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[online version](http://www.charltonslaw.com/sfc-publishes-faq-on-statutory-inside-information-disclosure-regime-and-the-exchange-publicly-censures-listed-issuer-for-non-disclosure-under-previous-listing-rule-regime/)

# SFC Publishes FAQ On Statutory Inside Information Disclosure Regime And The Exchange Publicly Censures Listed Issuer For Non-Disclosure Under Previous Listing Rule Regime

It is a little over three months since the new statutory regime for disclosure of price sensitive information (now termed **inside information**) came into effect under new Part XIVA of the Securities and Futures Ordinance (**SFO**) – the implementation date of which was 1 January 2013. In a news release published on 5 April, 2013, the Securities and Futures Commission (**SFC**) noted that inside information announcements in the first quarter of 2013 had increased by 43% over the same period in 2012. The SFC also published an FAQ on disclosure of inside information on the same day, advising companies not to use the heading “Voluntary Announcement” to disclose inside information and instead use the relevant heading. The FAQ also deals with dually listed companies’ disclosure obligation in relation to overseas regulatory announcements.

A detailed look at the new statutory inside information regime is set out in Charltons’ published [newsletter](/newsletters/hklaw/en/2012/155/nl-hklaw-20120511-155.html) on the statutory regime and further information regarding issuers’ amended listing rule obligations are dealt with in its [newsletter](/newsletters/hklaw/en/2012/175/nl-hklaw-20121220-175.html) on the listing rule amendments consequential on the new SFO regime for disclosure of inside information.

March 2013 also saw the Stock Exchange of Hong Kong Limited (**Exchange**) implement disciplinary action in relation to a listed issuer’s non-disclosure of price sensitive information under Listing Rule 13.09 as in force prior to January 2013.

## Increase in number of announcements on inside information

The implementation of the new statutory disclosure regime for price sensitive information has resulted in a significant increase in corporate announcements on inside information. In [its press release](http://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=13PR29) [[archived copy](Press_release.htm)], the SFC reported that the total number of corporate announcements on inside information in the first three months of 2013 increased by 43% compared to the same period last year. Most enquiries handled by its consultation service on the new regime were general in nature and were generally processed within the same day. The enquiries covered a broad range of issues such as the interpretation of inside information, the application of safe harbours and confidentiality requirements, the liability provisions and other general administrative matters.

## Frequently-Asked-Question (FAQ)

The SFC has prepared a FAQ to provide guidance to listed issuers on the application of the provisions of the statutory regime and the SFC Guidelines. The FAQ will be updated from time to time. The following is a summary of the responses to the three questions raised by the FAQ.

### 1. Issuing an announcement with the heading “Voluntary Announcement” to disclose inside information

Listed issuers should avoid using the heading “voluntary announcement” to disclose inside information since it exposes issuers to the risk of failing to comply with the requirement to disclose inside information that is accurate, complete and not misleading which is set out in the SFC Guidelines on Disclosure of Inside Information of June 2012 (at paragraph 43). The SFC additionally commented that the heading “voluntary announcement” is not helpful for investors to understand the significance of the information contained in the announcements. Issuers should instead ensure that the heading chosen for the announcement is that which most accurately reflects the substance of the relevant information.

### 2. Content requirements for an inside information announcement

Announcements of inside information should enable investors to make well-informed decisions and should therefore:

1. be factual, clear and expressed in a balanced and objective manner;
2. convey key messages that are clearly visible to and readily understandable by investors;
3. contain sufficient background information so that an announcement can be read without undue reference to other documents;
4. avoid boilerplate statements that tend to lengthen the document without providing meaningful information; and
5. contain sufficient quantitative information which has come to the knowledge of the listed corporation, the omission of which may cause the information disclosed to be false or misleading under section 307B(3) of the SFO.

### 3. Disclosing inside information in an “overseas regulatory announcement”

Under the Listing Rules (Main Board Rule 13.10B and GEM Rule 17.12), an issuer dually listed in Hong Kong and an overseas exchange must announce in Hong Kong all information released to any other exchanges at the same time as the information is released to that other exchange. Any publication on the Exchange website must be made in both Chinese and English unless otherwise specified (Main Board Listing Rule 2.07C and GEM Rule 16.18(3)(b)).

The Exchange, in practice, allowed “overseas regulatory announcement” to be published in one language only because they did not usually contain information reportable under the Listing Rules and it was assumed that they did not contain inside information.

The SFC and the Exchange have noticed, however, that there have been overseas regulatory announcements contain information which could constitute inside information under Hong Kong law (e.g. periodic results).

As a result, the practice described above has been revisited. The SFC takes the view that if an issuer discloses inside information in an overseas regulatory announcement in one language only, the issuer has not fully discharged its statutory obligation to disclose inside information in a manner that can provide for equal, timely and effective access by the public to the information (section 307C(1) of the SFO). Thus if information which a dually listed issuer is required to disclose to an overseas exchange in fact contains information which is inside information under Part XIVA SFO, the announcement to the Hong Kong market must be published in both Chinese and English.

