

WEBINAR: RESPONSIBILITIES OF HKEX LISTCO DIRECTORS

Part I: Directors' Duties and Liability for Breaching Listing Rule Obligations

24 AUGUST 2020

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1

Common Law and
HK Legislation

2

The Listing Rules

3

The Takeovers
Code

4

Declaration and
Undertaking

5

Guide on Directors'
Duties

MAJOR SOURCES OF DIRECTORS' OBLIGATIONS

Obligation to Ensure Compliance with the Listing Rules

c. cooperate in any investigation conducted by the Listing Division and/or the Listing Committee of the Exchange

a. comply to the best of his ability with the Main Board Rules and use his best endeavours to ensure that the listed issuer complies with the Main Board Rules

b. comply to the best of his ability, and use his best endeavours to ensure the listed company's compliance with the requirements of:

- the Companies Ordinance, the Companies (Winding up and Misc. Provisions) Ordinance;
- Parts XIVA and XV of the SFO;
- the Takeovers Code
- The Code on Share Buy-backs; and
- all other relevant securities laws and regulations in Hong Kong

DIRECTORS' FIDUCIARY DUTIES AND DUTIES OF SKILL, CARE AND DILIGENCE

Rule 3.08:

- a. act honestly and in good faith in the interests of the company as a whole;
- b. act for a proper purpose;
- c. be answerable to the listed issuer for the application or misapplication of its assets;
- d. avoid actual and potential conflicts of interest and duty;
- e. disclose fully and fairly his interests in contracts with the listed issuer; and
- f. apply such degree of skill, care and diligence as may reasonably be expected of a person of his knowledge and experience and holding his office within the listed issuer.



SECTION 465(2) COMPANIES ORDINANCE (CAP.622)

The standard of care, skill and diligence which would be exercised by a reasonably diligent person with:

- a. the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company (**the objective test**); and
- b. the general knowledge, skill and expertise that the director has (**the subjective test**).



CASE STUDY

MBLR 3.08(f) - every director must, in the performance of his duties as a director, apply such degree of skill, care and diligence as may reasonably be expected of a person of his knowledge and experience and holding his office within the company

23 May 2017 - Asia Resources Holdings Limited announced agreement to acquire 67% stake in water mine business for HK\$244m

Relevant Factors:

- (1) target had not commenced business
- (2) bottled water business was new business to the company
- (3) no directors had experience in this type of business

CONSEQUENCES OF NON-COMPLIANCE WITH THE MAIN BOARD RULES

Private reprimand

Public criticism

Public censure

Reporting to SFC

Remedial action

Refrain from taking action



CONSEQUENCES OF NON-COMPLIANCE (CONT.)

MAIN BOARD RULE 6.01(1)

If the Exchange considers the listed company failed in a material manner to comply with the Main Board Rules, the Exchange may suspend dealings in the company's securities or cancel the listing of the company's securities

S.384 SFO

Criminal offence to intentionally or recklessly provide any information which is false or misleading in a material particular in any public disclosure document filed with the Exchange or SFC. (*max penalty of 2 years' imprisonment and a fine of HK\$1m*).

S.214 SFO

Make orders disqualifying a person from being a director of any company for up to 15 years if he is found to be wholly or partly responsible for the misconduct of a company's affairs.

EXCHANGE PROPOSAL TO INCREASE DISCIPLINARY POWERS

Present Powers

Exchange can issue a PII statement for "wilful" or "persistent" failure by a director in discharging responsibilities under MBLR 2A.09(7)

Proposal

reduce criteria for making a PII statement by -

- (a) lowering existing threshold
- (b) clarify PII statement can be made after an individual no longer holds office with the listed co.
- (c) widen application to members of senior management and directors of listed co.

be able to direct follow-on actions at the same time as issuing statement against the individual,

be able to publicly issue a "Director Unsuitability Statement"



MAIN BOARD RULE 3.20

- directors of a listed company must inform the Exchange as soon as reasonably practicable after their appointment of the following contact information: phone number, facsimile number, email, residential address, contact address.
- for so long as a person remains a director of the company and for 3 years after ceasing to be a director, he must inform the Exchange of any change to his contact information as soon as reasonably practicable and within 28 days of any change

MAIN BOARD RULE 3.09A

In accepting to be a director of a listed company, directors will be considered to have:

- irrevocably appointed the listed company as their agent (for as long as they remain directors of the listed issuer) for receiving on their behalf any correspondence from and/or service of notices and other documents by the Exchange; and
- authorised the disclosure of any of the directors' personal particulars to members of the Listing Committee and, with the approval of the Chairman or Deputy Chairman of the Exchange, to such other persons, as the Executive Director of Listing may from time to time think fit.

