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[online version](http://www.charltonslaw.com/stock-exchange-consults-on-listing-rule-amendments-consequential-to-issuers-statutory-obligation-to-disclose-price-sensitive-information/)

# Stock Exchange Consults On Listing Rule Amendments Consequential To Issuers’ Statutory Obligation To Disclose Price Sensitive Information

## Introduction

Following the enactment of the Securities and Futures (Amendment) Ordinance 2012 (the **Amendment Ordinance**), Hong Kong Exchanges and Clearing Limited (the **Exchange**) has published a consultation paper (**Consultation Paper**) on proposed amendments to the Listing Rules (the **Rules**) of the Main Board (**MB**) and the Growth Enterprise Market (**GEM**). The Amendment Ordinance, which will take effect on 1 January 2013, gives statutory backing to listed issuers’ obligation to disclose price sensitive information (**PSI**) (referred to as “**inside information**” in the new statutory disclosure regime), which is currently required only under the non-statutory Rules. The purpose of the proposed Rule amendments is to eliminate overlap between the new statutory disclosure obligation and the requirements of the Rules.

The Securities and Futures Commission (**SFC**) will have the power to enforce the new statutory disclosure regime set out in new Part XIVA of the amended Securities and Futures Ordinance (**SFO**). The Exchange will remain responsible for maintaining an orderly, informed and fair market. In short, the Exchange’s jurisdiction over disclosure of PSI will cease. Interested parties may participate in this consultation by completing and submitting the consultation questionnaire by mail, hand delivery, fax or e-mail no later than 3 October 2012.

The consultation paper is available on [the Exchange’s website](http://www.hkex.com.hk/eng/newsconsul/mktconsul/Documents/cp201208.pdf).

The [consultation questionnaire](http://www.hkex.com.hk/eng/newsconsul/mktconsul/Documents/cp201208q.doc) is available on the website of the Exchange.

## Proposed PSI-Related Listing Rule Amendments

Most of the proposed amendments relate to listed issuers’ obligation to disclose PSI, and involve amendments to the “general disclosure obligation” in MB Rule 13.09(1) and GEM Rule 17.10(1). Other proposed changes include plain writing amendments aimed at making the Rules easier to understand and the escalation of some notes to Rules into fully-fledged Rules.

### Jurisdiction over PSI vests with the SFC

MB Rule 13.05 / GEM Rule 17.06 are proposed to be amended to state that the SFC is responsible for enforcement of the new statutory disclosure regime. Those Rules will refer to the Guidelines on Disclosure of Inside Information (the Guidelines) published by the SFC and note that the Exchange will not give any guidance as to the interpretation or operation of the statutory disclosure obligations under Part IVA SFO or the Guidelines.

However, where the Exchange is aware of a possible breach of statutory disclosure obligation, it will refer it to the SFC. The Exchange will not take any disciplinary action itself unless the SFC considers it inappropriate to pursue the matter under the SFO and the Exchange considers action under the Rules for a possible breach of the Rules to be appropriate.

Listed issuers will be required to announce PSI which is required to be disclosed under the SFO. They must also copy to the Exchange any application to the SFC for a waiver from the requirement to disclose PSI and the copy of the SFC’s decision whether to grant such waiver (MB Rule 13.09(2)(b) / GEM 17.10(2)(b)). The proposed Rule amendments will move to MB Rule 13.10B /GEM 17.10B the existing obligation to announce information released by the issuer to any other stock exchange on which its securities are listed and information released by an issuer’s overseas listed subsidiary to another stock exchange which is discloseable by the issuer under the Rules.

### Exchange to continue monitoring market after implementation of statutory regime

Although responsibility for the enforcement of the disclosure regime will rest with the SFC, the Exchange will remain responsible under Section 21 SFO for maintaining an orderly, informed and fair market in securities that are traded on the Exchange. Accordingly, the Exchange will continue to monitor the market and media and where necessary, will require trading suspensions under the Rules. Accordingly, the mechanism to monitor the market by making enquiries of listed issuers regarding unusual trading movements, the possible development of a false market in the trading of an issuer’s securities and of any other matters under MB Rule 13.10 (GEM Rule 17.11) remains.

Under the revised version of these Rules, if the Exchange makes an enquiry, an issuer will be required to respond promptly to the Exchange’s enquiries in one of the following two ways:

* provide to the Exchange and, if requested by the Exchange, announce any information relevant to the subject matter(s) of the enquiries available to it; or
* if appropriate, and if requested by the Exchange, confirm with an announcement that, the directors, having made due enquiry, are not aware of any information that is or may be relevant to the subject matter(s) of the enquiries, or of any inside information which needs to be disclosed under the SFO.

The revised standard form of such announcement set out in Note 1. to MB Rule 13.10 (GEM Rule 17.11) is as follows:

“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 due enquiry, we confirm that we are not aware of [any reasons for these price [or volume] movements] or [relevant information concerning the subject matter of the Exchange’s enquiry] or of any information which must be announced to correct or to prevent a false market in the Company’s securities or of any information which must be announced to correct or to prevent a false market in the Company’s securities or of any inside information under Part XIVA of the Securities and Futures Ordinance that needs to be disclosed.*

*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.”*

The revised standard announcement would require directors to make “due enquiry” into the relevant matter before issuing the announcement and require inclusion of that confirmation in the announcements. The revised standard form announcement would also exclude the confirmation currently required that there are no negotiations or agreements relating to intended acquisitions or realisations which are discloseable under the Rules on notifiable transactions or connected transactions.

The Exchange reserves the right to direct a trading halt of an issuer’s securities if an announcement (as set out above) cannot be made promptly (new Note 2 to MB Rule 13.10 / GEM Rule 17.11).

