact, it is a defense under S.271(3) of the SFO, Cap.571, if the person charged can "establish that *the purpose for which he deals in the listed securities in question* (or counseled or procured others to deal in those securities) *was not …….. for the purpose of securing or increasing a profit* or avoiding/reducing a loss, whether for himself or for others, *by using the relevant information*" (emphasis supplied).

Executive Director concerned is in performance of duties when he comes to know that info.

5. Response Question 1:

(a). No – see paragraph 1 & 2 above.

(b). No – see paragraph 3 & 4.

(c). Yes – we can make use of the existing HKEx-EPS mechanism.

6. Recommendations

(a). It is fundamentally wrong, as a concept, to equate PSI disclosure with insider information. Sufficient deterrents have already been in Part XIII and part XIV of the SFO to deal with the truly culpable instances arising from abuse of PSI. There is no compelling need to legislate additionally for PSI disclosure. Otherwise, the market may be glutted with information indiscriminately disseminated by LISTCO officers just to play safe from trap for the unwary under SFO. This is unhelpful, and at worst, can confuse the market.

(b). <u>Keep but amend R13.09</u> Instead, good use shall continuously be made of the machinery under existing Listing Rules 13.09. In terms of market familiarity and industry participants' understanding, there is not much difference between the operation of Rule 13.09 and the insiders dealing laws, both of which have been with us for sufficiently long time. We should keep using R13.09. The R13.09 regime should expand to include an obligation to disclose information of LISTCO's substantial shareholder in specific circumstances, such as that substantial shareholder has reached agreement to place down his shares or has agreed to pledge his shares in the LISTCO for facilities or advance to himself. These are instances when LISTCO share price may be affected but presently are outside the disclosure ambit of the Listing Rules.

(c). <u>*De minims* threshold</u> If contrary to what is suggested and PSI finds its way into the SFO, it is further suggested that a threshold be set to exempt from disclosure information which is quantitatively immaterial. Information which has the effect of a size test ratio[2] by, say, less than 5% should not be considered as material as requiring statutory disclosure. Instead, LISTCO is encouraged as matter of corporate governance – but not obliged as under SFO – to disclose. This helps weeding out the not-so-important information from the market.

[2] Borrowing the same ratios as in Chapter 14 of the Listing Rules.

7. On the proposed Safe Harbor B, is there an obligation to disclose if LISTCO has signed (limited effect) MOU/LOI – binding only on exclusivity and agreement for prospective buyer to perform due diligence on targeted assets – but nothing on commercial terms? What if the MOU/LOI contains the commercial terms but is expressed to be non-binding. Is there obligation to disclose such MOU/LOI? It is suggested that any PSI Rules/laws should catch only binding MOU/LOI. Info on non-binding LOI/MOU is not useful and can be confusing to the market.

8. Response to Question 2 (a) through (d) – assuming PSI issue does eventually find its way into SFO, yes.

9. Should company secretary (and non-consenting directors) be liable for not disclosing PSI ?

(a). Company secretary's role is administrative; rather than executive. S/he is to advise and implement decisions of the Board but has no executive power to block, or veto, a decision if the senior management disagrees with his/her reading of the situation. Similarly, if a director is not aware of the PSI (e.g. he is on leave, or relevant info is deliberately being withheld from him), or that director does not agree with the decision not to make PSI disclosure, it will be unfair to attach liability to him in those circumstances. In short, any liability on account of PSI disclosure should be (actual) knowledge-&-connivance based. If one does not know, or one does not agree or connive to it, then s/he should not be made liable.

(b). It is, in particular, not fair to make company secretary liable because, unlike Executive Directors, s/he has no management power or authority. If the company secretary has so advised on disclosure, and senior management disagrees or refuses to follow, then it will be a catch-22 for him/her. Also what if the senior management rejects, or simply refuses to follow, all or a large part of the measures recommended by the company secretary to prevent breaching PSI disclosure laws, what can the company secretary do in those circumstances? Why should the company secretary – earning (in small-cap LISTCOs) less than $1M a year – in those scenarios be made to pay $8M fine, become the subject of MMT order (effectively baring him/her from finding another job), or be ordered to pay hundreds of thousands cost to the SFC for a decision which s/he disagrees but over which, s/he is helpless to change?

(c). Recommendations – either the company secretary and the dissenting directors be craved out from the definition of "*officer*" for the purpose of this new Part IIIA, or an express exemption from liability be provided for those who have duly and diligent advised for disclosure, whose advice is backed up by external legal advice from reputable law firm.

i. This protects the company secretary as well as those directors who aired concerns but whose views are unreasonably rejected/not followed by his fellow directors. If no appropriate exemption is there to protect the honest and the innocent, who

would want to take the job of company secretary or paid executive director! This is all the more important when, as presently drafted, negligence/omission also attracts liability. This disproportionate exposure is not conducive to the development of the institution of company secretary, which in turns hampers the furtherance of corporate governance for LISTCOs in Hong Kong as a whole.