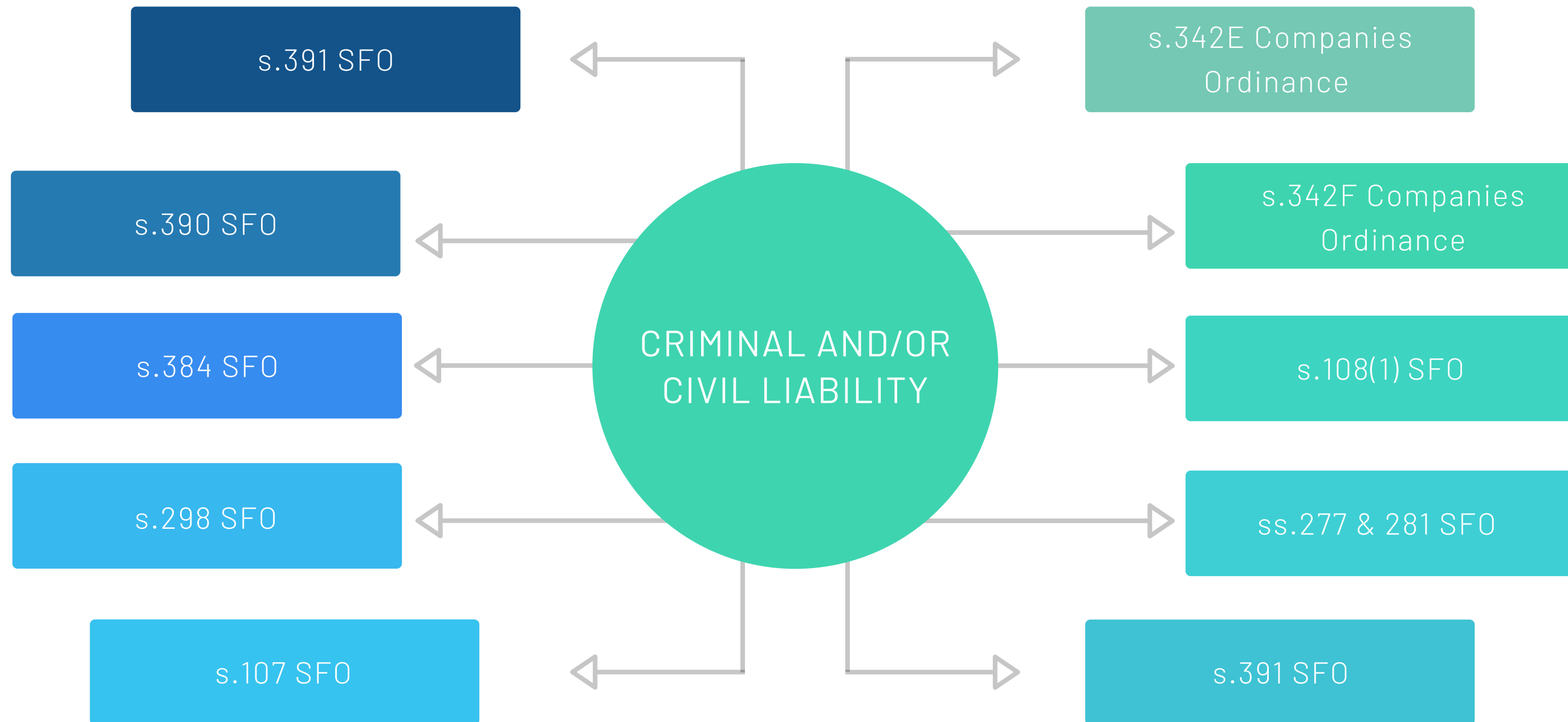




DIRECTORS' LIABILITY FOR MISSTATEMENTS IN PROSPECTUS - RESPONSIBILITY STATEMENT

"the directors, having made all reasonable enquiries confirm that to the best of their knowledge and belief the information contained in this document is accurate and complete in all material respects and not misleading or deceptive, and there are no other matters the omission of which would make any statement herein or this document misleading."

