Charltons - Hong Kong Law Newsletter - 15 August 2011

[online version](http://www.charltonslaw.com/sfc-extends-implementation-date-for-new-conflict-of-interest-requirements-governing-research-reports/)

# Hong Kong Law Issue 131

## SFC Extends Implementation Date For New Conflict Of Interest Requirements Governing Research Reports

The Securities and Futures Commission (**SFC**) has extended the implementation date of new conflicts-of-interest requirements governing research reports to 31 October 2011. Originally, the amendments to the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission and the Corporate Finance Adviser Code of Conduct were to take effect on 1 September 2011 or, in the case of new listing applications, 1 August 2011. The SFC extended the implementation date in response to market practitioners’ requests for more time to prepare for the changes.

The amendments will expand the scope of the existing requirements to:

* cover analysts conducting research on real estate investment trusts;
* cover analysts conducting research on listing applicants;
* cover analysts conducting research on businesses constituted in a form other than a corporation or a real estate investment trust; and
* require sponsors of listing applicants to ensure that all material information disclosed to analysts is included in the listing document.

Charltons published a [newsletter](/newsletters/hklaw/en/2011/130/nl-hklaw-20110716-130.html) previously on the consultation conclusions on the regulatory framework for pre-deal research reports that explains the new requirements.

## HKEx Reminds Listed Issuers Of Their Disclosure Obligations In Context Of Recent Market Conditions

### Introduction

The Hong Kong Exchanges and Clearing Ltd. (**HKEx** or the **Exchange**) sent a letter to listed issuers on 9 August 2011 reminding them of their obligation to disclose price-sensitive information in a timely manner under the Listing Rules, in the context of recent events in the equity and credit markets.

Listed issuers are expected to review whether recent events in the markets have materially affected their financial performance or expected performance and to inform investors of such effects without delay. The Exchange refers to its guidance published in a letter dated 31 October 2008, entitled: “[Recent Economic Developments and Disclosure Obligations Of Listed Issuers](http://www.hkex.com.hk/eng/rulesreg/listrules/listletter/documents/20081031.pdf)” ([see archive](20081031.pdf)).

That letter discussed issuers’ obligations to monitor their financial performance and financial condition continuously, and to update their expectations of performance on a regular basis. The following is a summary of that guidance.

### The Primary Disclosure Obligations

Under Main Board Listing Rule 13.09(1) (or GEM Listing Rule 17.10), issuers are obliged to keep the Exchange, members of the issuer and other holders of their listed securities informed as soon as reasonably practicable of any information relating to the group which:

* is necessary to appraise the position of the group;
* is necessary to avoid the establishment of a false market in its securities; or
* might be reasonably expected to materially affect market activity in and the price of its securities.

Issuers must also notify the Exchange, members of the issuer and other holders of their listed securities without delay where, to the knowledge of the directors, there is such a change in the issuer's financial condition, in the performance of its business or in the issuer's expectation of its performance that knowledge of the change is likely to lead to substantial movement in the price of its listed securities.

### Importance Of Timely Disclosure Of Information

Information should be announced as soon as a decision has been made that the information is potentially price-sensitive. That is a decision as to whether the information has characteristics, in the prevailing market conditions, that would be reasonably expected to materially affect market activity in and the price of the issuer’s securities. In determining whether information is price-sensitive, issuers should take into account that in times of market volatility, the market is more sensitive to information concerning the financial performance and financial condition of listed issuers, their subsidiaries and operations.

### Responsibility To The Market

Issuers are responsible to their existing shareholders and also to potential shareholders and the market as a whole. Where those duties conflict, an issuer and its management should give priority to its continuous disclosure obligations to the market as a whole. The two exceptions to this principle are: (i) where specific conditional relief from immediate disclosure is provided by the Listing Rules for transactions and fundraising which is in the course of negotiation or proposals in the course of development; and (ii) where the Exchange grants dispensation from immediate disclosure.

### Responsibility For Compliance

Compliance with the disclosure obligations is the responsibility of a listed issuer's "controlling mind", which is its directors and any members of senior management to whom responsibility has been delegated. Directors and members of senior management must ensure that they are familiar with the disclosure obligations under Main Board Listing Rule 13.09(1) (or GEM Listing Rule 17.10) and the Exchange's guidance on the disclosure of price-sensitive information.