ii. Job pressure, especially in times of down market, bends knees. To this, LISTCO shall have in place a mechanism (same as that afforded for the benefit of the INEDs) when the company secretary as well as the dissenting director can :

[I]. have direct access to external legal advice when a PDI disclosure issue emerges,

[II]. have his view recorded and then circulated to the full Board for consideration, and

[III]. the Board is statutory-obliged to put in appropriate statement(s) in the company secretary/director resignation announcement to state whether or not s/he has been in disagreement with the directors over PSI disclosure issue and if so, what is the view of the dissenting company secretary/resigning director and the reason of the Board/senior management in rejecting such view. If LISTCO does not put in such statement(s), the resigning company secretary/resigning director is entitled to put up his own announcement drawing the fact of his disagreement to the attention of the shareholders of the LISTCO concerned, and

[IV]. all [I] through [III] are to be done at the expenses of the LISTCO. In this manner, the company secretary or a paid/employee director is not put under job pressure and will have the spine to speak up on disclosure compliance issue.

10. The range of civil sanctions is not appropriate for breach of disclosure of PSI scenarios, especially when no personal greed/profit element is involved. This has much to do with the erroneous equating of PSI issue with insider information. PSI matter is more regulatory or compliance in nature. Insiders-dealing goes to the integrity of the Hong Kong capital market meriting, of course, sanctions and more serious treatments. Why should s/he suffers the consequence of "cold shoulder" order and be out of the job as company secretary for 5 years if his employer – the LISTCO – fails to make PSI disclosure during the annual leave of the company secretary and his/her less-experienced officer overlooks or makes an error of judgment on the matter?

11. If in the end, LISTCO/officers are vindicated of the charge under Part IIIA, then logically SFC, at fault in bringing the proceedings, shall bear all

the cost of the LISTCO/officers incurred in defending the MMT proceedings, compensate officers[3] concerned for loss suffered, such as loss of job & salary during the investigation & proceedings, and publish an announcement on the SFC website on the exonerating judgment.

12. Response to Question 3:

(a). MMT to handle PSI issue – yes, but only for the serious cases, such as intentional or reckless (but not negligent) breach, or one motivated by personal gain, or 2nd–time offender.

For innocent or technical breach (even with negligence), or 1st-time offender (not involving personal gain or securities inside-dealing), it is suggested that treatment shall first be dealt with at departmental level by way of a SFC reprimand, low-calibrated administrative fine, or public censure.

This reflects the principle of proportionality and has the advantage of not loading the MMT with too much backlog of works.

(b). Yes – only for paragraph 2.31 & 2.36 but then only on the basis that the protections suggested under paragraph 9 (c) are also in place. Otherwise, the sanctions are too severe, and glaringly out of proportion to pure-listing compliance issue like PSI disclosure.

The sentencing factors that MMT should take into account as set forth in paragraph 2.33 should be written – in a non-exhaustive manner – into Part IIIA.

As a matter of principle, PSI disclosure being regulatory and compliance in nature should not give rise to civil remedies. Otherwise, it will open litigation flood-gate. In principle, we disagree with paragraph 2.35. If contrary to this, civil remedy were to be provided, then it should only be available in limited circumstances when one can prove that he suffers pecuniary loss "solely and directly" a result of the PSI non-disclosure[4].

(c). Yes.

13. Response to Question 4 – yes but please clarify if SFC will continue to provide consultation after the 12-months trial period.

14. If we are to have part IIIA, why can't we simply delete the requirements of Listing Rules 13.09, now that the PSI has become statutory?

15. Response to Question 5 – please clarify whether, henceforth from the day Part IIIA coming into operation, there is still any need to comply with

[3] And also compensating the LISTCO too – perhaps on putative damages basis akin to defamation suit if reputational loss is hard to quantify.

[4] Or the same standard as one is to sue for civil compensation on the ground of misleading info/statements in a prospectus under Cap.32.

Listing Rules 13.09 and whether LISTCO should consult only SFC – and not SEHK any more – on PSI matters.

16. Submission on the PSI Guidelines in the Consultation Paper by SFC is also attached for sake of completeness.

Submission by:

Ricky CHAN[5]
28 June 2010

[5] The writer is the General Counsel of Pacific Century Premium Developments Limited (HKEx Stock Code : 432)

CHIU KA WAH

12 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I
Admiralty Centre
18, Harcourt Road
Hong Kong

Dear Sir/Madam,

Comments on Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information ("PSI") by Listed Corporations

I write to set out my views on the above Proposal as follows:

RATIONALE

I totally disagree with the rationale behind the Proposal since no one, in a civil society, should be punished for an error of judgment. I notice that the Proposal is not now seeking to criminalize any failure to disclose price sensitive information. However, the Proposal is still seeking to impose severe sanctions in the forms of, inter alia, (a) regulatory fine of up to HK$8 million, or (b) disqualifying a person from being a director for up to five years if he is found in breach of the statutory disclosure requirements, or (c) a "cold shoulder" order on the director for up to five years.