DIRECTORS' LIABILITY FOR MISSTATEMENTS IN THE PROSPECTUS





SECTION 213

s.213 allows the SFC to apply to the court of first instance for various orders where a person has contravened any provision of the SFO or prospectus regime in Companies Ordinance

provides compensation through:

- (1) restoration orders
- (2) orders requiring defendants to pay the difference between value of shares on day of transaction and actual transaction price

s.213 offers route to establish criminal liability for offences such as s.342F of the Companies Ordinance which must be proved "beyond reasonable doubt" and require the establishment of intent or recklessness

CASE STUDY: QUNXING PAPER HOLDINGS

1

listed on HKEx in 2007 and raised further funds via open offer of new shares and issue of unlisted warrants in Jan 2011

2

listed Group's sales had been materially overstated in IPO prospectus, annual results and results announcements between 2007 - 2011

3

found to have breached:

(1) ss.277 and 298 SFO

(2) s.384 SFO

(3) s.342F Companies Ordinance

4

ordered to pay HK\$1.42 bn to shareholders and holders of unlisted warrants

CASE STUDY: PME GROUP LIMITED

1

CONVICTION

convicted under s.384 for providing false or misleading information to HKEx in 3 announcements published in response to HKEx enquiries regarding increase in share price

2

MATERIAL TRANSACTION

announcements were false and misleading as the company was at the time taking steps to acquire around 50% of a HKEx-listed company

3

FINE

PME was fined HK\$60,000

RESTRICTIONS ON DISCLOSURE OF MATERIAL INFORMATION TO ANALYSTS

IS IT A PROSPECTUS?

- sole document by which the company sells its shares in the Hong Kong IPO
- additional documents by which securities are offered to the public could be a "prospectus" under HK Law

IS IT MATERIAL INFORMATION?

- is the information material to an investor in forming a valid and justifiable opinion of the company and its financial condition and profitability?

WHAT INFORMATION IS COVERED?

- any information provided to an analyst, directly or indirectly, formally or informally, in writing or verbally
- communications in a meeting, during a presentation, site visit, interview or in any other context

CONSEQUENCES?

- any untrue statement may give rise to criminal / civil liability; and
- directors must take personal liability for the truthfulness, accuracy and completeness of any information the company may be compelled to insert into the prospectus

DISCLOSURE OF PRICE SENSITIVE INFORMATION (PART XIVA OF THE SFO)

- objective test in determining whether information is "inside information"
- disclosure obligation
- obligation to ensure proper safeguards
- personal liability of directors / officers
- safe harbours
- SFC investigative powers and MMT proceedings
- MMT civil sanctions
- compensation to those who have suffered financial loss as a result of the breach

DEFINITION OF INSIDE INFORMATION (S.370A SFO)

Specific information that:

a. is about -

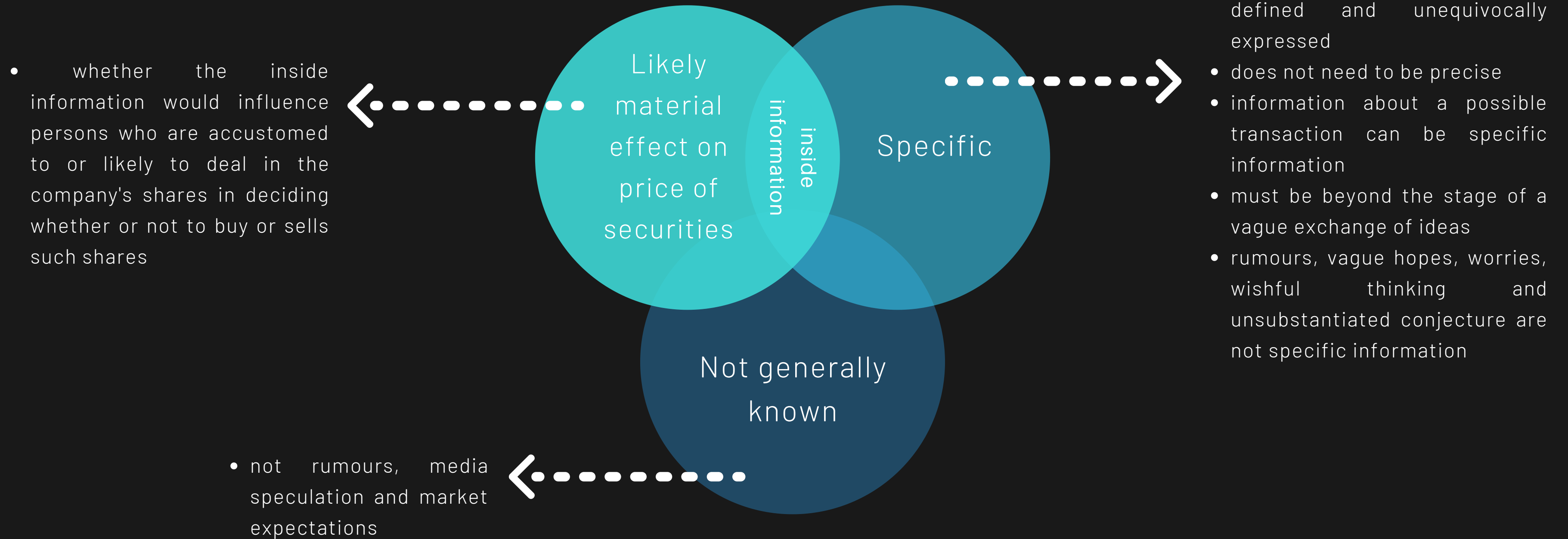
i. the company;

