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Client**Alert**

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Hong Kong's Statutory Regime for Issuer Disclosure of Price-Sensitive Information

Commencing **1 January 2013**, issuers with securities listed on the Hong Kong Stock Exchange will be required to disclose price-sensitive information to the public in accordance with the new Part XIVA of the Securities and Futures Ordinance (the **SFO**).

The general obligation under the new SFO provisions is for a listed corporation to disclose "inside information" to the public as soon as reasonably practicable after the information comes to—or ought reasonably to have come to—the knowledge of an officer of the corporation. Directors, company secretaries and managers will be liable if a corporation's breach is due to their intentional, reckless or negligent conduct or if they failed to take reasonable measures to prevent the breach.

Currently, Hong Kong-listed issuers are subject to a general disclosure obligation under the Hong Kong Stock Exchange's listing rules. The Exchange's enforcement powers are, however, relatively limited. Under the new statutory regime, a person who is in breach of a disclosure requirement may be liable to pay compensation by way of damages to others who have suffered pecuniary losses as a result. Hong Kong's Market Misconduct Tribunal will also have the power to make a broad range of orders including imposing regulatory fines in some circumstances and disqualifying persons from company management or from transacting in certain financial products in Hong Kong.

Earlier this year, the Securities and Futures Commission published guidelines on disclosure of information under the new provisions.

What Is "Inside Information" for Purposes of Issuer Disclosures?

"Inside information" is defined in similar terms as the current SFO definition of "relevant information", which in turn has been considered in numerous insider dealing proceedings. It has several elements:

- it is **specific** information about:
  - the corporation;
  - a shareholder or officer of the corporation; or
  - the corporation's listed securities (note that this would extend to securities that, at the time in question, are not yet issued or listed) or their derivatives

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- it is **not generally known** to people who are accustomed to dealing or would be likely to deal in the corporation's listed securities
- it would, if generally known, be **likely materially to affect the price** of the listed securities.

Taking each of the elements in turn:

"Specific"

Information about a corporation's affairs is regarded as "specific" if it can be identified, defined or unequivocally expressed. This standard, which has been adopted by the Commission in its guidelines, reflects well-known pronouncements in this area by Hong Kong tribunals and in judicial decisions in other jurisdictions. It raises as many questions as it provides answers, however, according to a 2004 Hong Kong Insider Dealing Tribunal report[1]. Hong Kong tribunals have interpreted the term very broadly. "Specific" information would include information that allows a transaction or matter to be identified and described (for example, information that a company is experiencing substantial financial difficulties, or that transactional negotiations are underway), even though the details may not all be known. The Commission notes that information does not have to be "precise"[2], in order to satisfy this element of the definition of inside information and that matters or proposals that are at a preliminary stage can amount to specific information[3].

"Not Generally Known"

Here the focus is whether the information is known to the group of people who trade in, or are likely to trade in, the securities.

The Commission's view is that even if information is disseminated in media comments or analysts' reports, a corporation may still be under an obligation to make a formal disclosure. The information in third party reports may not be accurate or complete, it may not have been disseminated widely enough, or it may be likely to be seen as speculative. In these cases, the Commission would be unlikely to view the information as "generally known" to the market. The Commission notes that information issued by parties such as regulators, government departments and ratings agencies could amount to inside information for purposes of the SFO provisions.

Even if the corporation itself issues information in the form of a press release, the Commission would not necessarily regard this as sufficient. Its guidelines indicate that where information is required to be disclosed under the new SFO provision, this should be done by way of an announcement via the Hong Kong Stock Exchange's system.

The Likelihood of a Material Effect on Price of Securities

The Commission has provided little substantive guidance on how a corporation should form a view on whether information is likely materially to affect the price of securities. Hong Kong tribunal decisions have considered whether the information in question would influence "ordinary reasonable investors[4]" who trade in or are likely to trade in the securities either to buy or sell those securities. A material price effect is more than a mere fluctuation or a slight change in price[5].

The disclosure decision has to be made at the time the information becomes available, based on anticipated effects. Nevertheless, the Commission notes that actual price effects observed once information becomes public would normally be indicative of what should have been anticipated, although they would not be conclusive.

When Does a Corporation Have Inside Information?

A corporation will be taken to have inside information if:

- the information comes to the knowledge of—or ought reasonably to have come to the knowledge of—an officer in the course of performing functions as an officer; and
- a reasonable person acting as an officer of the corporation would regard it as inside information in relation to the corporation.

