SECURITIES AND FUTURES COMMISSION
證券及期貨事務監察委員會

SFC
證監會

Consultation Paper on the Draft Guidelines on Disclosure of Inside Information

March 2010

Consultation

This consultation document invites public comments on the draft **Guidelines on Disclosure of Inside Information** ("**Guidelines**") which the Securities and Futures Commission ("**SFC**") proposes to issue under section 399 of the Securities and Futures Ordinance (Cap. 571) ("**SFO**").

Introduction

1. The SFC's proposed issue of the Guidelines is related to the Government's proposals to give statutory backing to the obligation on listed corporations to disclose price sensitive information.

2. To help market participants better understand the Government's proposals, the SFC proposes to issue the Guidelines to illustrate how the statutory disclosure requirements would operate in practice and what the compliance issues are. A copy of the draft Guidelines, attached as **Appendix** to this document, is now released for public consultation.

3. This document should be read in conjunction with the "Consultation Paper on The Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations" published by the Financial Services and Treasury Bureau concurrently.

4. The SFC invites interested parties to submit written comments on the draft Guidelines no later than 28 June 2010. Any person wishing to comment should provide details of any organisation whose views they represent. In addition, persons suggesting alternating approaches are encouraged to submit proposed text to be incorporated into the draft Guidelines.

Background to the Guidelines

5. The Guidelines seek to provide guidance to assist listed corporations to comply with their obligations to disclose price sensitive information under the statutory disclosure requirements.

6. Under the Government's proposals, a listed corporation is obliged to disclose to the public as soon as practicable any "price sensitive information" that has come to the knowledge of the listed corporation. In defining "price sensitive information", it is proposed that the definition of "price sensitive information" will replicate the definition of "relevant information" in section 245 of the SFO that specifies the information that the insider dealing regime in the SFO prohibits a person from using when dealing in the securities of a listed corporation. It is proposed that the SFO will use the term "**inside information**" to refer to "price sensitive information" that a listed corporation needs to disclose.

7. As the definition of the new term "inside information" is the same as that of "relevant information" used in section 245 of the SFO in connection with insider dealing, the Guidelines quote the decisions of the tribunals in Hong Kong with regard to the meaning of "relevant information". The decisions of the tribunals in relation to insider dealing, and "relevant information" are relevant for the purposes of determining what constitutes "inside information" and may assist in determining when an obligation to disclose information arises under the statutory disclosure regime.

8. Although the Guidelines summarise the key aspects of what has been viewed by the tribunals in Hong Kong as constituting "relevant information", it is important to recognise that the set of circumstances or events will not be the same in each case and every case turns on its own facts. Understanding the principles underlining the obligations will help listed corporations and their officers to comply with the disclosure requirements. The summary of guidance is not intended to be exhaustive and may not represent the latest legal authority.

9. The Guidelines explain the circumstances under which a listed corporation may delay the disclosure of inside information and how the safe harbours would operate in different circumstances. To clarify issues that may be raised by market participants, the Guidelines provide illustrative examples and discuss issues on particular situations and circumstances.

10. In preparing the Guidelines, we have made reference to the guidance issued in the European Union, the United Kingdom and Australia as to the operation of the disclosure regime in the respective markets to ensure that the proposed Guidelines are in line with international practices.

Other matters

11. Please note that the names of the commentators and the contents of their submissions may be published, in whole or in part, on the SFC's website and in other documents to be published by the SFC. In this connection, please read the Personal Information Collection Statement attached to this consultation document.

12. You may not wish your name and/or submission to be published by the SFC. If this is the case, please state that you wish your name and/or submission to be withheld from publication when you make your submission.

13. Written comments may be submitted as follows:

By mail:	The Securities and Futures Commission 8/F Chater House 8 Connaught Road Central Hong Kong Attention: Corporate Finance Division
By fax to:	(852) 2810-5385
By online submission at:	http://www.sfc.hk
By e-mail to:	cfdconsult@sfc.hk

Personal information collection statement

1. This Personal Information Collection Statement ("**PICS**") is made in accordance with the guidelines issued by the Privacy Commissioner for Personal Data. The PICS sets out the purposes for which your Personal Data[1] will be used following collection, what you are agreeing to with respect to the Commission's use of your Personal Data and your rights under the Personal Data (Privacy) Ordinance (Cap. 486) ("**PDPO**").

Purpose of collection

2. The Personal Data provided in your submission to the Commission in response to this consultation paper may be used by the Commission for one or more of the following purposes:

   (a) to administer the relevant provisions[2] and codes and guidelines published pursuant to the powers vested in the Commission;

   (b) in performing the Commission's statutory functions under the relevant provisions;

   (c) for research and statistical purposes; or

   (d) for other purposes permitted by law.

Transfer of personal data

3. Personal Data may be disclosed by the Commission to members of the public in Hong Kong and elsewhere as part of the public consultation on this consultation paper. The names of persons who submit comments on this consultation paper, together with the whole or any part of their submissions, may be disclosed to members of the public. This will be done by publishing this information on the Commission website and in documents to be published by the Commission during the consultation period or at its conclusion.