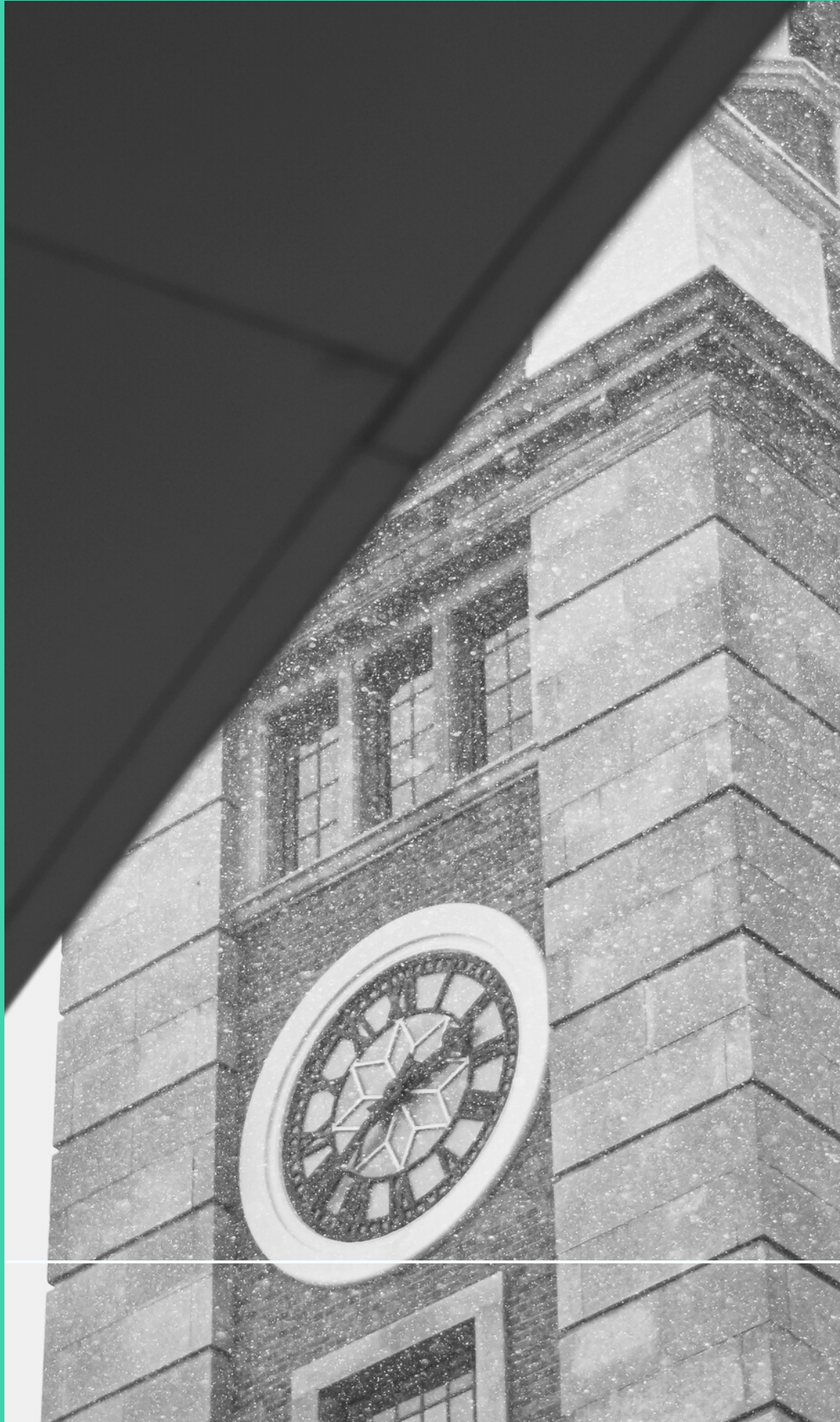
ii. a shareholder or officer of the company; or