However, a director/officer who has made an error of judgment of either (a) not regarding certain information as price sensitive, or (b) considering a one or two days/weeks delay in not disclosing the PSI as "as soon as practicable" is in fact NOT making any gain out of the failure at all. Such failure is also neither morally wrong nor ethically unacceptable. Such failure is not a result of fraudulent concealment or

withholding of information (in which case, the offence of fraud may be prosecuted), or the provision of false information (in which case, an offence under the Securities and Futures Ordinance or fraud under common law may have been committed).

In conclusion, the whole philosophy behind the Proposal is wrongly based and any enactment of the Proposal will have dire results on the market in that MMT's tribunal members' or SFC's officers' judgment would be substituted for judgment of those reasonable businessmen in the daily operations of the businesses they are most familiar with.

THE QUESTIONS

In the event the Government is not withdrawing the Proposal, my responses to the Questions posed in the Consultation Paper are as follows:

Question 1

(a) No comment.

(b) Disagreed. The offence/misconduct of insider dealing will only be committed if two elements are present, namely, (i) possession of the "inside information" and (ii) the action of dealing in securities. By punishing a director/officer for (a) not publishing or (b) delay in publishing PSI (i.e. inaction) is totally unsatisfactory in that possession of "inside information" alone will already lead to the risk of infringing the proposed statutory provisions. Thus, as I mentioned above, it is a punishment of error of judgment which is something that should not be punished at all.

All information is "inside information" so far as a listed corporation is concerned. The trap created by the Proposal is totally unreasonable.

(c) The existing provisions contained in the Listing Rules are already doing an excellent job and I do not see any reasons behind the Proposal.

At present, the sanctions against those who breach the Listing Rules already provide effective deterrence. I see no point in imposing additional sanctions on listed corporations and the directors/officers of listed corporations.

Question 2

(a) Yes. But Safe Harbour B should be amended as follows:

"*the information concerns an incomplete proposal or negotiation*" leaving "*the outcome of which may be prejudiced if the information is disclosed prematurely.*" since it is uncertain whether any such disclosure may prejudice the outcome. For example, a connected transaction between a listed corporation and its substantial shareholder may not be prejudiced by premature disclosure but premature disclosure of the negotiation/proposal will create uncertainty in the market when terms are not yet finalized.

(b) Yes. But general waivers are preferred and should be well publicized so that SFC may not be alleged to have favored certain listed corporations.

(c) Yes. Any delay of disclosure or non-disclosure caused by error of judgment of the directors/officers should be exempted since error of judgment should not be punished.

(d) Yes. But SFC should prescribe more safe harbours right away before enactment.

Question 3

(a) Yes, if the enactment is pushed through.

(b) (i) Remedies set out in 2.31(a) and (d) is acceptable. Remedies set out in 2.31(b), (c) and (e) are too harsh, since error of judgment should not be penalized that severely.

(ii) Remedies in 2.35 and 2.36 are unwarranted since every one will make mistakes in judgment even government officials and SFC officer (e.g. the Lehman Brothers mini-bond episodes or the 政改方案).

(c) If the enactment is pushed through, SFC's role as an enforcement agency is natural but any institution of proceedings should also be endorsed by the Secretary for Justice of the Legal Department.

Question 4

The informal consultation should last forever instead of 12 months. If SFC officers are not prepared to come up with their views on the matter, who will/can?

Question 5

I still think the existing mechanism in the Listing Rules is adequate enough to deal with the disclosure of price sensitive information.

COMMENTS ON PROPOSED S.101B(2)

The words "*or ought reasonably to have ...* " and "*in the course of performing functions as an officer of the corporation*" should be deleted therefrom. This is because one should not be penalized if he has no actual knowledge of the information.

COMMENTS ON PROPOSED S.101D(1)

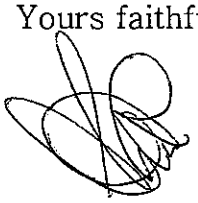
(1) S.101D(1)(c)(ii) should be amended as outlined in my answer to Question 2(a) above.

(2) the exceptions in sub-paragraphs (c)(i), (c)(iii), (c)(iv) and (c)(v) should always be excluded and not be required to meet the conditions set out in S.101D(1)(a) and (b) since those exceptions warrant complete exemptions.

CONCLUSION

The Government should not seek to create a "synthetic" wrongdoing and then seek to mete out punishment on a "synthetic" wrongdoing. This is in particular where the alleged "wrongdoer" has not benefited from the non-disclosure or delay in disclosure.

Yours faithfully,



CHIU KA WAH (Ms.)