Access to data

4. You have the right to request access to and correction of your Personal Data in accordance with the provisions of the PDPO. Your right of access includes the right to obtain a copy of your Personal Data provided in your submission on this consultation paper. The Commission has the right to charge a reasonable fee for processing any data access request.

Retention

5. Personal Data provided to the Commission in response to this consultation paper will be retained for such period as may be necessary for the proper discharge of the Commission's functions.

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[1] Personal Data means personal data as defined in the Personal Data (Privacy) Ordinance (Cap. 486).

[2] Defined in Schedule 1 of the SFO to mean provisions of the SFO and subsidiary legislation made under it; and provisions of Parts II and XII of the Companies Ordinance (Cap. 32) so far as those Parts relate directly or indirectly, to the performance of functions relating to prospectuses; the purchase by a corporation of its own shares; a corporation giving financial assistance for the acquisition of its own shares etc.

Enquiries

6. Any enquiries regarding the Personal Data provided in your submission on this consultation paper, or requests for access to Personal Data or correction of Personal Data, should be addressed in writing to:

The Data Privacy Officer
The Securities and Futures Commission
8/F Chater House
8 Connaught Road Central
Hong Kong

A copy of the Privacy Policy Statement adopted by the Commission is available upon request.

Appendix

Guidelines on Disclosure of Inside Information

Draft

[ ] 2010

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Introduction

1. On [ ] ("**Commencement Date**"), amendments to the Securities and Futures Ordinance ("**SFO**") came into effect to provide for a new Part IIIA under the SFO giving statutory backing to one of the most important principles in the Rules Governing the Listing of Securities ("**Listing Rules**") on the Stock Exchange of Hong Kong Limited ("**Stock Exchange**"). The provisions under Part IIIA impose a general obligation of disclosure of price sensitive, or "inside" information by listed corporations ("**corporations**")[1].

2. These Guidelines are published by the Securities and Futures Commission ("**SFC"**) under section 399 of the SFO to assist corporations to comply with their obligations to disclose inside information under Part IIIA of the SFO. However, they are not an exhaustive examination of the disclosure obligations as set out in the SFO nor can they be relied upon as an authoritative legal opinion. The obligations to disclose inside information depend upon the facts of each case and you should seek independent legal advice if you are in doubt.

3. These Guidelines provide examples and discuss issues on particular situations to illustrate the SFC's views on the operation of the provisions as set out in the SFO. They do not have the force of law.

4. As the definition of the new term "inside information" in Part IIIA of the SFO is the same as that of "relevant information" used in section 245 of the SFO in connection with insider dealing, the Guidelines have quoted the decisions of the tribunals in Hong Kong with regard to the meaning of "relevant information". The decisions of the tribunals in relation to insider dealing, and "relevant information" are relevant for the purposes of determining what constitutes "inside information" and may assist in determining when an obligation to disclose information arises under the SFO.

5. Although the Guidelines summarise the key aspects of what has been viewed by the tribunals in Hong Kong as constituting "relevant information", it is important to recognise that the set of circumstances or events will not be the same in each case and every case turns on its own facts. Understanding the principles underlining the obligations will help listed corporations and their officers to comply with the disclosure requirements. This summary is not intended to be exhaustive, is included for guidance only, and may not represent the latest legal authority.

6. The term "inside information" is used in the legislation because the provisions are concerned with information that is known to an officer, or "insider", of a corporation but not generally known to the market. The term "inside information" is also used in a similar context in the securities regulations of the European Union.

Background

7. The statutory requirements to disclose inside information are central to the orderly operation and integrity of the market and underpin the maintenance of a fair and informed market.

[1] Where depositary receipts are issued, the corporation whose shares in respect of which the depositary receipts are issued is the listed corporation for the purposes of the SFO.

8. The SFO sets out the minimum standards with which corporations are required to comply. To comply with the obligations, corporations should consider their own circumstances when deciding whether any inside information arises and how it should be disclosed properly to the public. Disclosure should be made in a manner that provides for equal, timely and effective access by the public to the information disclosed. For good corporate governance, corporations should aim at disclosing appropriate and quality information to the public on a timely and equal basis, and not at merely meeting the minimum regulatory requirements. This also makes good business sense as it has been repeatedly shown that investors give a premium rating to transparent companies.

9. The SFC acknowledges that it is important to strike an appropriate balance between encouraging timely disclosure of inside information and preventing premature disclosure of impending negotiations or incomplete proposals which might unduly prejudice a corporation's legitimate interests. In this regard, the SFO provides for appropriate safe harbours to permit a corporation to withhold the disclosure of inside information in specified circumstances.

10. From one month before the Commencement Date, the SFC will provide a consultation service to assist corporations understand how to apply the disclosure provisions. We will provide the consultation service initially for a period of 12 months and will then review whether it is necessary to continue the service for an additional period. We envisage that most questions will relate to the application of the Safe Harbours. 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's listed securities, and accordingly, is not able to offer advice to a corporation on whether a particular piece of information is inside information.

What may constitute inside information?

11. Section 101B(1) of the SFO 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*."

12. Section 101A(1) of the SFO states that " 'inside information', 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."

