Charltons - Hong Kong Law Newsletter - 22 February 2011

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# FSTB Publishes Consultation Conclusions On Statutory Backing To Price Sensitive Information Disclosure Requirements

## Introduction

The Financial Services and Treasury Bureau ("**FSTB**") published on 11 February 2011 Consultation Conclusions (the "**Conclusions**") on proposals to grant statutory backing to price sensitive information ("**PSI**") disclosure obligations. These obligations are currently contained in the non-statutory Listing Rules administered by the Stock Exchange of Hong Kong ("**SEHK**"). The Conclusions are the result of the Consultation Paper (the "**Consultation Paper**") on the issue, published by the FSTB in March 2010, which laid out the proposed new statutory framework governing enhanced PSI disclosure, and invited feedback from market participants. The FSTB received 110 written responses. The overall reaction to the proposals was positive, with the majority of respondents supporting the overarching aim of the proposals, which the Consultation Paper described as "(the cultivation of) a continuous disclosure culture among listed corporations".

The new regime outlined in the Consultation Paper and Conclusions creates a statutory obligation under the Securities and Futures Ordinance ("**SFO**") on listed companies to disclose PSI to the public, as soon as reasonably practicable after becoming aware of the PSI (to be referred to as "**inside information**"). It reflects recent developments in this form of disclosure requirement in other international markets, such as the United Kingdom, and seeks to counter allegations that the existing Listing Rules’ framework lacks "regulatory teeth", to quote the phrase used in the Consultation Paper. The Listing Committee of SEHK is supportive of the new regime and has declared its readiness to conduct a market consultation on the consequential amendments to the Listing Rules.

The new regime is discussed in detail in this newsletter but key elements include:

* To adopt the concept of "relevant information" currently used under the insider dealing regime to define PSI (to be called "inside information" in the SFO);
* To apply an objective test in determining whether information is "inside information";
* To create an obligation under the SFO on a listed company to disclose "inside information" as soon as reasonably practicable after it comes to the knowledge of the listed company (i.e. after the information has come into the possession of a director or officer of the company in the course of the performance of functions as a director or an officer of the company);
* To provide safe harbours for legitimate circumstances where non-disclosure or late disclosure would be permitted;
* To impose an obligation under the SFO on the directors and officers of a listed company to take all reasonable measures to ensure that proper safeguards exist to prevent the listed company breaching the statutory disclosure requirements;
* For directors and officers of a listed company to be individually liable for the company's breach of the statutory disclosure obligation, if they are in breach of the obligation referred to above or if the company's breach is a result of any intentional, reckless or negligent conduct on their part;
* For the SFC to enforce the statutory disclosure requirements. The SFC would be able to rely on its powers under the SFO to investigate suspected breaches and to institute proceedings directly before the Market Misconduct Tribunal ("**MMT**");
* To provide a range of civil sanctions, including a fine up to HK$8 million on the listed company and/or the director and disqualification of a director or officer for up to 5 years;
* To allow persons suffering pecuniary loss as a result of a breach of the new disclosure requirement to rely on the results of MMT proceedings when taking civil actions seeking compensation from those in breach;
* To enable the MMT to order an officer or a director to undergo training, and to order a listed corporation to appoint an independent professional adviser to review its compliance procedure or advise on compliance matters. The principle aim of these powers is to encourage good corporate governance; and
* In order to lessen the burden of compliance on listed corporations with substantial business operations outside Hong Kong, the extent of the SFC's powers will be broadened so that they may grant waivers to cover situations concerning prohibitions made by a law enforcement authority of a jurisdiction outside Hong Kong, or a government authority of a place outside Hong Kong, exercising a power conferred by the legislation of that jurisdiction.