### Guidance On Particular Situations

The letter contains guidance on a number of specific disclosure issues. This supplements the guidance previously given in the Exchange's "[Guide on disclosure of price-sensitive information](http://www.hkex.com.hk/eng/listing/listreq_pro/documents/full-e.pdf)" ([see archive](full-e.pdf)) and the Exchange's announcement on "[Clarification of Formal Reporting Requirements for Profit Forecasts by Main Board Issuers and Obligations of Main Board and GEM Issuers on the Release of Price Sensitive Information](http://www.hkex.com.hk/eng/newsconsul/hkexnews/2006/060911news.htm)" ([see archive](newsrelease.pdf)).

#### Price Sensitive Information During Preparation of Financial Reports or Other Disclosures

A listed issuer may become aware of price-sensitive information in the course of preparing periodic financial reports or other required disclosure documents such as circulars. The issuer cannot defer releasing the potentially price-sensitive information until the financial report or other disclosure document is issued. Separate disclosure of the price-sensitive information must be made immediately.

#### Price Sensitive Information During Negotiations concerning Transactions, Fund Raising or Other Proposals

If confidential information concerning the issuer is to be released to third parties during negotiations, the issuer must first "filter" and review such material to evaluate whether it contains potentially price-sensitive information. If it does, an announcement should be made immediately. For example, a review of management accounts may reveal financial trends which are potentially price-sensitive and require immediate disclosure. Disclosure of a material change in financial performance cannot be delayed while the negotiations proceed.

#### Legitimate Delay in Disclosure

The Listing Rules contemplate that an issuer may defer disclosure of transactions or fund-raising activities, if disclosure might prejudice the issuer's interests in the negotiations. The issuer may also give that information in strict confidence to parties involved in the development of the matter. Delay in disclosure and provision of the information to other parties is only permissible if:

* the issuer can ensure the confidentiality of the information; and
* the delay in disclosure will not cause the establishment of a false market.

In addition, parties who receive price-sensitive information must not deal in the issuer's securities until it has been announced.

If confidentiality is lost, which may be indicated by otherwise unexplained changes to the price of the issuer's securities or by reference to media or analyst reports, disclosure must be made immediately. The Exchange recommends that issuers should have a substantially complete and up-to-date draft of an announcement ready for release at the appropriate time to ensure that there is no delay.

#### Internal Developments

An issuer should investigate indications of problems within the issuer's business or operations immediately to determine whether the issuer has a disclosure obligation. If more work is needed to obtain complete information, a "holding" announcement must be made to satisfy the continuous disclosure obligation. Further disclosure should be made once more detailed information is obtained.

Where there are significant uncertainties about the outcome of a development, the issuer may have to give a detailed account of the nature and scale of the uncertainties and details of the actions being taken by the issuer.

If either of the above approaches risks creating a false (i.e. misinformed) market, the issuer should ask for a suspension of trading pending clarification of the position. The announcement of the suspension should indicate the nature of the matter pending clarification.

#### External Developments

Listed issuers are not required to disclose general external information (such as foreign currency rates or the market price of commodities) which may already be in the public domain, unless the information has a particular impact on the issuer.

#### Handling Market Rumours

An issuer is not usually required to make a negative statement rebutting a wholly unfounded rumour. However, if it does, it must do so by way of a formal announcement rather than by way of a press release or remark to a publication. The situations where a corrective announcement should be made include where denial of a wholly unfounded rumour is likely to affect the issuer's share price materially or where such rumour creates a disorderly market.

The Listing Division is likely to contact the issuer or its advisers if there are rumours relating to it in the media and will require a full justification of the issuer's proposed course of action and confirmation of the true position. Issuers should not seek to mislead the Exchange as they are required to provide the requested information under Main Board Listing Rule 13.10 (GEM Listing Rule 17.11). The Exchange may subsequently investigate any misleading statements made.

#### A Robust Compliance System

The Exchange's letter notes that in the current economic climate, compliance with the continuous disclosure obligations is an area of risk for directors. It recommends that all directors should ensure that they are familiar with the disclosure obligations and participate in a review of the adequacy of the arrangements in place to ensure compliance. The Exchange indicates that a robust system will assist directors not directly involved in handling compliance in a specific situation to establish a defence to any allegations of breach of the Listing Rules or of their undertakings to the Exchange.

The Exchange also recommends that issuers release periodic trading statements (with or without detailed financial and performance data) more regularly than the twice-yearly financial results announcements. It suggests that this will keep the market up-to-date and reduce the need for unplanned announcements.

The Exchange's letter sets out in an attachment a list of questions for directors to consider in assessing issuers' internal procedures for ensuring compliance with the continuous disclosure obligations.

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