13. The definition of **inside information** is the same as that of "relevant information" used in section 245 of the SFO which applies to insider dealing. The term "relevant information" has been the subject of consistent and definitive interpretation by the

tribunals in Hong Kong over many years and those decisions will continue to offer guidance as to the meaning of the new term **inside information**.

14. Paragraphs 15 to 28 below summarise the key aspects of what has been viewed by the tribunals as constituting "relevant information". A list of cases handled by the Insider Dealing Tribunal and the Market Misconduct Tribunal relevant to the interpretation of "relevant information" is set out in **Appendix A**. It is important to recognise that the set of factual circumstances or events will not be the same in each case. In particular, the circumstances in which insider dealings are regarded to have taken place would be different from the context in which the obligation to disclose may arise and thus the interpretative guidance available from these decisions may not apply. Understanding the principles underlining the obligations will help listed corporations and their officers to comply with the disclosure requirements. This summary is not intended to be exhaustive.

15. There are three key elements comprised in the concept of **inside information**. They are –

    (a) the information about the particular corporation must be **specific**;

    (b) the **information must not be generally known** to that segment of the market which deals or which would likely deal in the corporation's securities; and

    (c) the information would, if so known be **likely to have a material effect on the price of the corporation's securities**[2].

Inside information must be specific information

16. Inside information must be specific information. Specific information is information which has the following characteristics –

    (a) The information is capable of being identified, defined and unequivocally expressed.

        Information concerning a company's affairs is sufficiently specific if it carries with it such particulars as to a transaction, event or matter, or proposed transaction, event or matter, so as to allow that transaction, event or matter to be identified and its nature to be coherently described and understood.[3]

    (b) The information may not be precise.

        It is not necessary that all particulars or details of the transaction, event or matter be precisely known. Information may still be specific even though it has a vague quality and may be broad which allows room, even substantial room, for further particulars[4]. For instance, information that a company is having a financial crisis would be regarded to be specific, as would contemplation of a forthcoming share placing even if the details are not known. However specific information is to be

[2] See p.34 of the IDT report dated 6 August 2009 on Harbour Ring International Holdings Limited

[3] See p.58-59 of the IDT report dated 2 April 2004 and 8 July 2004 on Firstone International Holdings Limited

[4] See p.235-236 of the IDT report dated 5 August 1995 on Public International Investments Ltd

contrasted with mere rumour, vague hopes and worries, and with unsubstantiated conjecture.[5]

(c) Information on a transaction contemplated or at a preliminary state of negotiation can be specific information but vague hopes and wishful thinking may not be specific information.

The fact that a transaction is only contemplated or under negotiation and has not yet been subjected to any formal or informal final agreement does not necessarily cause the information concerning that contemplated course of action or negotiation to be non-specific. However, vague hope or wishful thinking that a transaction will occur or come to fruition does not amount to sufficient contemplation or preliminary negotiation of that transaction.

To constitute specific information, a proposal, whether described as under contemplation or at a preliminary stage of negotiation, should have more substance than merely being at the stage of a vague exchange of ideas or a "fishing expedition". Where negotiations or contacts have occurred, there should be a substantial commercial reality to such negotiations which goes beyond a merely exploratory testing of the waters and which is at a more concrete stage where the parties intend to negotiate with a realistic view to achieving an identifiable goal.[6]

Inside information must be information that is not generally known

17. By its very nature, inside information is information which is known only to a few and not generally known to the market, the market being defined as those persons who are accustomed or would be likely to deal in the listed securities of that corporation.[7] In some instances, the investor group or class who are accustomed or would be likely to deal in the listed securities of that corporation may be a large one, comprising not only professional dealers and investors with elaborate networks for obtaining information, but also those of the investing public including small investors who deal in the particular category of stocks to which the corporation belongs.[8]

18. Even though there might be rumours, media speculation or market expectation as to an event or a set of circumstances of a corporation, these cannot be equated with information which is generally known to the market. There is a clear distinction between actual knowledge of the market about a hard fact which is properly disclosed by the corporation and speculation or expectation of what might have happened about a corporation which obviously requires proof.[9]

19. It is not uncommon that information relating to a corporation is found in press articles, analyst research reports or electronic subscription database, which may consist of published historical information, market commentary, speculation, rumour or even information leaked from various sources. However, press speculation, reports and

[5] See p.20-21 of the IDT report dated 8 September 2006 and 14 December 2006 on Asia Orient Holdings Limited

[6] See p.60-61 of the IDT report dated 2 April 2004 and 8 July 2004 on Firstone International Holdings Limited

[7] See p.70 of the IDT report dated 10 April 2000 and 15 June 2000 on Hanny Holdings Limited

[8] See p.237-238 of the IDT report dated 5 August 1995 on Public International Investments Ltd

[9] See p.258 of the IDT report dated 5 August 1995 on Public International Investments Ltd

rumours in the market cannot be contended to be information generally known to the market, even though in some cases the press reports might have a wide circulation.[10]

20. Notwithstanding the above, a piece of information is regarded as generally known if it consists of readily observable matter such as general external developments e.g. changes in commodity prices, foreign exchange rates and interest rates, outbreak of pandemic diseases and occurrence of natural disasters or general public information e.g. disclosure of interests by directors and shareholders pursuant to Part XV of the SFO.

