CHEUNG KONG (HOLDINGS) LIMITED 長江實業(集團)有限公司

28th June, 2010

BY FAX (2810 5385) & BY HAND

The Securities and Futures Commission
8/F Chater House
8 Connaught Road Central
Hong Kong

Attention: Corporate Finance Division

Dear Sirs,

The SFC's Consultation Paper on the Draft Guidelines ("Guidelines") on Disclosure of Inside Information issued in March 2010 ("Consultation Paper")

We are writing to respond to the Consultation Paper, in parallel with our submission ("PSI Submission") to the Financial Services and the Treasury Bureau (FSTB) on their consultation paper on the proposed statutory codification of certain requirements to disclose price sensitive information by listed corporation issued in March 2010 ("PSI Consultation").

We welcome and support the Government's decision for not introducing criminal sanctions to the proposed statutory disclosure regime. However, we have commented in our PSI Submission on certain Government's proposals and the draft legislation with which we do not agree, wholly or partly, or that we have significant concerns.

Since the draft Guidelines are premised on the Government's proposals set out in the PSI Consultation, which may change depending on the results of the PSI Consultation, we shall comment on the draft Guidelines in fairly general terms, but may choose to respond in more details as the Government's proposals evolve in due course.

We shall extract below our main comments from our PSI Submission and comment generally on the draft Guidelines.

Part A – Our main comments on the PSI Consultation

(1) Comments on the draft legislation and the civil standard adopted for the offences

Though we agree that a listed corporation should be obliged to disclose to the public as soon as practicable any "inside information" which would be likely to materially affect the price of its listed securities that has come to its knowledge, we do not agree with the drafting of the proposed section 101B in that a listed corporation should be regarded to have knowledge of the inside information if its director or officer has, or ought reasonably to have, come into possession of that information in the course of the performance of his duties. The phrase "ought reasonably to have" in the draft sections 101B(2) and 101B(3) suggests that the listed corporation will be liable for non-disclosure in cases where the PSI may not have been actually known to any officer of the corporation. This will place an absolute or strict liability on the corporation to disclose PSI. A corporation should only be held responsible if the breach is "intentional" or "recklessly". Accordingly, the words "ought reasonably to have" should be deleted from the draft sections 101B(2) and 101B(3).

7-12/F Cheung Kong Center, 2 Queen's Road Central, Hong Kong Tel : (852) 2128 8888 / (852) 2526 6911 Fax : (852) 2845 2940

We disagree with the adoption of the "negligence" standard in draft sections 101B and 101G as this is setting a standard higher than the other types of more serious market misconduct offences under Part XIII of the SFO (e.g. false trading, market manipulation). The only market misconduct offence under Part XIII of the SFO which apply the "negligence" standard is "disclosure of false or misleading information inducing transactions" (section 277 of the SFO). However, this has to be differentiated from the proposed PSI offences in that S277 requires a positive act on the part of the offender while the proposed PSI offences could also be triggered through an omission to disclose. In addition, the offence under S277 requires an additional element of "inducing transactions". Accordingly, a consistent standard should be adopted for the proposed PSI offences, and that the words "or negligent" should be deleted from the draft sections 101B(3)(b) and 101G(2)(a).

The definition of "officer" in the draft legislation which includes a director, manager or secretary of, or any other person involved in the management of the listed corporation, is just too wide. The reference to an "officer" in the draft section 101G should be replaced by "director". It is inappropriate for any officer below director level to be subject to individual legal liability since the decision to whether or not disclose is solely a matter for the directors of a listed corporation. Officers other than the directors have no power or authority to effect the disclosure and it is inconceivable that they should be held responsible for a matter over which they have no control. For the same reason as stated above, the individual liability for officers under draft section 101G(2) should only be triggered if the breach of the PSI requirement is "intentional" or "reckless".

Further, a corporation's liability for failure to comply with the PSI requirements should not be made absolute since decisions for whether or not to disclose often involve fine judgment call based on the available information and the specific circumstances at the material time. There is a strong subjective element involved and is not merely a test of what a reasonable man would do at the material time. A corporation which has followed proper internal procedures and made a reasonable and good faith judgment not to disclose should not be held liable. We suggest that a safe harbour or a statutory defence in respect of this to be provided for in the legislation, as stated in paragraph (2)(i) below.

(2) Additional safe harbours proposed

We propose that additional safe harbours are to be provided for under the legislation in the following cases:

(i) Safe Harbour of Due Process

As explained above, a corporation's liability for failure to comply with the PSI requirements should not be absolute or strict since decisions for whether or not to disclose often involve fine judgment call based on the available information and the specific circumstances at the material time. If a corporation is able to prove that it has put in place proper system and procedures to prevent the breach of the PSI requirements by requiring its employees to escalate potential PSI to its board of directors which duly considers the same and comes to a reasonable conclusion in good faith that the information is not PSI, it should not be held liable under the PSI regime if its decision later proved to be incorrect with the benefit of the hindsight or if its employees fail to follow its prescribed internal procedures leading to a failure or delay for the disclosure of the PSI.