To assist companies in adhering to the requirements imposed on them by the new regime, the SFC has published draft Guidelines on Disclosure of Inside Information (the "**Guidelines**"), explaining the concept of "inside information", the availability of the safe harbours and giving advice on other particular situations and issues. The draft Guidelines are set out in the SFC's Consultation Paper on the Draft Guidelines on Disclosure of Inside Information (the "**SFC Consultation Paper**"). The FSTB Consultation Paper is available on the FSTB website at [*here*](http://www.fstb.gov.hk/fsb/ppr/consult/doc/consult_psi_e.pdf) and Frequently Asked Questions are available at [*here*](http://www.fstb.gov.hk/fsb/ppr/consult/doc/consult_psi_e.pdf). A copy of the SFC Consultation Paper is attached as Annex 2 to the FSTB Consultation Paper.

Additionally, Annex 1 of the Consultation Paper contains indicative draft legislative provisions concerning the disclosure obligations, safe harbours and what would constitute a breach of the disclosure obligations, which are intended to be included in the SFO. References to individual clauses throughout this newsletter relate to these indicative draft legislative provisions. The Consultation Conclusions are available at [*here*](http://www.fstb.gov.hk/fsb/ppr/consult/doc/psi_conclusion_e.pdf).

The Listing Rules will be amended to delete provisions which would otherwise duplicate the new statutory disclosure obligation and all existing SEHK guidelines on disclosure of PSI will be replaced by the SFC Guidelines. Although the Listing Rules will not be amended until after enactment of the new statutory regime, it is proposed that the commencement date of the statutory regime and the amended Listing Rules will be aligned. The FSTB proposes to introduce a bill to codify the disclosure requirements in the SFO in the 2010/2011 legislative session.

## The New Regime: Background And General Comment

The current regulatory regime governing disclosure of PSI is non-statutory, being located in the Listing Rules administered by the SEHK Listing Committee. As noted above, this has led to a public perception of a set of rules lacking regulatory force, a concern shared by both the FSTB and the Listing Committee. Eighty percent of respondents shared this view, specifically expressed in the Conclusions as follows:

"*(A) statutory regime is necessary to enhance market transparency and quality, to bring our regulatory regime for listed corporations more in line with those of overseas jurisdictions, and to sustain Hong Kong's position as China’s global financial centre and a premier capital formation centre in the region.*"

With this general aim in mind, the FSTB has created a statutory framework to regulate the disclosure of PSI. This seeks to balance the necessity of avoiding counterproductive obligations being placed on listed corporations with that of protecting investors by ensuring effective compliance with and enforcement of the disclosure rules.

## The New Regime: The Key Features

### Disclosure of Inside Information

The FSTB proposes to include the new disclosure obligations in a new Part IIIA of the SFO, a draft of which is attached as Annex 1 to the FSTB Consultation Paper.

### Definition of inside information

The FSTB proposed in the Consultation Paper that the term "inside information", as defined in section 245 of the SFO, should be used to refer to the PSI which a listed company must disclose. This approach has been confirmed in the Conclusions. "Inside information" is that which the insider dealing regime prohibits a person from using when dealing in the shares of a listed company. It is specific information that:

1. is about:
   1. the corporation;
   2. a shareholder or officer of the corporation; or
   3. the listed securities of the corporation or their derivatives: and
2. 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.

Inside information which a listed company will have to disclose is therefore the same information that is currently prohibited from being used for dealing in the securities of the listed company. This approach follows that adopted in the United Kingdom and other European Union countries.

Concerns were raised by market participants regarding the interpretation to be placed on the term "inside information", particularly as to whether the MMT's interpretation of "inside information" in insider dealing cases will affect the PSI regime. Other respondents queried whether "inside information" should be assessed from an objective or subjective perspective.

The Conclusions respond to these concerns by noting that the SFC will update its guidelines and periodically publish additional guidance materials (e.g. in the form of frequently asked questions ("**FAQs**")), to deal with matters arising from the application of the statutory PSI disclosure requirements. This will include issues arising from the interpretation of "inside information". The SFC's separate consultation conclusions will address the respondents’ detailed comments on its Draft Guidelines.

Finally, and most importantly, the Conclusions also state that the legislative provisions implementing the new regime will specify that an objective test is to be used in deciding whether any specific piece of information constitutes "inside information".