If any confirmation in the standard announcement is discovered to be false, the Exchange will refer the matter to the SFC.

### PSI disclosure Rules to be deleted

To avoid overlap with the SFO statutory disclosure requirements, most of MB Rule 13.09(1) / GEM Rule 17.10(1) are proposed to be deleted. These relate to the disclosure of information necessary to enable the Exchange, shareholders and the public to appraise the position of an issuer group or which might be reasonably expected materially to affect the market activity in and the price of its securities.

### Obligation to avoid false market to be retained

Regardless of whether the Exchange has made an enquiry, listed issuers will be required to disclose information to correct or prevent a false market. The obligation to disclose PSI will be amended to clarify that the obligation requires disclosure not only of information necessary to avoid the creation of a false market but also of information necessary to correct a false market (as set out in the proposed MB Rule 13.09(1)(b) / GEM Rule 17.10(2)). The requirement to publish periodic announcements of developments during the suspension of trading in a listed issuer’s securities on the Main Board would be kept as set out in the new MB Rule 13.24A.

The following provisions which exist currently as notes to Rules are proposed to be kept and escalated to become full-fledged Rules:

* MB Rule 13.06A / GEM Rule 17.07A – the requirement to maintain strict confidentiality of inside information until it is announced;
* MB Rule 13.06B / GEM Rule 17.07B – the requirement not to divulge information so as to privilege the dealing position(s) of any person(s); and
* MB Rule 13.24B / GEM Rule 17.26A – the requirement that an issuer must make an announcement if:
	+ an event occurs that would have caused any assumptions of a profit forecast to have been materially different; or
	+ income or loss generated by some previously undisclosed activity outside the issuer’s ordinary and usual course of business contributes materially to the profits for the period of the profit forecast.

### Trading halts

The SFO does not specify whether a trading halt is required pending the disclosure of PSI. Therefore, new Rules are proposed to require listed issuers to request a trading halt if (i) there is PSI to be disclosed and an announcement cannot be made promptly; or (ii) PSI may have been leaked where it is the subject of an application to the SFC for a waiver to comply with the statutory disclosure obligation or where it is exempt from the statutory disclosure obligation (except if the exemption concerns disclosure prohibited by foreign law or court order). The new requirement will be set out under MB Rule 13.10A and GEM Rule 17.11A.

The term “trading halts” in the revised Rules will refer to an interruption of trading in an issuer’s securities requested or directed pending disclosure of information under the Rules and extending for no more than two trading days. The issue of trading halts and resumptions during trading hours is the subject of a separate consultation paper published on 27 July 2012. For further information on its proposals please see Charltons newsletter on trading halts.

### Duty to preserve confidentiality of inside information

The obligation on directors of issuers to maintain strict confidentiality of price sensitive information until it is announced currently contained in Note 2 MB Rule 13.09(1) and GEM Rule 17.10 will be upgraded to Rules (MB Rule 13.06A and GEM Rule 17.07A).

## Other Rule Amendments

### Changes to Defined Terms

The terms “inside information”, “Inside Information Provisions” and “trading halt” are proposed to be added as new defined terms in the Interpretation sections of the MB Rules and GEM Rules. References to “price sensitive information” would be replaced by the term “inside information” to be consistent with the SFO. “Inside Information Provisions” would refer to Part XIVA of the SFO. Trading halts are a new concept on which the Exchange is consulting currently, as detailed in our newsletter on this subject, available here.

Additionally, “Exchange Listing Rules” would also be known as “Listing Rules” or “Rules” on the Main Board and “GEM Listing Rules” would also be known as “GLR” or “Rules” on the GEM. The SFO would also be known as the “Ordinance” on both the Main Board and the GEM. The term “general disclosure obligation” would no longer be used.

### Debt issues

According to the current MB Rule 37.44 / GEM Rule 31.01, where debt securities are guaranteed, the guarantor must announce immediately any information that is necessary for investors to appraise the position of the guarantor which may have a material effect on its ability to meet its obligations. The new statutory disclosure obligation under the SFO will only impose an obligation on the issuer. The Exchange therefore proposes to clarify in the Listing Rules and the Listing Agreement that a guarantor has an obligation to announce any information which may have a material effect on its ability to meet its obligations under the debt securities (see proposed new MB Rule 37.47A, paragraph 2A in MB Appendices 7C to 7E and 7H and GEM Rules 30.40A and 31.04(4).

### Guidance Materials

The Exchange has published guidance materials in respect of the obligation to disclose price sensitive information under the Listing Rules which are available on its website. These include the Guide on Disclosure of Price Sensitive Information (January 2002), the letter of 31 October 2008 in respect of recent economic developments and the disclosure obligations of listed issuers, and some of the no further disciplinary action (guidance) letters published in 2008 and 2009. Given the proposed deletion of MB Rules 13.09(1)(a) and (c) and GEM Rules 17.10(1) and the related notes, these guidance materials will be repealed with effect from 1 January 2013.

Additionally, the Exchange has proposed various minor “plain writing amendments” that are supposed to make the Rules easier to understand without changing existing policy.

## Responding To The Consultation

Interested parties should respond to the consultation by submitting the consultation questionnaire (available here) no later than 3 October 2012 by one of the following methods:

By mail or hand delivery to:

Corporate Communications Department Hong Kong Exchanges and Clearing Limited 12th Floor, One International Finance Centre 1 Harbour View Street Central Hong Kong **Re: Consultation Paper on Rule Changes Consequential on the Enactment of the Securities and Futures (Amendment) Ordinance 2012**

By tax to:

(852) 2524-0149

By e-mail to:

response@hkex.com.hk Please mark in the subject line: **Re: CP on PSI Codification Consequential Rule Changes**

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