

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

Quick Read

Financial Services and the Treasury Bureau (**FSTB**) published its “*Consultation Conclusions on Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations*” (**PSI Consultation Conclusions**) on 11 February 2011 in response to the corresponding consultation paper issued on 29 March 2010 in relation to the proposed statutory codification of certain requirements to disclose price sensitive information (**PSI**) by listed issuers (**PSI Statutory Regime**). On the same day, the Securities and Futures Commission (**SFC**) published its “*Consultation Conclusions on the Draft Guidelines on Disclosure of Inside Information*” (**PSI Guidelines Consultation Conclusions**) in response to the corresponding consultation paper issued on 29 March 2010. The Guidelines on Disclosure of Inside Information (**PSI Guidelines**) aim to assist listed issuers to comply with the requirements under the PSI Statutory Regime.

PSI Statutory Regime

The major principles of the PSI Statutory Regime as stated in the PSI Consultation Conclusions are summarised as follows:

THE DISCLOSURE OBLIGATION

Inside information - The existing definition of “relevant information” from the insider dealing regime under the Securities and Futures Ordinance

(Cap571 of the Laws of Hong Kong) (**SFO**) will be adopted to define PSI.

Objective test - An objective test will be applied to determine whether any particular piece of information is “inside information”.

Timing of disclosure - The timing of disclosure is “as soon as reasonably practicable” and so a listed issuer should be obliged to disclose to the public “as soon as reasonably practicable” any inside information that has come to its knowledge.

Knowledge - A listed issuer should be regarded to have knowledge of the inside information if an officer has, or ought reasonably to have, come to the knowledge of the information in the course of performing functions as an officer of the listed issuer. In this connection, the following points should be noted:

- “*officer*” - The term is defined in Part 1 of Schedule 1 to the SFO. In relation to an officer, it means “a director, manager or secretary of, or any other person involved in the management of, the corporation”. The intention is not to catch directors only but to include directors and high-level individuals responsible for managing the listed issuer, not middle management or low-ranked staff.
- “*ought reasonably to have*” - The major reason for including the concept of “constructive knowledge” or using the phrase “ought reasonably to have”

is to cater for situations where PSI has been channelled to an officer of a listed issuer but the officer failed to open or read the document containing the PSI, or where employees of a listed issuer deliberately hide the PSI from the officers. Such concept is considered to be in line with the duty of an officer under common law to exercise reasonable care in the discharge of his duties owed to a company.

- “*in the course of performing functions as an officer of the listed issuer*” - The intention is that information known in situations outside the course of performing functions as an “officer” of the listed issuer will not be caught.

False or misleading information - A listed issuer will be regarded as failing to disclose the inside information as required if (a) the information disclosed is false or misleading as to a material fact or through the omission of a material fact; and (b) an officer of the listed issuer knows or ought reasonably to have known that, or is reckless or negligent as to whether, the information disclosed is false or misleading. The rationale behind this provision is to clarify that the disclosure of information which an officer knows or ought reasonably to have known to be false or misleading, or the officer is reckless or negligent as to whether the information is false or misleading, would not be regarded as complying with the disclosure requirement.

Manner of disclosure - Disclosure of inside information must be made in a manner that can provide for equal, timely and effective access by the public to the inside information disclosed. Listed issuers are encouraged to use the Electronic Publication System of Hong Kong Exchanges and Clearing Limited for announcing inside information.

Safe Harbours - Subject to the satisfaction of the two conditions explained below, the following safe harbours are available:

- *The disclosure is prohibited under, or constitutes a contravention of a restriction imposed by, an*

enactment or an order of a court. It should be noted that this safe harbour is only referring to an order made by a Hong Kong court or provisions of Hong Kong legislation. Also, the safe harbour would be applicable irrespective of whether there is a leakage.