#### Timing of disclosure: Clause 101 B (1)

The new statutory obligation on listed companies to disclose to the public as soon as reasonably practicable any inside information which has come to their knowledge represents a compromise on the part of FSTB. The original word formulation given to the obligation in the Consultation Paper omitted the word "reasonably", but following concerns expressed by market participants, this has been altered. The Conclusions make it clear that the key reason for this is to allow listed companies to seek professional advice and assess the circumstances of the case. The SFC will also revise its guidelines to state explicitly that companies are permitted to take appropriate steps such as ascertaining details, conducting an internal assessment and performing due diligence verification, prior to making an announcement.

The Conclusions also address an issue raised by a number of respondents, by making clear that PSI disclosure should occur in as synchronized and prompt a manner as possible, across all markets on which the corporation is listed. Should this prove impossible, due to time differences for example, the corporation should allow no delay in disclosing the PSI in Hong Kong and do the same in other markets as soon as possible.

#### When a Company is taken to have knowledge of the PSI: Clause 101 B (2)

A listed company will be taken to have knowledge of inside information if a director or an officer has "come to the knowledge of that information in the course of the performance of his duties." The phrase "come to the knowledge of" (or something akin to that formulation, the FSTB notes that this has yet to be finalised) replaces that previously proposed in the Consultation Paper, which was "come into possession of the information". The aim behind this alteration is to restrict further the circumstances giving rise to a disclosure obligation as “come into possession” is more expansive than "come to knowledge".

The term "officer" is defined widely to include a director, manager or secretary of a listed company or any other person involved in its management (Part 1 of Schedule 1 to the SFO). This manner of attributing knowledge to the corporation has been retained by the FSTB, despite opposition from a majority of respondents. Such respondents were concerned that the definition of officer will capture middle managers, and some suggested that it should be restricted to directors. However the FSTB states that the regime does not intend to target middle managers. It is also highlighted that the SFC Guidelines place emphasis on the objective of the legislation, and the context at hand, to determine the meaning of the term "manager". In the context of the PSI regime, a "manager" generally connotes a person below the board level, who wields management powers affecting the whole or a substantial part of the corporation.

#### The phrase "ought reasonably to have come to the knowledge" and constructive knowledge: Clause 101 B (2)

A majority of respondents wished to delete the phrase "ought reasonably to have" from the disclosure obligation, stating that the requirement to release information of which the company has constructive knowledge only is too onerous a burden to impose. However the FSTB rejected this line of thinking in the Conclusions, underlining the fact that including the phrase will prevent companies from avoiding liability by deliberately keeping PSI away from the "officers" of the listed corporation.

Additionally, the phrase should be considered in the context of an officer's duty under common law to exercise reasonable care in the performance of his duties owed to a company. An officer who acts reasonably and complies with his duties, for example to 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, will not attract a sanction under the new regime.

However, as noted above, in order to guarantee that the scope of the duty is properly understood, the formulation "come into possession of the information" will be replaced with something akin to "come to the knowledge of the information" in clause 101B(2). This will restrict the operation of the section, as "come into possession" is more expansive than "come to knowledge".

#### Further Issues

Some respondents questioned whether the Clause 101 B (2) formulation "in the course of performing functions as an officer of the corporation" restricted the information which must be disclosed to that which becomes known in situations where the officer is acting in that capacity. The FSTB answered that this was their intention.

Other respondents took issue with Clause 101 B (3), which notes that "*A listed corporation fails to disclose the inside information required … if the information disclosed is false or misleading …*" The FSTB clarified that this Clause is not a duplication of section 384 of the SFO (provision of false or misleading information). Rather its purpose is to emphasise that where an officer discloses information which he knows to be false or misleading, or where he has been negligent in not knowing its false and misleading nature, he will not be regarded as complying with the disclosure requirement under Clause 101B(1).