iii. the listed securities of the company or their derivatives

b. is not generally known to the persons who are accustomed or would be likely to deal in the listed securities of the company but would if generally known to them be likely to materially affect the price of the listed securities.

KEY ELEMENTS OF THE DEFINITION





TIMING OF DISCLOSURE (S.307B(1)&(2) SFO)

Inside information has come to the company's knowledge if:

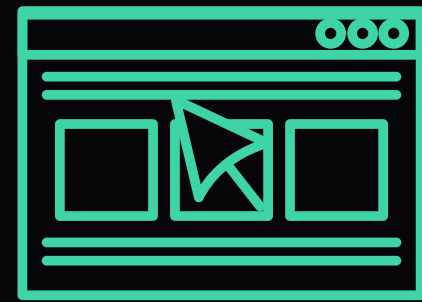
- a. the inside information has, or ought reasonably to have, come to the knowledge of an officer of the corporation in the course of performing functions as an officer of the company; and
- b. a reasonable person, acting as an officer of the company, would consider that the information is inside information in relation to the company.

KEY DEFINITIONS:

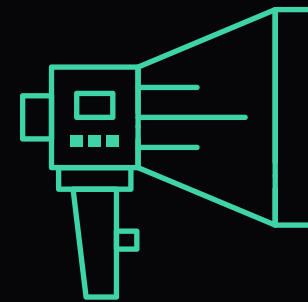
"as soon as reasonably practicable" - immediately take all steps that are necessary in the circumstances to disclose the information to the public

"officer" - director, manager, secretary or any other person involved in a company's management

MANNER OF DISCLOSURE (LISTING RULE 2.07(C))



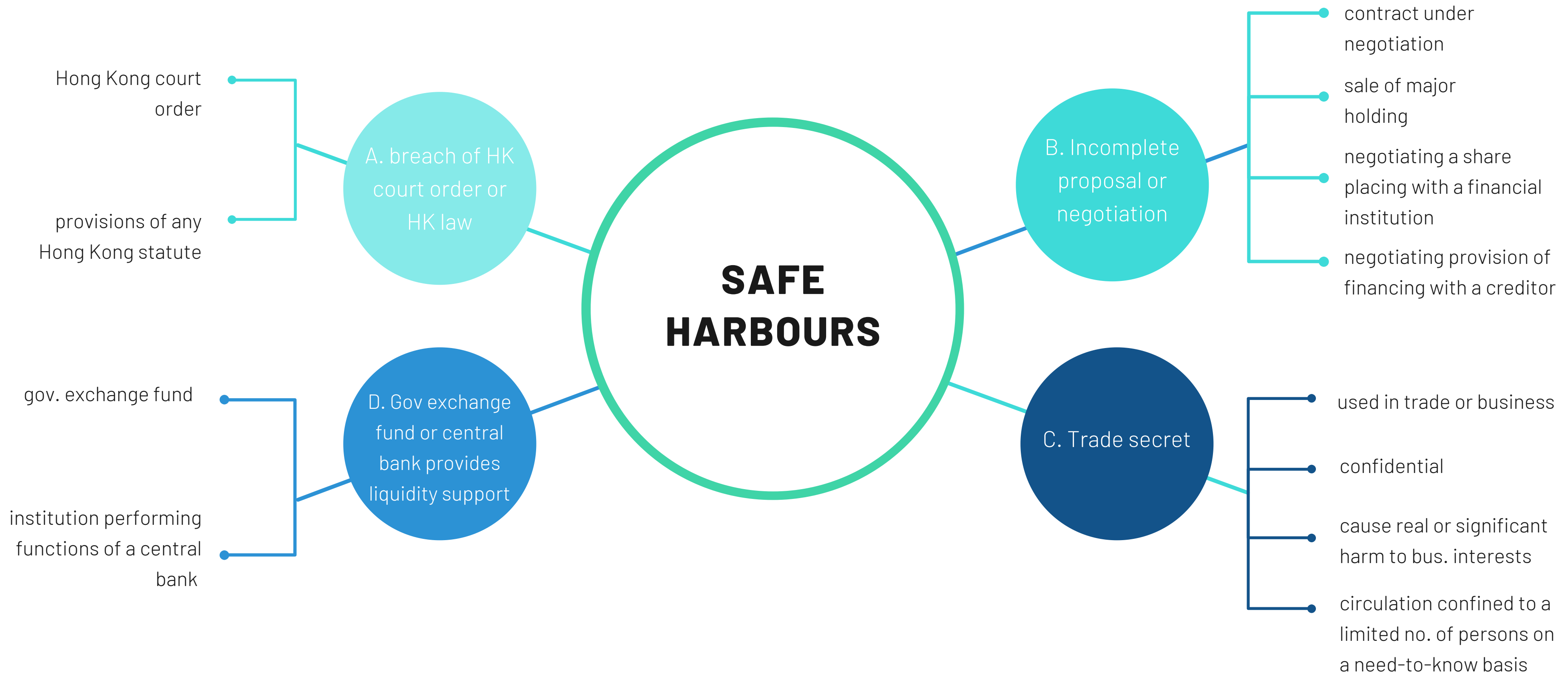
Publication on Exchange website (fulfills s.307C(1))