- *The information concerns an incomplete proposal or negotiation.* It should be noted that a proposal or negotiation cannot be regarded as incomplete once a legally binding agreement is signed. Also, a listed issuer should disclose details to the extent that they are known. Where pertinent information is not known, that fact should be stated.
- *The information is a trade secret.* Generally, a “trade secret” refers to proprietary information owned by a corporation (a) used in a trade or business of the corporation; (b) which is confidential (i.e. not in the public domain); (c) which, if disclosed to a competitor, would be liable to cause real or significant harm to the corporation; and (d) which the corporation must limit its dissemination. Trade secrets may be in relation to inventions, manufacturing processes or customer lists. However, a trade secret does not cover the commercial terms and conditions of a contractual agreement or the financial information of a corporation, which cannot be regarded as proprietary information or rights owned by the corporation.
- *The information is about the provision of liquidity support by the Exchange Fund or by a central bank to the listed issuer or, if the listed issuer is a member of a group of companies, to any other member of the group.* The reference to “central bank” will be expanded to include other monetary authorities which perform the functions of a central bank.

SFC Waiver - Subject to the satisfaction of the two conditions as explained below, the SFC is empowered to grant waivers from the disclosure requirements. Waiver applications will be considered on a case-by-case basis. Having said that, the SFC may only approve a waiver application based on the grounds

that if the disclosure is prohibited by (a) a legislation of a place outside Hong Kong; (b) an order of a court exercising jurisdiction under the law of a place outside Hong Kong; (c) a law enforcement authority of a place outside Hong Kong; or (d) a government authority of a place outside Hong Kong exercising a power conferred by a legislation of that place.

The two conditions - As mentioned above, the two conditions which are required to be satisfied before the safe harbours may be triggered or an SFC waiver may be granted are: (a) the listed issuer takes reasonable precautions for preserving the confidentiality of the information; and (b) the confidentiality of the information is preserved. The provision does not intend to mandate listed issuers to respond to mere rumours but if there is a leakage of inside information, the listed issuer should make the necessary disclosure to clarify matters and ensure market transparency. To address the concern that a listed issuer might not be aware of the leakage, a defence will be available to the listed issuer if it can prove that it has taken reasonable measures to monitor the confidentiality and it has made disclosure as soon as reasonably practicable when it became aware of the leakage.

DUTIES AND LIABILITIES

Proper safeguards - Every officer of a listed issuer must take all reasonable measures from time to time to ensure that proper safeguards exist to prevent the breach of a disclosure requirement. One point to note is that the mere failure of an officer to take such reasonable measures does not by itself amount to a violation of the statutory requirements on the part of that officer and the SFC will not be empowered to conduct investigation in such a failure alone. Such a failure would amount to a contravention of the law only if the listed issuer is in breach of a disclosure requirement in the first place and the SFC would then have the power to conduct investigation.

Breach by an officer - If a listed issuer is in breach of a disclosure requirement, an officer of the listed

issuer (a) whose intentional, reckless or negligent conduct has resulted in the breach; or (b) who has not taken all reasonable measures from time to time to ensure that proper safeguards exist to prevent the breach, is also in breach of that requirement.

SANCTIONS

MMT to handle breaches - The jurisdiction of the Market Misconduct Tribunal (MMT) will be extended to handle breaches of the PSI Statutory Regime requirements.

Civil sanctions - The following civil sanctions may be imposed on those breaching the PSI Statutory Regime requirements:

- a. a regulatory fine up to HK\$8 million on the listed issuer and/or the director. It should be noted that the HK\$8 million ceiling is not an aggregate amount and the listed issuer and each of its directors could be fined up to HK\$8 million separately;
- b. disqualification of the director or officer from being a director or otherwise involved in the management of a listed issuer for up to five years;
- c. a “cold shoulder” order on the director or officer (i.e. the person is deprived of access to market facilities) for up to five years;
- d. a “cease and desist” order on the listed issuer, director or officer (i.e. an order not to breach the statutory disclosure requirements again);
- e. an order that any body of which the director or officer is a member be recommended to take disciplinary action against him; and
- f. payment of costs of the civil inquiry and/or the SFC investigation by the listed issuer, director or officer.