The Conclusions also highlight Clause 101B(4), as its role is to ensure that market participants are aware that the circumstances in which a corporation fails to comply with the disclosure requirement of clause 101B(1) are not listed exhaustively in Clause 101 B (3). In recognition of the uncertainty felt by respondents regarding the interaction of these two Clauses, the FSTB state in the Conclusions that they will improve the wording of both.

#### Disclosure must be made in a manner that can provide for equal, timely and effective access by the public to the information disclosed

The requirement that disclosure be made in a manner that provides the public with equal, timely and effective access to information attracted widespread support from respondents to the Consultation Paper. In response to inquiries regarding the manner in which disclosure should be made, the FSTB stated that although the Electronic Publication System operated by the Hong Kong Exchanges and Clearing Limited ("**HKEx-EPS**") will meet this requirement, it is not intended to be the exclusive means of disclosure. However other forms of disclosure (e.g. an announcement on a website or a press conference) may fall short of the obligation to give the public equal, timely and effective access to information. It should be borne in mind that all listed companies do use HKEx-EPS and doing so to release PSI is not a huge burden. The FSTB also confirms that should there be a total breakdown in the HKEx-EPS, the company should take the appropriate steps to fulfil its duty to disclose any PSI.

## The Safe Harbours

In order to strike a reasonable balance between market transparency and fairness, and the safeguarding of the legitimate interests of listed companies in keeping certain information confidential to facilitate their operations and business development, four safe harbours permit listed companies to not disclose or delay disclosing inside information. Listed companies may only rely on the safe harbours where they have taken reasonable precautions to preserve the confidentiality of the inside information and the inside information has not been leaked. However a defence does apply, discussed below, where a piece of information has been leaked and hence a safe harbour is removed, but the corporation under examination can demonstrate the existence of reasonable measures to monitor the confidentiality of the information in question and that it made disclosure as soon as reasonably practicable, once it became aware of the leakage.

The four safe harbours are as follows:

### Safe Harbour A - when disclosure would breach an order by a Hong Kong court or any provisions of other Hong Kong statutes

This grants safe harbour to listed companies if they are prohibited from disclosing inside information under a Hong Kong court order or legislation. Reaction to this carve out from the regime was largely positive. In the Conclusions, the FSTB lends its support to a respondent's proposal that the safe harbour continue regardless of whether there is leakage of the PSI, and state that this will form part of the safe harbour. However the suggestion that it should be extended to situations where the disclosure breaches court judgments and law/rules/regulations made outside Hong Kong is rejected, as such a move would make the SFC's enforcement task very difficult. However the SFC is prepared to hear waiver applications in such circumstances.

### Safe Harbour B - When the information is related to incomplete negotiations or incomplete proposals

The Consultation Conclusions shed light on a number of issues in relation to this safe harbour which had been picked up on by respondents. First the safe harbour does relate to incomplete negotiation regarding litigation, but if the corporation faces massive losses arising from hedging activities or fair valuations, and if such information is price sensitive, disclosure will be required. Second, although the term "impending negotiations" is used in the Consultation Paper, going forward the SFC and statutory requirements will use the term "incomplete negotiations". Third in the formulation employed in the Consultation Paper, the safe harbour related to situations "when the information is related to impending negotiations or incomplete proposals the outcome of which may be prejudiced if the information is disclosed prematurely". The latter part of this phrase has now been deleted, so that the safe harbour encompasses circumstances where a piece of PSI concerns an incomplete proposal or negotiation which may not have its outcome prejudiced if the information was to be disclosed prematurely.