寄件人:	E Lee	■新增聯絡人 ■新增群組 ■顯示所有標題 ■列印外觀 ■Quick Print ■加到白名單/黑名單 ■報告錯誤分類
日期:	2010 年 6 月 23 日 18:32	
收件人:	<psi_consultation@fstb.gov.hk>	
副本抄送:		
標題:	Comments on Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Dislcose Price Sensitive Information by Listed Corporations	
附件:	Submission (12 June 2010).pdf (261 KB)	

Dear Sir/Madam,

I refer to the attached submission dated 12 June 2010 submitted by my friend. I endorse her views therein. In addition, I have the following comments on the Proposal:

1. I see no reason why in s.101B, knowledge of an officer is imputed to a listed corporation since "officer" will cover a wide range of people including directors, company secretaries, and even managers. I would therefore suggest that all references to "officer" in s.101B and s.101G be substituted with the word "director".
2. I have also looked at paragraph 29 of the proposed "Guidelines on Disclosure of Insider Information" to be issued by SFC and come to the conclusion that most probable than not, a listed corporation will disclose any information coming into its possession, in which case, the market will be inundated with information which is neither useful nor constructive.
3. There is no definition of "trade secret" in the proposed amending ordinance and that is totally unsatisfactory.

My view is that if the government is to implement the Proposal, it is adding another piece of "擾民之政". Can our government not go back to the basics and follow the thoughts of 老子 in 道德經, that is, "我無爲，而民自化；我好靜，而民自正；我無事，而民自富；我無慾，而民自樸。”.

Yours faithfully,
Eva LAM

Enc.

CHIU KA WAH

12 June 2010

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I
Admiralty Centre
18, Harcourt Road
Hong Kong

Dear Sir/Madam,

Comments on Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information ("PSI") by Listed Corporations

I write to set out my views on the above Proposal as follows:

RATIONALE

I totally disagree with the rationale behind the Proposal since no one, in a civil society, should be punished for an error of judgment. I notice that the Proposal is not now seeking to criminalize any failure to disclose price sensitive information. However, the Proposal is still seeking to impose severe sanctions in the forms of, inter alia, (a) regulatory fine of up to HK$8 million, or (b) disqualifying a person from being a director for up to five years if he is found in breach of the statutory disclosure requirements, or (c) a "cold shoulder" order on the director for up to five years.

However, a director/officer who has made an error of judgment of either (a) not regarding certain information as price sensitive, or (b) considering a one or two days/weeks delay in not disclosing the PSI as "as soon as practicable" is in fact NOT making any gain out of the failure at all. Such failure is also neither morally wrong nor ethically unacceptable. Such failure is not a result of fraudulent concealment or

withholding of information (in which case, the offence of fraud may be prosecuted), or the provision of false information (in which case, an offence under the Securities and Futures Ordinance or fraud under common law may have been committed).

In conclusion, the whole philosophy behind the Proposal is wrongly based and any enactment of the Proposal will have dire results on the market in that MMT's tribunal members' or SFC's officers' judgment would be substituted for judgment of those reasonable businessmen in the daily operations of the businesses they are most familiar with.

THE QUESTIONS

In the event the Government is not withdrawing the Proposal, my responses to the Questions posed in the Consultation Paper are as follows:

Question 1

(a) No comment.

(b) Disagreed. The offence/misconduct of insider dealing will only be committed if two elements are present, namely, (i) possession of the "inside information" and (ii) the action of dealing in securities. By punishing a director/officer for (a) not publishing or (b) delay in publishing PSI (i.e. inaction) is totally unsatisfactory in that possession of "inside information" alone will already lead to the risk of infringing the proposed statutory provisions. Thus, as I mentioned above, it is a punishment of error of judgment which is something that should not be punished at all.

All information is "inside information" so far as a listed corporation is concerned. The trap created by the Proposal is totally unreasonable.

(c) The existing provisions contained in the Listing Rules are already doing an excellent job and I do not see any reasons behind the Proposal.

At present, the sanctions against those who breach the Listing Rules already provide effective deterrence. I see no point in imposing additional sanctions on listed corporations and the directors/officers of listed corporations.

Question 2

(a) Yes. But Safe Harbour B should be amended as follows:

"*the information concerns an incomplete proposal or negotiation*" leaving "*the outcome of which may be prejudiced if the information is disclosed prematurely.*" since it is uncertain whether any such disclosure may prejudice the outcome. For example, a connected transaction between a listed corporation and its substantial shareholder may not be prejudiced by premature disclosure but premature disclosure of the negotiation/proposal will create uncertainty in the market when terms are not yet finalized.

(b) Yes. But general waivers are preferred and should be well publicized so that SFC may not be alleged to have favored certain listed corporations.

(c) Yes. Any delay of disclosure or non-disclosure caused by error of judgment of the directors/officers should be exempted since error of judgment should not be punished.

(d) Yes. But SFC should prescribe more safe harbours right away before enactment.

Question 3

(a) Yes, if the enactment is pushed through.

(b) (i) Remedies set out in 2.31(a) and (d) is acceptable. Remedies set out in 2.31(b), (c) and (e) are too harsh, since error of judgment should not be penalized that severely.

(ii) Remedies in 2.35 and 2.36 are unwarranted since every one will make mistakes in judgment even government officials and SFC officer (e.g. the Lehman Brothers mini-bond episodes or the 政改方案).