Inside information is information that is likely to have a material effect on the price of the listed securities

21. Corporations with potential inside information need to assess promptly whether or not the information is likely to have a material price effect. It would not be sufficient to meet the test of "likely to have a material price effect" if the information is likely to cause a mere fluctuation or slight change in price. For information to constitute inside information, there must be likelihood that the information would cause a change in the price of sufficient degree to amount to a material change.[11]

22. Generally information that is likely to have a material effect on the price of the listed securities is important information concerning a corporation. But the converse is not necessarily true. Some important information or information of great interest concerning a corporation may excite comment but may not be information that would be likely to have a material effect. Similarly, some important information may be of a neutral or mixed nature that may influence some investors to buy and others to sell, but which would not be likely to affect the price either up or down to a material degree.[12]

23. The test of whether the information is likely to materially affect the price is a hypothetical one in that it has to be applied at the time the information becomes available. The exercise in determining how the general investor would behave if he is in possession of that piece of information has necessarily to be an assessment.[13]

24. It is clear that fixed thresholds of price movements or quantitative criteria alone are not a suitable means of determining the materiality of a price movement. For example, the volatility of "blue-chip" securities is typically less than that of small, less liquid stocks and "blue-chip" securities usually move within ranges narrower than those of small stocks. While a certain percentage movement for a small company stock might be seen immaterial, the same (or even lower) percentage movement if applied to a large company stock might be considered material by virtue of the stock's nature and size. In determining whether a material effect is likely to occur, the following factors should be taken into consideration –

    (a) the anticipated magnitude of the event or the set of circumstances in question in the context of the totality of the corporation's activity;

    (b) the relevance of the information as regards the main determinants of the price of the listed securities;

[10] See p.57-58 of the IDT report dated 22 February 1990 on Lafe Holdings Limited

[11] See p.58-59 of the IDT report dated 22 February 1990 on Lafe Holdings Limited

[12] See p.20 of the IDT report dated 10 March 2005 on HKCB Holding Company Ltd & Hong Kong China Ltd

[13] See p.19-20 of the IDT report dated 10 March 2005 on HKCB Holding Company Ltd & Hong Kong China Ltd

(c) the reliability of the source;

(d) market variables that affect the price of the listed securities in question (These variables could include prices, returns, volatilities, liquidity, price relationships among securities, volume, supply, demand, etc.).

25. Whilst the actual magnitude of the share movement once the information becomes publicly known indicates the extent of probable change the information might have brought about was it known to the market at the time, this evaluation is by no means conclusive. It is possible that the actual price change on the day the information is released is moderate because of the mixed impact arising from the information released and other extraneous factors or considerations. It is possible that a material price movement may have been pre-empted by the fact that the share price has already declined substantially in the period leading up to the release of the information. Care must be taken to ascertain whether and how the investors' response once the information is stripped of its confidentiality and becomes public knowledge is attributable to the information released and / or affected by other events or considerations.[14]

Management accounts

26. In the ordinary course of running the business, directors and officers are likely to possess information concerning the corporation not generally known to the market. It is therefore necessary to distinguish between information about the day-to-day activities, and on the other hand, significant events and matters which are likely to change a corporation's course or indicate that there has been a change in its course.[15]

27. Generally the mere knowledge of the likely annual or interim accounts prior to their publication or internal management accounts would not be specific information. However knowledge of substantial losses or profits made by a corporation even through 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 and every case turns on its own facts. To constitute inside information the difference between the results which the market might predict and the results the directors or officers know must be significant.[16]

28. In assessing what results the market might predict for a corporation, account must be taken of information previously disclosed by the corporation including past results, statements and any forecasts issued by the corporation. Reference should also be made to profit projections by analysts and the availability of data and information about the corporation in financial journals and publications from which a sophisticated investor may logically deduce the corporation's results. However, it would be inadvisable to consider these research reports or financial publications to be information generally known to the market because the market means "the persons who are accustomed or would be likely to deal in the listed securities of the corporation" which might include smaller investors who are unable to perform or follow professional analyses.[17]

[14] See p.59-60 of the IDT report dated 22 February 1990 on Lafe Holdings Limited

[15] See p.72-73 of the IDT report dated 10 April 2000 and 15 June 2000 on Hanny Holdings Limited

[16] See p.35-36 of the IDT report dated 23 July 1998 of Ngai Hing Hong Company Limited

[17] See p.62-70 of the IDT report dated 10 July 1997 on Chevalier (OA) International Limited

Examples of possible inside information concerning the corporation

29. There are many events and circumstances which may affect the price of the listed securities of a corporation. It is vital for the corporation to make a prompt assessment of the likely impact of these events and circumstances on its share price and decide consciously whether the event or the set of circumstances constitutes inside information that needs to be disclosed. The following are common examples of such events or circumstances where a corporation should consider whether a disclosure obligation arises.