### Safe Harbour C - Where the information is a trade secret

Once again this safe harbour received general support from the market, although some questioned the meaning of the term "trade secret". In response, the FSTB noted that the SFC will give more details on the matter in their guidelines. Additionally the FSTB stated that, in keeping with the situation in Singapore and Australia, there would be no statutory definition of trade secret. This is to ensure that an inflexible legal term does not emerge which fails to reflect a dynamic market. However the Conclusions do contain the following advice on the term:

*"In general, a "trade secret" refers to proprietary information owned by a corporation (a) used in a trade or business of the corporation; (b) which is confidential (i.e. not in the public domain); (c) which, if disclosed to a competitor, would be liable to cause real or significant harm to the corporation; and (d) which the corporation must limit its dissemination. Trade secrets may concern inventions, manufacturing processes or customer lists. However a trade secret does not cover the commercial terms and conditions of a contractual agreement or the financial information of a corporation, which cannot be regarded as proprietary information or rights owned by the corporation."*

### Safe Harbour D - When the Government’s Exchange Fund or a Central Bank provides liquidity support to the listed corporation

The Conclusions reiterate the arguments of the Consultation Paper by confirming the purpose of this safe harbour to be the warding off of financial contagion. It resembles a similar stability ensuring liquidity support mechanism employed in the UK. The withholding of information under this safe harbour is permanent, as the effect of later disclosure is uncertain and potentially dangerous to a company’s financial health. Although the FSTB confirms that it is happy with the scope of the safe harbour, the reference to central bank will be broadened to include any authorities performing the role and functions of a central bank.

#### Safe Harbour Conditions on Confidentiality

Under the proposals set out in the Consultation Paper, the safe harbours are only available where the company in question adheres to the "confidentiality conditions". These demand that (a) the corporation takes reasonable precautions for preserving the confidentiality of the information; and (b) the confidentiality of the information is preserved. The regime does not demand that a company respond to mere rumours. Respondents questioned precisely when confidentiality was to be regarded as having been lost and also when could information be dismissed as mere rumour. The Conclusions note that a rumour has no substance, whereas a leakage by a third party of "inside information" involves widespread circulation of details which are significant and reasonably specific. The latter must be disclosed by the company in order to safeguard market transparency and efficiency. The FSTB clarifies that this requirement to address a leakage with disclosure of information applies to leakage regarding incomplete negotiations, a query raised by responding market practitioners.

#### New Defence

The Conclusions add a new defence to address the situation where a listed corporation is not aware of a leakage. This defence operates where a piece of information has been leaked and thus a safe harbour evaporates, but the corporation under examination can demonstrate the existence of reasonable measures to monitor the confidentiality of the information in question and that it made disclosure as soon as reasonably practicable, once it became aware of the leakage.

### The Power of the SFC to grant waivers from the New Regime and attach conditions thereto

The Consultation Paper empowered the SFC, as the regulator and enforcement authority of the statutory disclosure requirements, to grant a waiver to listed corporations if they face a disclosure prohibition arising from court orders or legislation of another jurisdiction. A consensus emerged among respondents that the ability of the SFC to grant waivers is a useful facet of the new regime, with a number of respondents wishing to see this ability expanded.

#### Extension of Waiver

However the FSTB refused to support the discretion to give blanket waivers. Rather the power proposed in the Consultation Paper has been widened by the Conclusions to include situations concerning prohibitions made by a law enforcement authority of a place outside Hong Kong or a government authority of a place outside Hong Kong exercising a power conferred by the legislation of that place. This is to ensure that administrative orders made in a jurisdiction outside Hong Kong, with a certain form of legal basis, do not prevent a company listed in Hong Kong from adhering to the new disclosure regime. All applications for waivers will be assessed by the SFC on a case-by-case basis.

The Conclusions also emphasise that during an application for a waiver, confidentiality has to be maintained. Should an information leakage occur, the corporation would be obliged to suspend trading prior to making a disclosure. Finally, the Conclusions reveal that the SFC suggests a waiver application fee of $24,000, corresponding to that for a ruling under the Codes on Takeovers and Mergers and Share Repurchases ("Takeover Codes") or a waiver under Part XV of the SFO. It also suggests a review application fee of $50,000, which is same as that of a review under the Takeovers Codes.

#### The Possibility of Further Safe Harbours

The Consultation Paper sought feedback on whether further safe harbours should be included in the legislation, and if so, what form they should take. This question was answered in the affirmative by a substantial number of respondents, who made various recommendations for other safe harbours which they felt merited inclusion in the legislation.

