



Hong Kong Institute of  
**Certified Public Accountants**  
香港會計師公會

# Note on Statutory Inside Information Disclosure Requirements

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As the new statutory inside information regime was the source of significant discussion during its passage through the Legislative Council and it is still giving rise to questions among some listed companies, representatives of the Institute met the representatives of the Securities and Futures Commission ("SFC") at the end of June 2013 to clarify points raised on practical aspects of the new law.

The meeting was constructive. While the information below represents the Institute's understanding of the position and not the official position of the SFC, it may nevertheless provide some useful insights and be of assistance to members working in listed companies who need to apply the new law. Please note that this does not constitute legal advice to members. Members should be aware of the [Guidelines on Disclosure of Inside Information \(June 2012\)](#) ("Guidelines") and the [answers to frequently-asked questions \("FAQs"\) on disclosure of inside information](#) issued by the SFC and if, in doubt, seek clarification from the relevant regulator or seek professional advice.

### ***When to make an announcement and how to characterise a disclosure announcement***

- 1) Generally, disclosure is encouraged and the grounds for making particular disclosures are matters for individual companies as they should know best whether particular information may be important to their investors. When deliberating whether or not something is inside information and should be disclosed, companies can ask themselves, whether the relevant information is information that would surprise the market.
- 2) The Institute notes that FAQs on the SFC's website discourage disclosures made under the heading "voluntary announcement", as this could be misleading and may downplay important or relevant information. Where a company has formed a clear view of the matter, it is useful for announcements to be labelled explicitly as inside information announcements or announcements under rule 13.09 of the listing rules (to avoid a false market in an issuer's securities). However, it is possible that a company may not have arrived at a definitive view as to whether certain information is or is not inside information before making an announcement. The key issue is that announcements should have relevant or informative headings.
- 3) As regards whether and when to announce, two pieces of differing information that may each be inside information should not be "netted off" in the belief that taking into account the picture as a whole, the market may not react strongly. If each piece of information is inside information in its own right, in principle, each should be disclosed, as further explained below.
- 4) Whether significant mark-to-market changes in a market that is fluctuating day to day should be announced depends on the company and the circumstances. If, for example, the property market drops 20%, depending on previous disclosures made by

a property developer, it might not be unexpected that the value of the property developer's property holdings has dropped by a similar amount. The directors might take the view that this is not inside information. It is for the company to decide.

- 5) Similarly, if a company's share portfolio is widely known to the market and the portfolio moves up and down regularly in line with the Hang Seng Index, there may be no need to make any immediate announcement. Where a company's portfolio mix changes from time to time, there may be a need to update the market on fair value changes more regularly, depending on what has been previously announced. If the company has already informed the market of the portfolio's fair value, a further announcement may not be necessary, where such movements can reasonably be inferred from information previously disclosed.
- 6) Where there is a matter which has a significant impact on a company's performance, the company should not wait several weeks to see if a particular situation resolves itself or becomes clearer, before deciding whether to make an announcement.
- 7) The business environment is often uncertain. A company's sales may currently be down but a new marketing campaign may be under way. When deciding whether an announcement should be made, a company should ask itself whether there is a story to tell the market.

#### ***Announcements should be as specific as possible***

- 8) Announcements should as far as possible contain specifics. If, for example, a company knows its investments have dropped 30% in value, it should indicate that this is the case.
- 9) Profit warnings should also contain specifics and not just references to, e.g., a "substantial change" in profits. Where an impairment has occurred, the size of the relevant asset should be indicated. Reference to, for example, a "goodwill write off", does not explain the reasons for the change. We understand that further FAQs on profit warnings may be provided in future and that some real examples may also be published, after cases have been through the market misconduct tribunal.

#### ***Responding to analysts' reports***

- 10) Sometimes companies may want to give more frequent, ongoing guidance to the market, to improve transparency and avoid any misreading of the situation by investors. There is no established practice in Hong Kong of giving regular guidance to the market, so care would need to be taken in case any such profit guidance crosses the line into profit forecasting. As this area falls within the regulation of the stock exchange, rather than the SFC, questions about this should be directed to the exchange.

- 11) If a company has previously issued relevant information about its performance, the law on inside information does not require it to respond to inaccurate analysts' reports or to survey the media for reports on it. Nevertheless, if the market has clearly misunderstood the company's business and performance, the Guidelines (paragraph 82) suggest that it would be good practice to correct such errors. The company could consider stating that there is nothing new to report beyond what has already been reported (so, e.g., the market view may be an overestimate). Prima facie, this would not amount to a profit forecast, but companies may need to clarify the position with the stock exchange. Similarly, if, for example, negative analysts' reports are circulating about the company, it would be regarded as good communications for the board to say something to address concerns that shareholders may have, even if there is no inside information to announce. In some cases, these situations could fall within rule 13.09 of the listing rules.
- 12) Where a company's performance has increased from, say, "100" to "110", and the market is predicting a performance of "200", the company could refer to its previous results to indicate that the market may be over-estimating its performance. Where however, its performance has already increased substantially, to "150", which was not disclosed to the market, and the market is subsequently predicting a performance of "200", the situation will need to be handled more carefully, as the increase to "150" would normally be expected to trigger a disclosure.
- 13) Where a company is aware of different analysts' reports saying very different things about it, this would suggest that the market has not taken an overall view, and there would be no reason to react.

#### ***Trade secrets and confidential trade terms***

- 14) As regards the safe harbour from disclosure for trade secrets under the inside information legislation, we understand that this is intended to cover such things as the proprietary formulae for brands of soft drinks. While paragraph 74 of the SFC Guidelines makes it clear that the commercial terms of contracts are not, in themselves, trade secrets, if the terms of a major contract have improved substantially upon renewal, this may be able to be described in other ways (e.g., in terms of increases in revenue or sales) in any disclosures.

#### ***Other examples of possible inside information***

- 15) The list of possible inside information in paragraph 35 of the Guidelines is intended to be illustrative only and includes items contained in lists from other jurisdictions and other items from insider dealing cases in Hong Kong. Changes in accounting policy, for example, may often be of no real significance but, occasionally, they could change the way investors look at a company. Given that, nowadays, there is generally a long

lead time before new financial reporting standards come into effect, the impact of such changes upon their implementation might generally not come as a surprise to the market.

***Interface between listing rule 13.09 and inside information requirements***

- 16) Where the stock exchange requires a rule 13.09 announcement to avoid a false market, but the related information is protected by a safe harbour, a company could adopt a standard form of announcement stating that there is nothing to announce under the Securities and Futures Ordinance. However, a rapid share price movement could indicate that confidentiality around inside information has been breached, which would remove the protection of the safe harbour. This sometimes happens during takeovers.
  
- 17) As regards the interface between the requirements on trading halts, under rule 13.10A of the stock exchange listing rules, and on disclosure of inside information, the obligation to make an inside information announcement is decoupled from any arrangements for seeking a trading halt.