(c) If the enactment is pushed through, SFC's role as an enforcement agency is natural but any institution of proceedings should also be endorsed by the Secretary for Justice of the Legal Department.

Question 4

The informal consultation should last forever instead of 12 months. If SFC officers are not prepared to come up with their views on the matter, who will/can?

Question 5

I still think the existing mechanism in the Listing Rules is adequate enough to deal with the disclosure of price sensitive information.

COMMENTS ON PROPOSED S.101B(2)

The words "*or ought reasonably to have ...* " and "*in the course of performing functions as an officer of the corporation*" should be deleted therefrom. This is because one should not be penalized if he has no actual knowledge of the information.

COMMENTS ON PROPOSED S.101D(1)

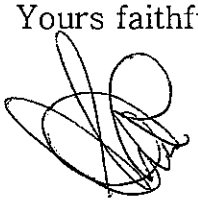
(1) S.101D(1)(c)(ii) should be amended as outlined in my answer to Question 2(a) above.

(2) the exceptions in sub-paragraphs (c)(i), (c)(iii), (c)(iv) and (c)(v) should always be excluded and not be required to meet the conditions set out in S.101D(1)(a) and (b) since those exceptions warrant complete exemptions.

CONCLUSION

The Government should not seek to create a "synthetic" wrongdoing and then seek to mete out punishment on a "synthetic" wrongdoing. This is in particular where the alleged "wrongdoer" has not benefited from the non-disclosure or delay in disclosure.

Yours faithfully,



CHIU KA WAH (Ms.)

寄件人:	Meaney, Patrick
日期:	2010 年 5 月 31 日 18:31
收件人:	"'psi_consultation@fstb.gov.hk'"<psi_consultation@fstb.gov.hk>
副本抄送:	
標題:	Comments on Consultation on the proposed Statutory Codification of Certain Requirements

Dear Sir/Madam

I write to make a suggestion in respect of the above referred consultation paper.

By way of background, between 2002 and 2005 I was Head of Listing Enforcement at HKEx.

I support the thrust of the proposals and believe that if adopted they will enhance Hong Kong's reputation as a financial market. I believe a civil penalty regime administered by the MMT provides the appropriate flexibility in range of sanction options. My only concern about the MMT is that the procedure be streamlined to allow for timely outcomes.

My only comment of substance is in relation to question 5 about the appropriateness of the enforcement regime. My concern is that most HK listed companies have one or more directors resident outside Hong Kong who may not have any reason to travel to Hong Kong. When conducting investigations at the HKEx, I was able on occasion to use the Listing Rules to require listed companies to have their non-resident directors attend the HKEx's offices and answer questions.

As the SFC's investigation powers are based on territorial jurisdiction, it may not be able to require a non-resident director of a listed company to attend an interview if it is unable to serve the director in Hong Kong with a notice to attend. Even if the notice were validly served, the director could avoid penalty for non-compliance by not entering Hong Kong. The only penalties currently available for non-compliance with a notice are criminal and so cannot be imposed without the physical attendance of the relevant person in Hong Kong. This sort of non-cooperation could frustrate the SFC's investigation.

Possible ways to address this may be to make service on the listed company's registered office of a notice to attend an interview, valid service of the notice on a non-resident director and to provide for some form of public censure or disqualification of the individual director from being a listed company director or public censure of the listed company for the non-attendance of the director at the investigation interview. In essence the SFC should be allowed to advertise the fact that a director of

a listed company is not cooperating with an SFC investigation into possible breaches of disclosure obligations so that investors are on notice that the company, or at least some of its directors, cannot be trusted. The threat of being able to do that should in most cases be sufficient to ensure cooperation.

If the SFC had an effective mechanism to ensure non-resident directors of listed companies attended investigation interviews, then in my opinion it would have a more effective investigation regime than that of the HKEx.

Yours faithfully,

Patrick Meaney

Lingnan 嶺南大學 University

岑振猷 大律師
[redacted]

Mr. Clement SHUM LLB (HKU), LLM (QUEEN MARY), BARRISTER
[redacted]

24 June 2010/6/24

Ms Jane Lee
Financial Services Branch
Financial Services & The Treasury Bureau
Government of the HKSAR

Dear Ms Lee

I refer to your letter of 29 March 2010 (SUB/12/2/2/5) addressed to our Professor Robin Snell, Director of Business Programmes, School of Business. It has been passed to me for action.

I refer to the list of questions for consultation and offer my answers as follows:

Question 1

(a) I agree with the proposal to adopt the existing definition of "relevant information "from the insider dealing regime under the SFO to define PSI, because the market is familiar with the concept and the proposed law will not create another heavy burden for a listed corporation.

(b) I 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 ***whether or not in the course of the performance of his duties,*** because "in the course of the performance of his duties" may pose some subtle problems of law.

(c) I 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) I agree to the provision of the four proposed safe harbours.

(b) I agree that the SFC should be empowered to grant waivers and to attach conditions thereto. ***But the proposed law should clearly set out the circumstances under which waiver may be granted by the SFC.***

(c) I think the proposed safe harbours have already covered a wide range of foreseeable circumstances, and hence no additional safe harbours are needed.