Suggestions ranged from adopting the UK procedure, which permits a listed corporation to withhold or delay disclosure so as not to prejudice its legitimate interests, provided that such omission would not be likely to mislead the public, and provided that the issuer was able to ensure the confidentiality of that information, to a safe harbour for information which, if disclosed, might prejudice the listed corporation in arbitration or litigation proceedings. All of the suggestions for further safe harbours were rejected by the FSTB, with the two mentioned above being dismissed on the grounds of (a) vagueness and (b) the need to preserve market transparency.

#### The Ability of the SFC to Prescribe further Safe Harbours under the SFO

The empowerment of the SFC to create new safe harbours, should market conditions require them to, received very positive feedback. Under the proposals as they currently stand, such safe harbours would be subject to a negative vetting process to be conducted by the Legislative Council. The SEHK and the SFC are to liaise closely together, in order to ensure the safe harbours in place reflect the needs of the market.

## Duties And Liabilities Under The New Regime

### Clause 101G(1): "Every officer must take all reasonable measures from time to time to ensure that proper safeguards exist to prevent the breach of a disclosure requirement"

Concerns were expressed once more by respondents, with a key worry being that with clause 101G(1), two potential infringements were created – the SFC might investigate whether a corporation had appropriate safeguards, in addition to the power to investigate whether a breach of the disclosure requirement had actually occurred. This was dismissed by the FSTB, who stated that a mere failure on the part of an officer to take reasonable measures from time to time to ensure proper safeguards could not be actionable in itself. A breach of Clause 101 G (1) can only occur if the listed corporation first fails to fulfil a disclosure obligation (see clause 101G(2)(b) of the indicative draft legislative provisions) and, by extension, an investigation by the SFC may only occur where there are reasonable grounds to believe such a failure has taken place.

A further query from the market concerned what reasonable measures officers should put in place. The FSTB focused on the need to create an internal reporting system, which all officers take responsibility for, which ensured all PSI was relayed to senior management for disclosure.

The only change made to this section by the FSTB is a minor one and involves adjusting Clause 101 G (2) B, via the introduction of the phrase "who has not taken all reasonable measures from time to time to ensure that proper safeguards exist to prevent the breach". This is in order to make its meaning more explicit and align it, in content and form, to Clause 101 G (1).

### Clauses 101A (2) and 101G(2): Liabilities of listed corporations and "officers"

Although support was expressed by a major professional body in the legal sector for the FSTB proposal to make officers individually liable for a corporation's breach of the disclosure regime, where said officer failed to take all reasonable measures to prevent the breach, other respondents sought to narrow the circumstances in which liability could be imposed. Some called for a regime in which liability could only be imposed on individuals where they knowingly allowed the breach to occur, or that negligence should not be a sufficient state for liability. Others went much further and called for a very low standard of review, similar to that of the Business Judgment Rule [[1]](#footnote-49), or even a requirement for the regulator to show Wednesbury unreasonableness [[2]](#footnote-50) on the part of the individual concerned.

The FSTB move in the Conclusions to assure business leaders that assessment of their behaviour will not be tinged with hindsight bias. However the assessment will not be made using the Business Judgment Rule, as this is a good faith based subjective standard appropriate for business decisions, not an objective one suitable for the performance of statutory obligations. The FSTB also make the point that negligent disclosure harms market transparency and efficiency as much as reckless or intentional disclosure.

As a result of this, the FSTB will retain negligence liability in Clause 101G(2)(a), which imposes liability on "officer(s)" whose intentional, reckless or negligent conduct has resulted in a breach by the listed corporation. The corollary of this is also explained in the Conclusions, namely that where an "officer" has fulfilled his duties to maintain proper safeguards under clause 101G(1), and that the infringement by the listed corporation is not a consequence of his intentional, reckless or negligent conduct, he will not become liable.