Press release, press conference, announcement on website



Disclose at the same time as it is released to overseas markets

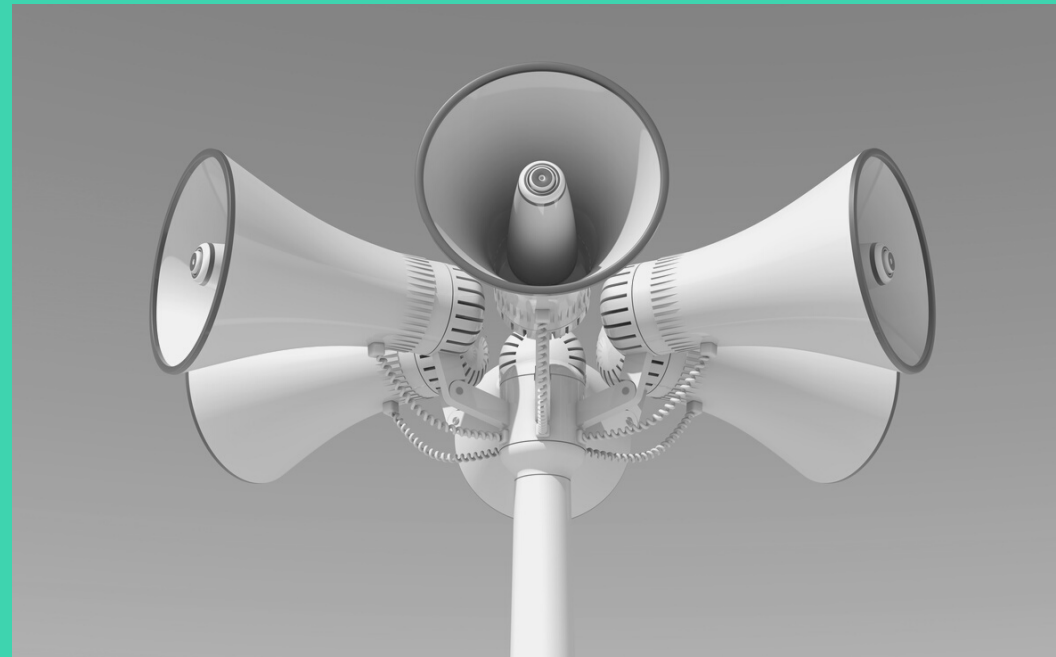


CONDITION OF CONFIDENTIALITY



ONLY AVAILABLE IF AND SO LONG AS:

- a. the company takes reasonable precautions for preserving the confidentiality of the information; and
- b. the confidentiality of the information is preserved



IF CONFIDENTIALITY IS LOST:

- safe harbour will cease to be available
- company must disclose the inside information as soon as possible



NO BREACH OF DISCLOSURE REQUIREMENT IF:

- a. has taken reasonable measures to monitor the confidentiality of the information in question; and
- b. made disclosure as soon as reasonably practicable, once it became aware that the confidentiality of the information had not been preserved