(d) I do not agree that the SFC should be empowered to prescribe further safe harbours in the form of rules under the SFO. If additional safe harbours are needed, the law should be amended accordingly.

Question 3

I am in favour of the proposed law imposing criminal sanctions for breaches of statutory requirements to disclose PSI. First, the market is familiar with the concept of "inside information", and therefore, it is not too burdensome for officers of listed corporations to take all reasonable measures to ensure that proper safeguards exist to prevent the corporation from breaching the statutory disclosure requirements. Second, the proposed civil sanctions are not an effective deterrent to potential defaulters. Prosecution should be instituted in a normal court.

Question 4

I 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

I think the administration and enforcement arrangements proposed by the SFC and SEHK are appropriate.

Clement Shum

Clement Shum
Associate Professor
Department of Accountancy
Lingnan University

Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I
Admiralty Centre
18, Harcourt Road
Hong Kong

Fax: 2529 2075

Dear Sir

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

I refer to the above consultation paper released in March 2010 (the "Consultation Paper") and would like to set out my comments below for your consideration. The item numbers below correspond to the question numbers in page 25 to page 26 of the Consultation Paper.

1 (a) Yes

(b) Yes, but a director or an officer should not only be regarded as to have knowledge of the inside information when he is in possession of that information in the course of the performance of his duties but he must also be deemed to have the knowledge of the inside information if he becomes in possession of that information by virtue of his capacity as a director or an officer of that listed corporation.

(c) Yes

2 (a) Yes, but it seems that Safe Harbour B would likely to be the most frequently used safe harbour for non-disclosure. I consider that Safe Harbour B is too wide and too subjective. Certain objective yardsticks may need to be built into Safe Harbour B.

(b) Yes, but I have two concerns. First, the timing of the granting of waiver by SFC. SFC may not be able to act quickly enough to respond/grant the waiver. Listed corporations need to receive SFC's respond within a very short period of time as to whether or not it will grant the waiver. Secondly, I am not quite agreeable to the argument that "user pays" principle would help deter abusive use of waiver application. The FSTB did not propose the level of fee in the Consultation Paper that it considers would deter such abusive use of waiver application.

(c) No, safe harbours must be limited to a very few situations where disclosure of PSI is not required.

(d) Yes, it may leave the SFC with flexibility in case additional safe harbours are justifiable.

3 (a) No

(b) No, I consider that criminal action should be taken, instead of civil action, against any person for breaching the statutory disclosure requirements. It is clear that the SFC has been using criminal proceedings as an important facet to combat various market misconducts such as insider dealing. The proposed civil action does not seem to be compatible with the SFC's current approach.

(c) No

4 Basically I agree that SFC should provide informal consultation for listed corporations with regard to the statutory disclosure requirements. However, according to my past experience with SFC, the officers would not be able to provide any useful guidance to the listed corporations. The officers would merely tell the listed corporations to seek legal advice. Alternatively, the officers will simply tell the listed corporations to make a written submission to the SFC for their consideration. As I mentioned in 2(b) above, timing for statutory disclosure is very important. Unless SFC is really willing to help the listed corporations when it is being consulted, otherwise the proposed informal consultation would not be helpful at all to the listed corporations

5 Yes, but in paragraph 3.9, I suggest that SFC should be able to conduct investigation where it "appears to the SFC that....." instead of where it "has reasonable cause to believe that....". FSTB may consider the wordings in section 179 of the SFO (Cap 571).

I hope my comments above would be helpful to you.

Should you have any questions, please feel free to call me at 9302 6084. I have no objection for my name and comments to be referred to in other documents you publish and disseminate through different means after the consultation.

Yours faithfully,

SUEN Chi Wai
Solicitor of HKBAR
HKICPA

Trasy Gold Ex Limited
卓 越 金 網 有 限 公 司
(Incorporated in Cayman Islands with limited liability)

28 June 2010

By fax: 2529 2075

Division 2
Financial Services Branch
Financial Services and the Treasu
18/F., Tower I,
Admiralty Centre
18 Harcourt Road,
Hong Kong

Dear Sirs,

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

I, the director of Trasy Gold Ex Limited, would like to voice my OBJECTION to the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations (the "Codification").

At the onset, we were given the impression that the Codification would help ease the restrictions set upon us by the Stock Exchange of Hong Kong Limited and provide greater clarity as to what information we need to provide in order to meet our obligations as listed corporations. We are responsible company who want to maximize returns to our investors as well as compete on a level playing field.

However, after reading through your consultation as well as the subsequent "Guidelines on Disclosure of Inside Information" published by the Securities and Futures Commission, I am of the opinion that this Codification not only creates an additional burden to listed corporations, it does not add transparency of half-baked information that will be submitted to the market by the companies afraid of running afoul of the law. This Codification, in effect, will make Hong Kong the laughing stock of the financial community worldwide.