The FSTB did make a drafting improvement in this area, as the phrase "act or omission" will be replaced with the word "conduct" in Clause 101 G (2), as the latter is already defined in Part 1 of Schedule 1 to the SFO to include any act or omission, and any series of acts or omissions.

Finally the use of Wednesbury unreasonableness is dismissed out of hand by the FSTB, on the grounds that it is an administrative law concept and not one suited to the context of statutory PSI disclosure obligations.

## Sanctions

### The Extension of the Jurisdiction of the MMT so that it may handle breaches of the Statutory Disclosure Requirements

There was a wide-ranging consensus among the respondents for the MMT to deal with breaches of the statutory PSI disclosure requirements and this will form part of the new regime.

### The Civil Remedies available under the new Regulatory Framework

#### Civil v Criminal Remedies

The FSTB repeats its intention, first expressed in the Consultation Paper, to focus on civil and not criminal remedies for those who are in breach of their PSI disclosure obligations. This met with approval from a majority of respondents. However the FSTB notes that they will be monitoring the effectiveness of the regime and are prepared to introduce new sanctions, including criminal ones, as market conditions develop.

#### The HK$8 Million Regulatory Fine

Despite criticism from some respondents, the FSTB has defended this maximum fine as appropriate and giving the required amount of discretion to the MMT to determine the exact fine in each case. Furthermore, the Conclusions confirm that the limit is not an aggregate amount, as the listed corporation and each of its directors may be fined $8 million separately. The fine, which the FSTB reiterates is regulatory in nature, is subject to the principle of proportionality and the facts of the case. Examples of pertinent factors to be considered include whether the conduct was intentional, reckless or negligent, and the financial resources of the one breaching the disclosure requirements.

#### Disqualification order, "cold shoulder" order, "cease and desist" order, recommendation to take disciplinary action and payment of costs

No respondents took serious umbrage with the power of the MMT to impose any of the above orders upon those found to be in breach of their duties under the new statutory regime. Some concerns were expressed about their possible harshness, especially the "cold shoulder order", but the FSTB addresses these by stating that it expects the MMT to take the gravity of the violation and the nature of the officer's intention into account, when assessing what form of order to impose.

#### Reliance on MMT findings to seek compensation for pecuniary loss

Some respondents opined that the provision allowing claimants to rely on MMT findings in constructing their cases may lead to excessive litigation. However, the FSTB pointed out that a similar provision is available in section 281 of the SFO and that even without the proposed provision, those suffering financial loss due to a breach can take civil actions against those who breached the disclosure requirements.

#### Sanctions under the existing sections 213 and 214 of the SFO and their interaction with those available to the MMT

Certain respondents expressed concern that the sanctions under the SFO sections 213 and 214 would duplicate those open to the MMT. Others raised the possibility of the SFC taking an action under sections 213 or 214, despite a finding of no breach from the MMT. The FSTB has dismissed the possibility of the latter, as the SFC has confirmed that it will not commence a proceeding under section 214 for a suspected breach of the PSI disclosure obligation where the MMT has already concluded that no such breach has occurred. It has also been confirmed in the Conclusions that the two actions will be used in a manner which ensures that they complement one another.

### Other Remedies

Following suggestions from market participants and after consideration of similar remedies available under Listing Rule 2.09, the sanctions available under the new regulatory regime have been expanded so that the MMT may impose such orders as are required to ensure that the company takes suitable action to avoid a comparable breach of the disclosure obligation. According to the Conclusions, this could include ordering an "officer" to undergo training, ordering a corporation to appoint an independent professional adviser to review its compliance procedure, and ordering a corporation to appoint an independent professional adviser to advise on compliance matters.

### The SFC's direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements

Under the previous regulatory framework, the SFC did not have the power of direct access to the MMT, only the power under the SFO to refer cases to the Financial Secretary, who would then assess whether or not to commence proceedings. Most of those respondents who opposed a right of direct access being granted to the SFC were apprehensive that such a move would lead to a loss of checks and balances. However the FSTB, agreeing with a major legal professional body, highlighted the reality that the MMT itself provides the most efficient checks and balances. It is an independent tribunal, presided over by a high court judge, before which legal counsel may appear and from the decisions of which a right of appeal exists. The crucial determination as to whether or not there has been a violation of the obligation to disclose PSI is made by the MMT, not the SFC.