## Regulatory decision to censure a listed issuer for its breach of the old Listing Rule 13.09

In March 2013, the Listing Committee of the Exchange published its decision to censure a listed issuer and four of its directors for breach of Rule 13.09 governing disclosure of price-sensitive information as in force prior to 1 January 2013.

The Company reported $104,977,000 net profit for the year ended 31 December 2010, a 49% increase compared to the previous year. The Company’s performance then deteriorated significantly during the six months ended 30 June 2011 compared to the same period in 2010. The Company’s monthly consolidated management accounts showing the deterioration were brought to the directors’ notice in the first week of successive months from February 2011. The percentage changes to the monthly net profit compared to the same period in 2010 are as below:

Jan

Feb

Mar

Apr

May

Jun

% Change

+178.6%

-173.2%

-94.9%

-112.4%

-91.3%

-78.4%

On 11 July 2011, the Company published a profit warning announcement, disclosing that “*the financial results of the Group for the six months ended 30 June 2011 are expected to decrease significantly as compared with that for the corresponding period in 2010*”.

On the next trading day, the Company’s share price fell by 30.3% at the maximum and closed with a decrease of 28.7%. Trading volume was 19 times the 10-day average.

On 29 August 2011, the Company announced its 2011 interim results which reported a 78% decrease in net profit compared to the same period in 2010.

Prior to January 2013, Listing Rule 13.09 required issuers to disclose, **as soon as reasonably practicable**, any information which:

1. is necessary to enable shareholders and the public to appraise the position of the group;
2. is necessary to avoid the establishment of a false market in the company’s securities; or
3. which might be reasonably expected **materially to affect market activity in and the price of its securities**.

## Analysis

The Listing Division of the Exchange pointed out that the significant deterioration in the company’s performance during the relevant period as indicated in the consolidated management accounts (i) was not information in the public domain, (ii) was outside market expectation, (iii) was price-sensitive and (iv) required disclosure as soon as reasonably practicable under the old Listing Rule 13.09.

The Company’s obligation to disclose the information in relation to its deteriorating performance arose in:

1. **in the first week of May 2011**, when the directors had possession of the April monthly management accounts reporting a net loss representing a 112% drop compared to the same period in 2010;
2. **on 31 May 2011**, when the April monthly management accounts were discussed at a board meeting; or
3. **in the first week of June 2011**, when the directors had possession of the May monthly management accounts reporting a 91% decrease in net profit compared to the same period in 2010.

Publication of the profit warning announcement on **11 July 2011** was not “*as soon as reasonably practicable*” under the old Listing Rule 13.09.

However, it is not clear why the obligation to disclose was not considered by the Exchange to have arisen earlier in the first week of March and April, when the Directors had possession of the monthly management accounts for February and March, both showing a significant decrease in the Company’s net profit.

## Internal control measures

The Listing Division noted that the Company’s internal control measures to ensure compliance with the price-sensitive information provisions were not adequate and effective:

1. The Company did not have any written internal procedures for compliance with the provisions;
2. There were no guidelines for senior management and directors to determine whether certain information was price sensitive; and
3. There were no internal procedures and mechanism for the Company to gauge and monitor market expectation of its performance and its share price movements.

## The new statutory regime for the disclosure of price-sensitive information

The new statutory regime governing listed issuers’ disclosure of price sensitive information (referred to in the new legislation as "inside information") (PSI) came into effect on 1 January 2013 to replace the non-statutory regime under the Listing Rules.

### *“As soon as reasonably practicable”*

An issuer must disclose PSI to the public **as soon as reasonably practicable** after any inside information has come to its knowledge (section 307B(1) SFO). Inside information has come to the corporation’s knowledge if:

1. 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 corporation; and
2. a reasonable person, acting as an officer of the corporation, would consider that the information is inside information in relation to the corporation (section 307B(2) SFO).

### *“effective systems and procedures”*

Issuers must therefore ensure that they have **effective systems and procedures** in place to ensure that any material information which comes to the knowledge of any of their officers is promptly identified and escalated to the board to determine whether it needs to be disclosed.

According to the SFC, “as soon as reasonably practicable” means that the corporation should immediately take all steps that are necessary in the circumstances to disclose the information to the public. The necessary steps that the corporation should immediately take before the publication of an announcement may include: ascertaining sufficient details; internal assessment of the matter and its likely impact; seeking professional advice where required and verification of the facts (paragraph 40 of the SFC Guidelines).

## Conclusion

Although this regulatory decision was made in relation to the breach of the old Listing Rule 13.09 which has been replaced by the new statutory regime, the Exchange’s interpretation of the key concepts such as “**as soon as reasonably practicable**” and “**effective systems and procedures**” may help illustrate how listed issuers should comply with the new statutory regime.

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