Yours sincerely,

Tang Chi Ming
Director

香港上環干諾道西38號遠陸中心1字樓
1/F., Talon Tower, 38 Connaught Road West, Sheung Wan, Hong Kong
電話Tel: (852) 2587 1200 傳真Fax: (852) 2529 9181 網址Website: http://www.trasy.com

From: benny wong
Date: Mar 29, 2010 19:15
To: <psi_consultation@fstb.gov.hk>
Cc:
Subject: 建議將上市法團披露股價敏感資料的若干規要定納入法例的諮詢文件

強烈要求 "股權披露" , 主要股東增持或減持 , 應該要在當日通知, 隔日可以在"披露易"獲知..

漢傳媒集團有限公司
SEE CORPORATION LIMITED
於百慕達註冊成立之有限公司
Incorporated in Bermuda with limited liability

BY FAX (2529 2075)

To Whom it May Concern:

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

I, the director/~~representative~~ of See Corporation Limited would like to voice my OBJECTION to the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations..

At the onset, we were given the impression that Codification would help ease the restrictions set upon us by HKEx and provide greater clarity as to what information we need to provide in order to meet our obligations as listed companies. We ARE responsible companies who want to maximize returns to our investors as well as compete on a level playing field.

However, after reading through your consultation as well as the subsequent "Guidelines on Disclosure of Inside Information" published by the SFC, I am of the opinion that this Codification not only creates an additional burden to listed companies, it does not add transparency to our investors. In fact, it will create greater market turbulence because of a myriad of half-baked information that will be submitted to the market by the companies afraid of running afoul of the law. This Codification, in effect, will make Hong Kong the laughing stock of the financial community world wide.

Yours Sincerely,

Allan Yap

香港九龍觀塘鴻圖道83號東瀛遊廣場20樓D及E室
Offices D & E, 20/F., EGL Tower, 83 Hung To Road, Kwun Tong, Kowloon, Hong Kong
Tel: (852) 2542 2212 Fax: (852) 2544 2212

To: Division 2, Financial Services Branch
Financial Services and the Treasury Bureau
18/F, Tower I, Admiralty Centre, 18, Harcourt Road, Hong Kong

Email: psi_consultation@fstb.gov.hk

Date of Submission: 19th June 2010

RE: Submission with regards to the consultation paper on the proposed statutory codification of certain requirements to disclose price sensitive information by listed corporations

Submission Drafted by:

Angus Young, Lecturer in Business Law, School of Accountancy, Queensland University of Technology

Tina Chu, Solicitor of the Supreme Court of Queensland and Research Assistant, School of Accountancy, Queensland University of Technology

---

First of all, we would like to applaud the HKSAR government's decision to codify disclosure of price sensitive information of listed companies in Hong Kong. It is in our humble opinion a long overdue reform that will enhance the confidence of local and international investors in Hong Kong's capital market.

Second, the gist of this submission is to respond to question 1(b) of the consultation paper on the proposed statutory codification of certain requirements to disclose price sensitive information by listed corporations.

Kindly note that our submission will not address the entire question of 1(b), rather it is focused on the issue of timing of the disclosure of price sensitive information – "as soon as practicable". We strongly feel that the proposed timing would likely to create some confusion during the implementation of the statutory requirements for the directors and officers of the listed companies in Hong Kong.

As stated in the SFC's Consultation Paper on the Draft Guidelines on Disclosure of Inside Information, the proposed statutory provision governing the disclosure of inside information will be stipulated in section 101B (1) of the *Securities and Futures Ordinance* (SFO) where; "*A listed corporation must, as soon as practicable after any inside information has come to its knowledge, disclose the information to the public.*"[1]

The phase "as soon as practicable" is explained in paragraph 32 of the SFC Consultation Paper on Draft Guidelines on Disclosure of Inside Information in the following: "*For this purpose, "as soon as practicable" means that the corporation should immediately take all*

[1] Securities and Futures Commission, „Consultation Paper on Draft Guidelines on Disclosure of Inside Information' (2010) [2] <https://www.sfc.hk/sfcConsultation/EN/sfcConsultMainServlet?name=dii> at 18 June 2010.

necessary steps that are reasonable in the circumstances to disclose the information to the public. [Emphasis added]"[2]

Our contention is with the implications of the timing in the release of inside information stipulated in section 101B (1) of the SFO. Confusion could arise between the phases "as soon as practicable" and "immediately take all necessary steps". Furthermore, the disclosure can simply be deferred by arguing that the circumstances to release price sensitive information might not be practicable then.

Furthermore, the legal interpretation of the phase "as soon as practicable" is subjective and ad hoc. In the dicta of *Kuang Teng Industry and Minton Optic Industry v Multispark Ltd and Shinon Indistries,*[3], Chu J contends that a six day delay (even with good reason) is too long to give effect to as soon as practicable to execute a Mareva Injunction. However, his honour has left open as to what constitute "as soon as practicable". In another case, *First Shanghai Enterprises v Dahlia Properties*,[4] the court gave an example that the contractual expression of "as soon as practicable" may mean three days if there is no specific contractual period stipulated by the parties. Accordingly, we recommend that the wording of the proposed provision, s101B of the SFO should be amended.