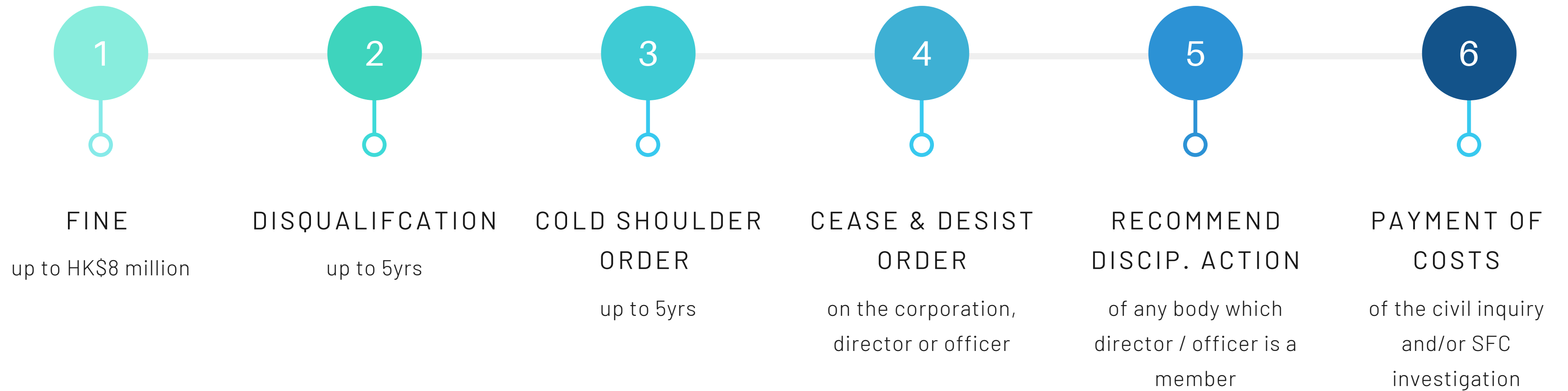
LIABILITY OF OFFICERS (S.307G SFO)

a. the breach resulted from the officer's intentional, reckless or negligent conduct; OR

An officer will be in breach of the disclosure obligation if the listed corporation has breached the obligation
AND:

b. the officer has not taken all reasonable measures to ensure that proper safeguards exist to prevent the breach

MMT SANCTIONS



CIVIL LIABILITY - PRIVATE RIGHT OF ACTION (S.307Z SFO)

- The company or officer will be liable to pay damages provided it is fair, just and reasonable that it/he should do so
- MMT determination that a breach took place or identifying a person as being in breach of the requirement will be admissible in evidence
- Courts may impose an injunction in addition to or in substitution for damages