An "officer" of a corporation is defined in the SFO as a director, manager or secretary of the corporation or any person involved in its management.

1 Report of the Insider Dealing Tribunal (the **IDT**, the predecessor of the Market Misconduct Tribunal) on Firstone International Holdings Limited, July 8th, 2004 (at page 57).
2 Defined as "exact" in Bider and Ashe, *Insider Crime* (1993) Jordan Publishing Ltd., at page 32, discussed in the report of the IDT on Hanny Holdings Limited, June 15th, 2000, at pages 71-72.
3 The guidelines reiterate the approach taken by the IDT in the report on Firstone International Holdings Limited, July 8th, 2004, at pages 59-61.
4 See the reports of the IDT on Chinese Estates Holdings Limited, June, 1999, at page 47 and on Hanny Holdings Limited, June 15th, 2000, at page 76.
5 See the report of the IDT on China Apollo Holdings Limited, June 6th, 2002, at page 30.

When Does Information Have To Be Disclosed?

Information is required to be disclosed "as soon as reasonably practicable" unless:

- disclosure is prohibited by, or would be a contravention of, a Hong Kong enactment or an order of a Hong Kong court; or
- the corporation takes **reasonable precautions** for preserving its confidentiality, the **confidentiality is in fact preserved** and:
  - the information concerns an incomplete proposal or negotiation;
  - the information is a trade secret;
  - the information concerns provision of liquidity support to the corporation (or another member of its corporate group) from the Hong Kong Exchange Fund or a central bank (or central bank equivalent); or
  - the Commission waives the disclosure, provided that any applicable conditions are satisfied.

In the case of the last four sub-paragraphs, the protection of the safe harbors would be lost if the information ceased to be confidential. If seeking to rely on these safe harbors, the corporation would be required to take reasonable steps to monitor whether or not confidentiality had been preserved and, if the corporation became aware that it had not, to disclose the information as soon as reasonably practicable. A corporation would not be regarded as having lost these protections if it were to disclose the information, in the ordinary course of business, to anyone who required it to perform his or her functions in relation to the corporation, as long as that person was under a legal or contractual duty to the corporation not to disclose the information to any other person.

The Commission notes that, where a corporation is relying on preservation of confidentiality under an available safe harbor, media speculation, information included in analysts' reports and rumors could, depending on their content, indicate that information has leaked and thus that the safe harbor protection is no longer available and that public disclosure should be made.

Faced with a disclosure obligation, a corporation (and its officers) must also be mindful that any disclosure made must not be false or misleading as to any material fact or through any omission of a material fact. The guidelines contemplate that there may be situations where a corporation is not in a position to issue a full announcement immediately; in these circumstances, the Commission would expect a suitable holding announcement to be made or an application to suspend trading in the corporation's securities.

How Should Information Be Disclosed?

Generally, information will need to be disclosed through the Hong Kong Stock Exchange's publication system.

The Commission takes the view that issuing press releases, holding press conferences and posting information on a corporation's website are not likely to satisfy the statutory requirement for "equal, timely and effective access by the public".

Who Is Responsible for Disclosure?

The corporation is responsible for disclosure.

If a corporation is in breach of the disclosure requirement, an officer of that corporation will also be in breach of the requirement:

- if the officer's intentional, reckless or negligent conduct resulted in the breach; or
- if the officer did not take all reasonable measures from time to time to ensure the existence of proper safeguards to prevent the breach.

Corporate officers, including non-executive directors, are responsible for the corporation implementing procedures to comply with its disclosure obligations. The Commission's guidelines set out a list of corporate management and control measures that it expects corporate officers to consider.

What Are the Consequences of a Breach?

The new disclosure regime includes civil liability provisions that apply in addition to, and don't replace, any rights or liabilities that may arise under other statutes or at common law.

A person who is in breach of a disclosure obligation under the new SFO provisions will be liable, where such liability is "fair, just and reasonable" in the circumstances, to pay compensation by way of damages to "any other person" for any pecuniary loss sustained by the other person as a result of the breach.

The Commission will have the power to institute proceedings under the new provisions in Hong Kong's Market Misconduct Tribunal, which in turn will have broad powers to investigate and determine whether a breach of a disclosure requirement has occurred and if so by whom. The Tribunal make may a number of different types of orders, including orders that corporations appoint independent advisers or that individuals undertake training, costs orders, disqualification of directors or managers, restrictions on trading of various financial products in Hong Kong and, where reasonable in the circumstances, the imposition of regulatory fines on listed corporations or directors or chief executives of listed corporations.