- Changes in performance, or the expectation of the performance, of the business;
- Changes in financial condition, e.g. cashflow crisis, credit crunch;
- Changes in control and control agreements;
- Changes in directors and (if applicable) supervisors;
- Changes in directors' service contracts;
- Changes in auditors or any other information related to the auditors' activity;
- Changes in the share capital, e.g. new share placing, bonus issue, rights issue, share split, share consolidation and capital reduction;
- Issue of debt securities, convertible instruments, options or warrants to acquire or subscribe for securities;
- Takeovers and mergers (corporations will also need to comply with the Codes on Takeovers and Mergers and Share Repurchases that include specific disclosure obligations);
- Purchase or disposal of equity interests or other major assets or business operations;
- Formation of a joint venture;
- Restructurings, reorganizations and spin-offs that have an effect on the corporation's assets, liabilities, financial position or profits and losses;
- Decisions concerning buy-back programmes or transactions in other listed financial instruments;
- Changes to the memorandum and articles (or equivalent constitutional documents);
- Filing of winding up petitions, the issuing of winding up orders or the appointment of provisional receivers or liquidators;
- Legal disputes and proceedings;
- Revocation or cancellation of credit lines by one or more banks;

- Changes in value of assets (including advances, loans, debts or other forms of financial assistance);
- Insolvency of relevant debtors;
- Reduction of real properties' values;
- Physical destruction of uninsured goods;
- New licenses, patents, registered trademarks;
- Decrease or increase in value of financial instruments in portfolio which include financial assets or liabilities arising from futures contracts, derivatives, warrants, swaps protective hedges, credit default swaps;
- Decrease in value of patents or rights or intangible assets due to market innovation;
- Receiving acquisition bids for relevant assets;
- Innovative products or processes;
- Changes in expected earnings or losses;
- Orders received from customers, their cancellation or important changes;
- Withdrawal from or entry into new core business areas;
- Changes in the investment policy;
- Changes in the accounting policy;
- Ex-dividend date, changes in dividend payment date and amount of dividend; changes in dividend policy;
- Pledge of the corporation's shares by controlling shareholders; or
- Changes in a matter which was the subject of a previous announcement.

30. However, the above list of events or circumstances should not be treated as definitive in terms of meaning that the information in question, if disclosed, will have a material price effect. It is a **non-exhaustive and purely indicative** list of the type of events or circumstances which might constitute inside information. The fact that an event or a set of circumstances does not appear on the list does not mean it cannot be inside information. Nor does inclusion in the list mean that it automatically is inside information. It is the materiality of the information in question that needs to be considered. Information which is likely to materially affect the price of the securities should be disclosed.

31. Moreover, corporations should take into account that the materiality of the information in question will vary widely from entity to entity, depending on a variety of factors such as the entity's size, its course of business and recent developments, the market sentiment about the entity and the sector in which it operates. What may constitute material information to one party to a contract may be immaterial to another party. A cancellation

of credit line by a bank which is material to an entity facing liquidity problems may be immaterial to another entity which is highly liquid.

When and how should inside information be disclosed?

32. A corporation must disclose any inside information to the public *"as soon as practicable"* unless the information falls within any of the Safe Harbours as provided in the SFO. For this purpose, "as soon as practicable" means that the corporation should immediately take all necessary steps that are reasonable in the circumstances to disclose the information to the public.

33. Before the information is fully disclosed to the public, the corporation should ensure that the information is kept strictly confidential. Where the corporation believes that the necessary degree of confidentiality cannot be maintained or that confidentiality may have been breached, it should immediately disclose the information to the public.

34. If a corporation needs time to clarify the details of, and the impact arising from, an event or a set of circumstances before it is in a position to issue a full announcement to properly inform the public, the corporation should consider issuing a "holding announcement" which –

    (a) details as much of the subject matter as possible; and

    (b) sets out reasons why a fuller announcement cannot be made.

    The corporation should make a full announcement as soon as possible.

35. There are circumstances where confidentiality has not been maintained and the corporation is not able to make an announcement, be it a full announcement or a holding announcement. In such cases, the corporation should consider applying for a suspension of trading in its securities until disclosure can be made. The fact that trading in the securities of the corporation is suspended in no way lessens the obligations of a corporation to disclose inside information to the public as soon as practicable.

36. Section 101C(1) of the SFO states that –

    "*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*."

37. Section 101C(2) of the SFO states that –

    "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."

38. To fulfil the obligation to disclose to the public, the corporation should disclose inside information to the market as a whole so that all users of the market have equal and simultaneous access to the same information.

39. The SFC considers the disclosure obligation to ensure that the public has equal, timely and effective access to the information is only likely to be satisfied if the corporation

disseminates the information via the electronic publication system operated by the Stock Exchange in a manner specified by the Stock Exchange.

40. Dissemination of the information via other means such as issuing a press release through news or wire services, holding a press conference in Hong Kong and / or posting an announcement on its own website, is not regarded to be sufficient to satisfy the obligation to ensure equal, timely and effective access by the public to the information.

Responsibility for compliance and management controls

41. Section 101B(2) of the SFO states that –

"*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*."

42. Section 101G(1) of the SFO 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."*

43. Although the disclosure obligation rests with the corporation, the corporation is a legal entity which cannot act on its own. The corporation can only act through its "controlling mind", which encompasses its officers. An "officer" means a director, manager or secretary of, or any other person involved in the management of, the corporation. Therefore the corporation is considered to have knowledge of the inside information when one or more of its officers come into possession of that information in the course of performing functions as officers of the corporation.