CASE STUDIES

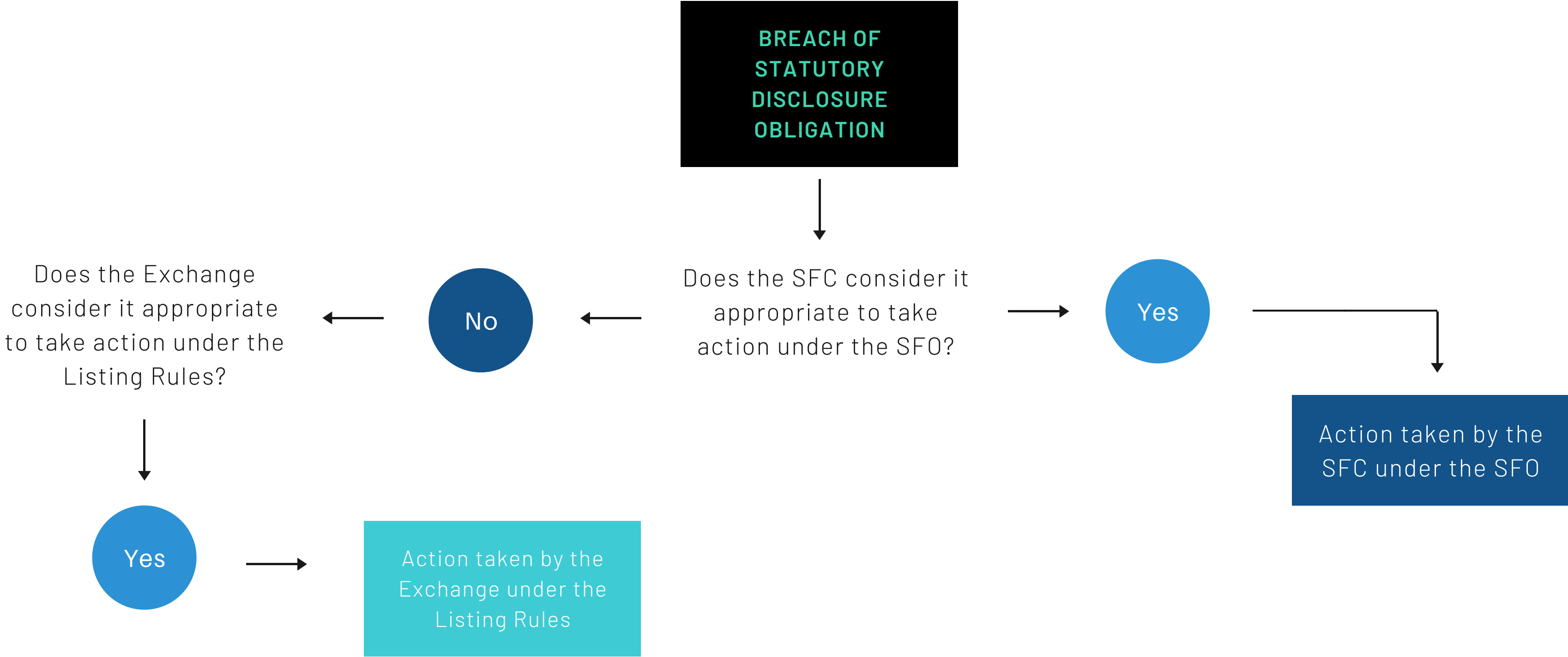


Proceedings brought by SFC against Fujikon and its Chairman/CEO/Executive Director and CFO/Company Secretary/Executive Director for late disclosure of inside information



Proceedings brought by Magic Holdings and its nine directors for failure to disclose inside information as soon as reasonably practicable

ROLE AND DUTIES OF THE SFC AND THE EXCHANGE






OBLIGATION TO AVOID FALSE MARKET (MBLR 13.09(1))

- company must announce necessary information to avoid a false market as soon as reasonably practicable (after consultation w/ the Exchange)
- company must contact the Exchange as soon as reasonably practicable if it believes there is likely to be a false market in its securities



OBLIGATION TO RESPOND TO THE EXCHANGE'S ENQUIRY (MBLR 13.10)

- company must respond promptly to the Exchange's enquiries by either:
 - a. providing / announcing relevant info; or
 - b. issuing an announcement that directors are not aware of any relevant info / any inside information that needs to be disclosed under the SFO

A dark, low-angle photograph of a modern building facade with a large bull sculpture in the foreground. The building has a grid-like pattern of windows and panels. The bull sculpture is in the lower left, facing right. The overall tone is dark and moody.

"This announcement is made at the request of the Stock Exchange of Hong Kong Limited.

We have noted [the recent increases/decreases in the price [or trading volume] of the [shares/warrants] of the Company] or [We refer to the subject matter of the Exchange's enquiry]. Having made such enquiry with respect to the Company as is reasonable in the circumstances, we confirm that we are not aware of [any reasons for these price [or volume] movements] or of any information which must be announced to avoid a false market in the Company's securities or of any inside information that needs to be disclosed under Part 14A of the Securities and Futures Ordinance.

This announcement is made by the order of the Company. The Company's Board of Directors collectively and individually accept responsibility for the accuracy of this announcement."

TRADING HALTS OR SUSPENSION (MBLR 13.10A)

Company must request a trading halt or suspension if an announcement cannot be made where:

1

a company has information which must be disclosed under MBLR 13.09;

2

a company reasonably believes that there is inside information which must be disclosed under Part XIVA SFO; or

3

inside information may have been leaked which is the subject of an application to the SFC for a waiver from compliance with the disclosure obligation or is exempt from the disclose obligation

The Exchange can direct a trading halt where:

1

there are unexplained movements in price or trading volume or a false market has developed and the company's authorised rep cannot be immediately contacted to confirm the company is not aware of any relevant matter;

2

the company delays issuing an announcement in respect to enquiries from the Exchange under MBLR 13.10; or

3

there is uneven dissemination or leakage of inside information in the market giving rise to an unusual movement in the price or trading volume of the company's listed securities