

# Client Alert.

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## Statutory Obligation for Listed Companies to Disclose Price Sensitive Information

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On 11 February 2011, the Hong Kong Government published its consultation conclusions on its proposal to enact legislation requiring listed companies to disclose price sensitive information. The Government is proceeding with the proposal, subject to minor amendments, and a Securities and Futures (Amendment) Bill is expected to be gazetted and introduced to the Legislative Council in the 2010/11 legislative session.

In conjunction with the Government's conclusions, the Securities and Futures Commission ("SFC") has also published consultation conclusions on its draft Guidelines on Disclosure of Inside Information ("Guidelines"). The Guidelines help to illustrate how the statutory disclosure requirements will operate in practice and the relevant compliance issues. They will not have the force of law, but will help listed companies meet the requirements of the law.

### KEY TAKEAWAYS

- Listed companies and their officers will need to check their systems for managing the flow of information; evaluating the disclosure implications of internal developments; and monitoring the quality and extent of information in the general market. If in doubt, disclose - or seek advice
- Senior management will be subject to statutory sanctions for negligence where a required disclosure is not made
- Disclosure will now be required as soon as reasonably practicable: the SFC will expressly recognize that appropriate internal preparation time will be allowed
- Materiality of information will be assessed by its effect not just on share price, but also on an ordinary reasonable investor's decision to buy or sell
- Safe harbors have been simplified to include incomplete negotiations or proposals, irrespective of disclosure's effect on them
- Handling market rumors will be challenging: companies must evaluate whether they are based on guesswork (no action required) or a leak (must disclose)
- 2 year consultation service from SFC

### PROPOSED STATUTORY OBLIGATION

A listed company will be obliged to disclose to the public as soon as reasonably practicable "inside information" that has come to its knowledge. The Guidelines will specify that a listed company is allowed to take appropriate steps such as ascertaining details, conducting internal assessment and due diligence verification before making an announcement.

# Client Alert.

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## WHAT CONSTITUTES “INSIDE INFORMATION”?

The concept of “relevant information” currently used in the insider dealing regime will be used to define “inside information”. Under this approach, it will be the same set of information which is prohibited from being used for insider dealing and which is required to be disclosed to the public: broadly, specific information about the company or its shareholder/officer/listed securities, not generally known in the market but which would if so known be likely to affect materially the listed securities’ price. The Guidelines will provide that this includes materially affecting the ordinary reasonable investor’s decision on dealing in the listed securities.

The legislation will clarify that an objective test is to be applied in determining whether any particular piece of information is “inside information”.

## WHAT CONSTITUTES “KNOWLEDGE”?

A listed company will be regarded as having knowledge of inside information if its director or other officer has, or ought reasonably to have, “come to the knowledge of the information” in the course of performing his/her duties. An “officer” is “a director, manager or secretary of, or any other person involved in the management of, the corporation”; the intention of the proposed legislation is to include directors and high-level individuals responsible for managing the listed company.

The scope of inside information that an officer “ought reasonably to have” will be assessed in the light of an officer’s duty under the common law to exercise reasonable care in the discharge of duties owed to a company.

## DUTY AND LIABILITY OF OFFICERS

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

If a listed company is in breach of a disclosure requirement, and that breach is the result of any intentional, reckless or negligent act of an officer, or that officer has not taken all reasonable measures from time to time to ensure that proper safeguards exist to prevent the breach, that particular officer would be liable.

## DEALING WITH SPECULATION OR RUMORS

The Guidelines will clarify that listed companies are under no obligation to respond to press speculation or market rumors. However, where the rumors indicate that inside information intended to be kept confidential has been leaked, the listed corporation would need to disclose such inside information as soon as reasonably practicable.

## SAFE HARBORS

The Bill will provide four safe harbors to allow listed companies to withhold or delay disclosure of price sensitive information where:

1. disclosure would constitute a breach of a Hong Kong court order or any other Hong Kong statute. The powers of the SFC will be extended to grant waivers where disclosure is prohibited by a law enforcement authority or government authority of a place outside Hong Kong;
2. the information is related to incomplete negotiations or incomplete proposals;

## Client Alert.

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3. the information is a trade secret (but commercial terms and conditions of contractual agreements or the financial information of a company cannot be regarded as trade secrets); or
4. the Government's Exchange Fund or a central bank provides liquidity support to the listed company.

Where a piece of information has been leaked, all but the first of these safe harbors will fall away, but it will be a defence for the listed company to prove that it took reasonable measures to monitor the confidentiality of the information and it made disclosure as soon as practicable when it became aware of the leakage.

### ENFORCEMENT AND SANCTIONS

The SFC will be the enforcement authority for these disclosure requirements, with powers of investigation, and of bringing enforcement proceedings directly before the Market Misconduct Tribunal ("MMT"), which will be the body with jurisdiction to hear such proceedings.

One or more of the following civil sanctions may be imposed by the MMT for a breach:

1. a regulatory fine up to HK\$8 million on the listed company and/or each of the directors;
2. disqualification of the officer from being a director or otherwise involved in the management of a listed company for up to five years;
3. a "cold shoulder" order on the officer for up to five years;
4. a "cease and desist" order on the listed company or officer;
5. a recommendation that the officer be disciplined by any body of which that person is a member;
6. payment of the costs of the civil inquiry and/or the SFC investigation by the listed company or officer; and
7. other orders, such as additional training or appointment of an independent compliance adviser.

Persons who suffered pecuniary loss as a result of others breaching the disclosure requirements will be able to rely on the findings of the MMT to take civil actions seeking compensation.

### SFC'S CONSULTATION SERVICE

The SFC will provide a consultation service for an initial period of 2 years to assist listed companies with regard to the statutory disclosure requirements.

A copy of the Government's consultation conclusions can be found [here](#) and a copy of the SFC's consultation conclusions can be found [here](#).

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# Client Alert.

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