44. 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. This would require a timely and structured flow to the Board of information arising from the development or occurrence of events and circumstances so that the Board can decide whether disclosure is necessary.

45. In the context of ensuring compliance with the obligation to disclose inside information in relation to any material changes in the corporation's financial condition, in the performance of its business or in its expectation as to its performance, the Board should establish and maintain appropriate and effective reporting procedures which ensure a structured flow of financial and operational data necessary for such an appraisal.

46. It is ultimately the responsibility of the officers to ensure that the corporation complies with the disclosure obligation. Officers are obliged to take all reasonable measures to prevent the corporation from breaching the statutory disclosure requirement, which would include the creation and maintenance of appropriate internal control and reporting systems. If a breach commissioned by the corporation is attributable to the failure to take all reasonable measures by, or to any recklessness or negligence of, any officers, the officers concerned would also be liable.

Safe Harbours that allow non-disclosure of inside information

47. To strike an appropriate balance between requiring timely disclosure of inside information and preventing premature disclosure, the SFO provides for Safe Harbours which permit a corporation to withhold disclosure of inside information under specified circumstances. Section 101D(1) of the SFO sets out the Safe Harbours –

"*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 section101E(2) in relation to the waiver is complied with."

48. The first and second requirements of the Safe Harbours are that the corporation must take reasonable measures to preserve the confidentiality of the information and that the confidentiality of the information is preserved. In this regard, the corporation needs to ensure that knowledge of information is restricted to those who need to have access to it and that recipients of the information are aware that the information is confidential and recognise their resulting obligations. If the corporation subsequently becomes aware that the information has not been kept confidential or there has been a leak, whether intentionally or inadvertently, any of these conditions will not be fulfilled and any Safe Harbour will no longer apply.

49. If there are unexplained changes to the share price of the corporation's securities or if there are comments about the corporation in the media or analysts' reports, this may indicate that confidentiality has been lost. It would be more likely to indicate that confidentiality has been lost where comments about the corporation or its proposals or events are significant and credible and the details are reasonably specific or the market moves in a way that appears to be referrable to such comments.

50. Confidentiality is not regarded to be lost because information is given to the corporation's advisers or a person with whom the corporation is negotiating if it is given on the basis that restricts its use to the stated purpose and the recipient owes the corporation a duty of confidentiality. However, any release of the information from any source, however inadvertent, will mean that confidentiality is lost and the Safe Harbour no longer applies.

51. If a corporation has availed itself of any of the Safe Harbours, it should keep under review whether confidentiality of the information has been maintained. If confidentiality has been lost, the Safe Harbour no longer applies and the corporation must disclose the inside information immediately. The corporation should normally prepare a draft announcement (albeit a holding announcement) to be kept updated ready for publication immediately if it becomes apparent that confidentiality is no longer maintained. In addition, the corporation should consider recording the reasons for, and the steps taken in, applying the Safe Harbour which may be to the advantage of the corporation if subsequently any such information is required to be provided.

52. The third requirement of the Safe Harbours is that the information is of the type in one or more of the following categories. If the information is not, or if it loses that character, then the requirement is not satisfied.

53. ***Where disclosure is prohibited by law***. No statutory disclosure is required for information which it would be a breach against an order made by a Hong Kong court or any provisions of other Hong Kong statutes to disclose. For example, under section 30 of the Prevention of Bribery Ordinance, it is unlawful for a person to disclose details of an investigation of the Independent Commission Against Corruption, except for disclosure matters which are carved out from that prohibition. If a corporation or any of its officers is subject to an investigation by the ICAC and such investigation constitutes inside information, disclosure would not be required to the extent that it is prohibited statutorily. Nonetheless, disclosure of other details of the investigation which would not contravene the statute is still required.

54. The Safe Harbour does not apply to information the disclosure of which is prevented by a contractual duty. A corporation cannot justify not making the disclosure by virtue of the terms of an agreement which require the parties entering into the agreement not to disclose information about the agreement or the transaction that is the subject of the agreement. The terms and conditions of a contract do not override the requirements of the statutes.

55. ***Where information concerns incomplete proposal or negotiation.*** No statutory disclosure is required for information concerning impending negotiations or incomplete proposals where the outcome or normal pattern of these negotiations or developments may be prejudiced if the information is disclosed prematurely. The following are certain examples: -

- when a contract is being negotiated but has not been finalised where a premature disclosure may threaten the loss of the contact to another party;

- when a corporation decides to sell a major holding in another corporation and the deal may fail with premature disclosure;

- when a corporation is negotiating a share placing with a financial institution and the deal will be jeopardised if disclosed prematurely; or

- when a corporation is negotiating the provision of financing with a creditor where a public disclosure may undermine the conclusion of such negotiation.

56. Where a corporation in financial difficulty or with worsening financial condition is in the course of negotiations with potential interested parties for funding, the Safe Harbour provides relief for disclosure in respect of the subject negotiations and the status of progress of those negotiations. However the Safe Harbour does not allow the corporation to withhold disclosure of any material change in its financial position or performance merely on the basis that its position in negotiations or subsequent negotiations may be jeopardised by the disclosure of its financial condition.