We submit that the wordings and standards found in section 674(2) of the Australian *Corporations Act (2001)* (Cth) (CA) in conjunction with Australian Stock Exchange (ASX) Listing Rule 3.1 is more appropriate for Hong Kong.

ASX Listing Rule 3.1 states that, "*Once an entity is become aware of any information it that a reasonable person would have a material effect on price or value of the entity's securities, the entity must immediately tell ASX that information*. [emphasis added]*"* This rule is backed by section 674(2) of the CA where the entity must notify ASX if, "*the entity has information that those provisions require the entity to notify to the market operator;*[5] *and that information: (i) is not generally available; and (ii) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED(enhanced disclosure) securities of the entity; the entity must notify the market operator of that information in accordance with those provisions [r3.1 of the ASX Listing Rules].*[6]*"*

Note that the timing to release price sensitive information (inside information) in Australia is "immediately". The immediate release of information is in line with the assumptions of the efficient capital market hypothesis (ECMH), where stock prices reflect all available information about the listed entity.[7] The underlying assumptions of ECMH are that: investors are rational; makes decision based on all available information; and cost of disclosure is low.[8] Hence the immediate release of price sensitive information is expected to enhance the

[2] Ibid, 9.
[3] [2001] HKCU 911
[4] [2001] HKCU 375
[5] S674(2)(b) of the *Corporations Act (2001*) (Cth)
[6] S674(2)(c) of the *Corporations Act (2001*) (Cth)
[7] Paul Redmond, *Companies and Securities Law: Commentary and Materials* (5th ed., 2009) 718.
[8] Robert Baxt, Ashley Black, and Pamela Hanrahan, *Securities and Financial Services Law* (7th ed., 2008) 337-8.

confidence of investors and the price of the share of the listed entities are not distorted by information asymmetry.

Australia's corporate regulator, the Australian Securities and Investment Commission (ASIC) issued an infringement notice to Rio Tinto on 5th June 2008 for contravention of section 674(2) of CA in failing to inform the ASX immediately when the company was aware that a particular information (a US$38.1 billion acquisition of Alcan Inc) had a material effect on the price of the entity's securities.[9] During the 1 hour and 11 minutes delay in the release of price sensitive information, 725,624 shares were traded (representing 37.6% of the volume of the day's trading) and the value of the shared traded was AUD$64,899,964 (representing 35.3% of the value of the day's trading),[10] it had distorted the value and price of the shares traded because investors did not have all available information to make an informed choice. Hence the importance of "immediate" release of price sensitive to the market is exemplified from this example.

Consequently, if Hong Kong adopted the timing of the release of price sensitive information from "as soon as practicable" to "immediately" as well as the wordings found in section 674(2) of the Australian CA in conjunction with ASX Listing Rule 3.1, we believe that it could enhance the reputation of Hong Kong as an international financial hub for the following reasons:

(1) it would remove any possible confusion over what constitute "as soon as possible";

(2) by changing the timing from "as soon as possible" to "immediately", it would not only remove any possibility of listed entities delaying the release of price sensitive information, the availability and promptness in the release of information about listed entities would help investors to make an informed choice about their investments; and

(3) it also would remove any price distortions attributed to the delay in the release of price sensitive information and this in turn would enhance the confidence of local and international investors in Hong Kong's capital market.

References

Legislations

Hong Kong

Securities and Futures Ordinance (Cap. 571)

Australia

Corporations Act 2001 (Cth)

[9] ASIC, *'08-117 Rio Tinto complies with ASIC Infringement notice'* (Press Release, 5 June 2008).
[10] Ibid.

Cases

First Shanghai Enterprises v Dahlia Properties [2001] HKCU 375

Kuang Teng Industry and Minton Optic Industry v Multispark Ltd and Shinon Indistries [2001] HKCU 911

Textbooks

Paul Redmond, *Companies and Securities Law: Commentary and Materials*, 5th ed., (2009)

Robert Baxt, Ashley Black, and Pamela Hanrahan, *Securities and Financial Services Law* 7th ed., (2008)

Government Resources

Hong Kong

Securities and Futures Commission, „Consultation Paper on Draft Guidelines on Disclosure of Inside Information' (2010) [2] <https://www.sfc.hk/sfcConsultation/EN/sfcConsultMainServlet?name=dii> accessed on 18 June 2010.

Australia

ASIC, *„08-117 Rio Tinto complies with ASIC Infringement notice'* (Press Release, 5 June 2008) < http://www.asic.gov.au/asic/asic.nsf/byheadline/08-117+Rio+Tinto+complies+with+ASIC+infringement+notice?openDocument# > accessed on 18 June 2010.

Australian Stock Exchange Listing Rule 3.1 < http://www.asx.net.au/ListingRules/chapters/Chapter03.pdf > accessed on 17 June 2010.

End of Submission