Other remedies - The MMT will also be empowered to make such order as it deems appropriate to ensure that a listed issuer takes appropriate action to

prevent a similar breach of the disclosure requirement. Such power includes ordering an officer to attend training, ordering a listed issuer to appoint an independent professional adviser to review its compliance procedures and ordering a listed issuer to appoint an independent professional adviser to advise on compliance matters.

Direct access to the MMT - To empower the SFC to institute proceedings on the existing six categories of market misconduct and breaches of the PSI Statutory Regime requirements direct before the MMT, without having first to report to the Financial Secretary for its decision to do so.

Reliance on MMT findings - A person suffering from pecuniary loss as a result of another person breaching the PSI Statutory Regime requirements can rely on the MMT findings to take civil actions to seek compensation from such another person.

THE ROLES OF THE SFC AND SEHK

Threshold to invoke investigation - It is intended that The Stock Exchange of Hong Kong Limited (SEHK) will refer all possible breaches of the PSI Statutory Regime requirements to the SFC and the SEHK will no longer be in a position to handle cases in this regard. The threshold for the SFC to invoke investigation is that it has reasonable cause to believe that a breach of the disclosure requirement may have taken place.

Informal SFC consultation - The SFC will provide informal consultation for listed issuers with regard to the PSI Statutory Regime requirements for an initial period of 24 months. It will also update its guidelines and publish FAQs from time to time.

Listing Rules and the SEHK's guidelines - The SEHK intends to amend the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (**Listing Rules**) to cater for the enactment of the PSI Statutory Regime but this can only be done after the regime has been duly enacted. Also, all existing SEHK's guidelines on PSI will be

superseded and replaced by the SFC's guidelines. It is also intended that the commencement date of the PSI Statutory Regime be aligned with the commencement date of the amended Listing Rules so as to facilitate compliance.

BILL TO THE LEGISLATIVE COUNCIL

The Government is preparing the Securities and Futures (Amendment) Bill (**Bill**) to codify the PSI Statutory Regime requirements and it is intended that the Bill will be introduced to the Legislative Council in the 2010/11 legislative session.

Guidelines on Disclosure of Inside Information

In parallel with the publication of the PSI Consultation Conclusions by the FSTB, the SFC also published its PSI Guidelines Consultation Conclusions on 11 February 2011 in response to the corresponding consultation paper issued on 29 March 2010. The major aim of the PSI Guidelines is to assist listed issuers to comply with the requirements under the PSI Statutory Regime. The PSI Guidelines provide examples and discuss issues on particular situations to illustrate the SFC's views on the operation of the PSI Statutory Regime provisions as set out in the SFO. They do not have the force of law.

OVERVIEW

The major matters contained in the PSI Guidelines are summarised as follows:

- What may constitute inside information
- When and how should inside information be disclosed
- Responsibility for compliance and management controls
- Safe harbours that allow non-disclosure of inside information
- Guidance on particular situations and issues
 - » Dealing with rumours

- » Internal matters
- » Corporation listed on more than one exchange
- » Analysts' reports
- » Publications by third parties
- » External developments
- » In the course of preparing periodic and other structured disclosures
- List of cases handled by the Insider Dealing Tribunal and MMT.

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WAY FORWARD

The SFC will revise the PSI Guidelines subject to the Bill to be published by the Government and will finalise the PSI Guidelines when the legislation is settled.

Copies of the PSI Consultation Conclusions can be downloaded via the link below:

<http://www.fstb.gov.hk/fsb/ppr/consult/psi.htm>

Copies of the PSI Guidelines Consultation Conclusions can be downloaded via the link below:

http://www.sfc.hk/sfc/doc/EN/speeches/public/consult/psi_conclusions_paper_eng.pdf

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