57. ***Where information concerns a trade secret***. No statutory disclosure is required for information that is a trade secret where the corporation needs to protect its confidential information used in a trade or business which if disclosed to a competitor would be liable to cause real or significant harm to the corporation's business interests. Trade secrets may concern inventions, manufacturing processes or customer lists. For example, a corporation with a new pharmaceutical product may withhold disclosure until after completing the registration of the patent for the product.

58. ***Where information concerns the provision of liquidity support***. No statutory disclosure is required for information concerning the provision of liquidity support from the Exchange Fund of the Government or from a central bank, including an overseas central bank. The liquidity support may be provided to the corporation or, if the corporation is a member of a group of companies, to any other member of the group. The entity receiving the liquidity support is a banking institution which may be registered in or outside Hong Kong.

59. ***Where disclosure is waived by the SFC***. There are circumstances that disclosure of the information is prohibited under the legislation, or orders imposed by a court, of an overseas jurisdiction especially where the corporation or certain of its subsidiaries are incorporated or operate outside Hong Kong. In these cases, the SFC may, on application by a corporation, grant an exemption to waive disclosure of the information if it considers appropriate to do so. An exemption granted may be unconditional or subject to specified conditions. No statutory disclosure is required for information for which an exemption has been granted and any conditions imposed in relation to the exemption have been complied with.

60. An application to the SFC to exempt disclosure of the information must be made in writing. The application should contain a clear explanation of why the exemption is requested in the circumstances and include all relevant details and information necessary for the SFC to consider the matter. Where applicable, the application should include an appropriate legal opinion to set out all relevant issues. The application should be accompanied by a fee which is payable pursuant to the Securities and Futures (Fees) Rules.

Guidance on particular situations and issues

Dealing with rumours

61. Corporations are under no obligation to respond to press speculation or market rumours. This notwithstanding, the existence of speculation or rumours about a corporation might indicate that matters intended to be kept confidential have leaked. In particular, where press speculation or market rumours are largely accurate and the information underlying the speculation or rumours constitutes inside information, the corporation should disclose the information as soon as practicable. Accurate and extensive rumours and media speculation are unlikely to represent information that is generally known and accordingly disclosure by the corporation is necessary.

62. Although a corporation is generally not obliged to respond to speculation or market rumours, the Stock Exchange may require a corporation to provide disclosure or clarification beyond that required by the SFO under the Listing Rules, for example the issue of a negative announcement to confirm that the rumour is false. The fact that the corporation issues an announcement as requested by the Stock Exchange would not in itself imply that the corporation has failed to meet the disclosure obligation for inside information. If a corporation wishes to respond to rumours, the corporation should do so by making a formal announcement, rather than making a remark to a single publication or by way of a press release. This will ensure that the whole market is equally and properly informed.

Internal matters

63. A corporation may consider internal issues in its day-to-day running which may involve matters of supposition or indefinite nature and where premature disclosure of the information may be more misleading than informative. Such information is not specific information. These might include, for example, the development of a new technology, the planning of a major redundancy program or the possibility for a substantial price cut in its products. The consideration of these matters with hypotheses or scenarios would not immediately trigger the disclosure duty. However, once these matters become specific or definite and are not within any of the Safe Harbours, the corporation should make an announcement as soon as practicable.

64. Similarly, a corporation may from time to time generate internal reports for management purposes. For example, an internal marketing research report may indicate that a new product to be launched by a competitor may pose a significant challenge that needs to be addressed as one possible outcome would be a significant loss of sales. The mere possibility that without a successful response the corporation would face a serious decline in profits does not automatically trigger an obligation to disclose. However, if after time the competitor's new product has significantly reduced sales, then the fact of the change in trading performance, shown by regular performance monitoring, may constitute inside information.

Corporation listed on more than one exchange

65. If the securities of a corporation are listed on more than one stock exchange, the corporation should synchronise the disclosure of inside information as closely as possible in all markets in which the securities are listed. In general, the corporation should ensure that inside information is released to the public in Hong Kong at the

same time it is given to the overseas markets. If inside information is released to another market when the market in Hong Kong is closed, the corporation should issue an announcement in Hong Kong before the Hong Kong market opens for trading.

66. If necessary, the corporation may request a suspension of trading in its securities pending the issue of the announcement in Hong Kong.

Analysts' reports

67. A corporation should ensure that only public information is given when answering an analyst's questions or reviewing an analyst's draft report. It is inappropriate for a question to be answered, or draft report corrected, if doing so involves providing inside information. When analysts visit the corporation, care should be taken to ensure they do not obtain inside information.

68. In some circumstances, for example where a corporation's business is complex and / or comprised of many different divisions, it is possible that analysts may draw on out of date data, or misread or misinterpret historical information. In such cases it is appropriate for a corporation to clarify historical information and correct any factual errors in analysts' assumptions which are significant to the extent that they may mislead the market, provided any clarification is confined to drawing the analyst's attention to information that has already been made available to the market. If the corporation is aware of inside information that would correct a fundamental misconception in the report, it should consider making public disclosure of such information and at the same time correcting the report.