## Roles Of The SFC And SEHK

### The Role of the SFC as Enforcer of the Regime and Conductor of the Investigation

Once more the majority of the respondents approved of the SFC's role as chief enforcer and investigator. In response to a query from the market, it was confirmed that the SEHK’s intention is to refer all possible breaches of the statutory PSI disclosure requirements to the SFC. Furthermore, the Conclusions state that in most cases, the simple fact that the SFC has undertaken a statutory enquiry into a company is doubtful to constitute inside information and so a disclosure obligation will seldom arise in such circumstances.

### The SFC's responsibility to provide informal consultation for the listed corporations with regard to the statutory disclosure requirements

This facet of the Consultation Paper's proposals was widely supported by the market, with the SFC quoted in the Conclusions as agreeing to extend the informal consultation period from an initial 12 to an initial 24 months. The SFC also pledged to update its guidelines and periodically publish FAQs on the regime, again in response to comments from the market.

### The Administration and Enforcement arrangements proposed by the SFC and SEHK

#### Amending Listing Rules to synchronise them with statutory provisions

The idea of aligning Listing Rules with statutory provisions on PSI disclosure was well received by respondents. Additionally, following input from the market, the FSTB note in the Conclusions that Listing Rules 13.09(1) (a) and (c), which bear a significant resemblance to the statutory PSI disclosure obligation, will be removed. This is principally to ensure that the SEHK and the Listing Committee are not placed in a position where they must interpret and oversee the statutory obligation of disclosing PSI. However, the residual part of Listing Rule 13.09 and its notes will be retained and relocated in a revised Chapter 13 of the Listing Rules, as they do not directly relate to the disclosure of PSI.

Furthermore, in order to streamline the process of introducing the new regime in a manner which aligns it with the Listing Rules, the following will occur:

* The SFC's guidelines will take the place of and supersede all SEHK Guidelines on PSI disclosure;
* Any modifications of the Listing Rules must consider the final form of the new statutory PSI disclosure regime and therefore may only occur after its enactment;
* In line with accepted procedure, the Listing Rules would only be amended after public consultation and the consent of the SFC; and
* The initiation date of the statutory regime and the amended Listing Rules will be aligned to assist companies in achieving compliance.

#### Importance of avoiding an overlap between the SFC and SEHK's duties and investigation

The Conclusions note that the apportionment of responsibilities between the SFC and SEHK is likely to occur via the alteration of the 2003 Memorandum of Understanding Governing Listing Matters, which is signed by the two bodies. Once the new regime is in force, the SEHK will have no remit in cases involving the non-disclosure of PSI. However, if certain information (whether PSI or not) should have been, but has not been disclosed, there may also be a breach of specific Listing Rules on, e.g. financial reporting and notifiable or connected transactions. The SEHK retains its right of action in such circumstances. Nevertheless investigation and enforcement of possible breaches of the PSI regime, by the SFC, take precedence over such SEHK actions. A good working relationship between the two bodies is the key to avoiding duplication of effort.

## The Next Step

In the Conclusions, the FSTB states that it plans to introduce a bill to the Legislative Council to codify the disclosure requirements in the SFO in the 2010/11 legislative session.

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**Charltons - Hong Kong Law Newsletter - Issue 112 - 22 February 2011**

1. Duties And Liabilities Under The New Regime [↑](#footnote-ref-49)
2. Wednesbury Unreasonableness is an administrative law concept. In this context it would mean no liability exists if a reasonable Board of Directors, after taking into account the facts and circumstances which existed at the relevant time, concluded that the information in question was not inside information, even if another reasonable Board of Directors might have come to a different conclusion. [↑](#footnote-ref-50)