69. It is important that no analyst, investor or journalist should receive a selective release of inside information.

Publications by third parties

70. Publications by industry regulators, government departments, rating agencies or other bodies may affect the price of, or market activity in, the securities of the corporation. If such events when they become public knowledge are expected to have significant consequences directly affecting the corporation this may be inside information that should be disclosed by the corporation with an assessment of the likely impact of those events.

External developments

71. Corporations are not expected to disclose general external developments, such as foreign currency rates, the market price of commodities or changes in a taxation regime. However, if the information has a particular impact on the corporation this may be inside information that should be disclosed by the corporation with an assessment of the likely impact of those events.

In the course of preparing periodic and other structured disclosures

72. A corporation may be required in a number of circumstances to prepare disclosure in certain prescribed structured formats pursuant to the relevant laws and listing rules, for example, regular periodic financial reports, circulars and listing documents. In the course of preparing these prescribed disclosure documents, a corporation may become aware of inside information previously unknown to the directors and officers, or

information in respect of a matter or financial trend which may have crystallised into inside information.

73. A corporation should be aware that inside information which requires disclosure may emerge during the preparation of these disclosures, in particular periodic financial information, and that the corporation cannot defer releasing inside information until the prescribed structured document is issued. Separate immediate disclosure of the information is necessary.

Appendix A

List of cases handled by the Insider Dealing Tribunal and the Market Misconduct Tribunal

The following is a list of cases handled by the Insider Dealing Tribunal and the Market Misconduct Tribunal. Details of these cases can be found on the Insider Dealing Tribunal website at http://www.idt.gov.hk/ and the Market Misconduct Tribunal website at http://www.mmt.gov.hk/

1) Harbour Ring International Holdings Limited (currently known as Hutchison Harbour Ring Limited) – Report of the IDT dated 6 Aug 2009

2) Vanda Systems and Communications Holdings Limited – Report of the IDT dated 26 Mar 2007

3) Dransfield Holdings Limited (later renamed China Merchants DiChan (Asia) Limited; now known as Pearl Orient Innovation Limited) – Report of the IDT dated 22 Dec 2006

4) Siu Fung Ceramics Holdings Limited – Report dated 18 Mar 2004 (1st Report), 25 Oct 2004 (2nd Report), 14 Mar 2006 (3rd Report) & 2 Nov 2006 (4th Report)

5) Asia Orient Holdings Limited – Report of the IDT dated 8 Sep 2006 & 14 Dec 2006

6) Cheong Ming Investments Limited (formerly Cheong Ming holdings Limited) – Report of the IDT dated 3 Aug 2006 & 14 Sep 2006

7) Easy Concepts International Holdings Limited (subsequently renamed as 21CN CyberNet Corporation Limited and known as CITIC 21CN Company Limited) and Easyknit International Holdings Limited – Report of the IDT dated 19 Jan 2006

8) Gilbert Holdings Limited – Report of the IDT dated 11 May 2005 & 15 Dec 2005

9) HKCB Holding Company Ltd & Hong Kong China Ltd (now renamed Lippo China Resources Ltd) – Report of the IDT dated 10 Mar 2005 (1st part)

10) Chinney Alliance Group Limited – Report of the IDT dated 24 Dec 2004

11) Firstone International Holdings Limited – Report of the IDT dated 2 Apr 2004 & 8 Jul 2004

12) Stime Watch International Holding Limited – Report of the IDT dated 6 Dec 2003 & 14 Feb 2003

13) China Apollo Holdings Limited – Report of the IDT dated 31 Jan 2002 & 6 Jun 2002

14) Indesen Industries Company Limited (now known as Central China Enterprises Limited) – Report of the IDT dated 2 Nov 2001

15) Hanny Holdings Limited (formerly known as Hanny Magnetics (Holdings) Limited) – Report of the IDT dated 10 Apr 2000 & 15 Jun 2000

16) Ngai Hing Hong Company Limited – Report of the IDT dated 23 Jul 1998

17) Chee Shing Holdings Limited – Report of the IDT dated 30 Mar 1998 & 21 Jun 2001

18) Emperor (China Concept) Investments Limited – Report of the IDT dated 8 Jun 1998

19) Hong Kong Worsted Mills Limited (now renamed as Beijing Development (H.K.) Limited) – Report of the IDT dated 18 Nov 1997 & 21 Jan 1998

20) Chevalier (OA) International Limited – Report of the IDT dated 10 Jul 1997

21) Hong Kong Parkview Group Limited – Report of the IDT dated 5 Mar 1997

22) Yanion International Holdings Limited – Report of the IDT dated 29 Oct 1996

23) Public International Investments Ltd – Report of the IDT dated 5 Aug 1995

24) Success Holdings Limited – Report of the IDT dated 24 Jun 1994

25) Lafe Holdings Limited – Report of the IDT dated 22 Feb 1990

26) International City Holdings Limited – Report of the IDT dated 27 Mar 1986 (Vols. I & II)

27) China Overseas Land and Investment Limited – Report of the MMT dated 8 Jul 2009

28) Sunny Global Holdings Limited – Report of the MMT dated 21 Jul 2008