(ii) Safe Harbour of Consistent Application

Where a listed corporation has responded to enquiries from the SEHK concerning unusual movements in the price or trading volume of its listed securities or any other matters under Rule 13.10 of the Listing Rules, following which the Stock Exchange does not request the listed corporation to issue a Rule 13.10 announcement, the listed corporation should not be held responsible for non-disclosure under the proposed PSI legislation. From an issuer's perspective, it is reasonable for it to expect the SFC and the SEHK to adopt a consistent approach in applying PSI requirements.

(3) Comments on the proposed civil remedies

Paragraph 2.33 of the Consultation Paper sets out the factors which MMT may take into account when determining the amount of regulatory fines, one of which is the financial resources of the one breaching the disclosure requirements. We disagree that this should be a factor to be considered for determining the quantum of the fines as the resources or means of the offender, unlike the quantum of the profit made or loss avoided in the case of insider dealing, should not be a relevant consideration as it has no correlation with the offender's conduct.

The power of the MMT to issue cease and desist orders for PSI breaches should be restricted to cases where the breach is intentional and the listed corporation has a history of previous intentional PSI breaches, given that the failure to comply with the said order by the listed corporation or its officers imposed by the MMT will lead to criminal conviction under section 257(10) of the SFO. To empower the MMT to issue cease and desist order in the case of a first time offender and a case where the mens rea of the offender is less than "intentional" would be inconsistent with the announced policy not to introduce criminal sanction for PSI breaches.

(4) SFC should not be granted direct access to the MMT to institute proceedings on breaches of the statutory disclosure requirements

No explanation has been given as to why the proposed streamlined process to enforce the statutory disclosure requirement is required. There was no suggestion that there had been any problem with the existing procedure under S252(2) of the SFO whereby the Financial Secretary institutes proceedings before the MMT. We do have reservation for the proposal to empower the SFC to institute proceedings on breaches of the disclosure requirements direct before the MMT (without having first to report to the Financial Secretary for his decision to do so). We believe that the Financial Secretary, which would not be involved in the initial investigation and evidence-gathering process, will play an important role when deciding whether to institute MMT proceedings. Accordingly, we recommend that the existing procedure under S252(2) of the SFO be preserved. The separation of the investigation and prosecution functions will provide appropriate checks and balances in respect of instituting MMT proceedings.

Further and more importantly, we noted from paragraph 2.34 of the consultation paper on the PSI Consultation that the proposed streamlined process is also proposed to apply to the existing six types of MMT proceedings under Part XIII of the SFO. We believe this is a serious and substantial issue that warrants thorough consideration and discussion before a decision or even recommendation should be made. The market should be provided with more information for consideration and discussions. Given the lack of information contained in the consultation paper on the PSI Consultation, a separate and proper market consultation should be conducted on this proposal.

(5) SFC should provide continuous informal consultation for the listed corporations with regard to the statutory disclosure requirements

The SFC should provide informal consultation for the listed corporations with regard to the statutory disclosure requirements for so long as it is designated by the SFO to enforce such requirements for the following reasons:

(i) Further safe harbours may be prescribed from time to time which necessitates continuous consultation with the SFC in relation to the application of the new safe harbours; and

(ii) Continuous informal consultation service with regard to the statutory disclosure requirements is necessary with a view to ensure the market is well informed as to the expectations of the SFC which could be changing from time to time due to market developments.

(6) The roles of the SFC and SEHK should be clearly defined and without duplication

It has been proposed in the PSI Consultation that the SEHK will modify the general disclosure obligations in the Listing Rules to dovetail them with the statutory provisions. Accordingly, it is important to ensure that under the new statutory regime, the authorities and responsibilities between the SFC and the SEHK are clearly defined and without duplication such that listed corporations will not be subject to dual regulation and face duplicate investigations which would unnecessarily increase compliance costs. It would therefore be helpful if clarifications could be made to the public on the regulatory roles of the SFC and SEHK in respect of non-statutory and statutory PSI requirements.

In address the above concerns, we suggest that the SFC should only investigate any potential breaches of the statutory disclosure requirements following the referral or recommendation by the SEHK. This will be consistent with the existing role of the SEHK as the frontline regulator to monitor unusual price and trading volume movements.

(7) A separate duty to implement proper compliance safeguards is unnecessary and inappropriate

The draft section 101G will impose a statutory duty on each officer of the listed corporation to put in place proper safeguards to prevent the breach of a statutory disclosure requirement. This is unnecessary and inappropriate for the following reasons:

(i) Listed corporations and their officers being subject to the new statutory disclosure requirements will have every incentive to ensure proper safeguards are in place to prevent a breach;

(ii) It is unusual to include a separate obligation to ensure compliance with the main obligation (i.e. statutory disclosure obligation); and

(iii) The failure to put in place adequate safeguards to prevent a breach should only be considered as a relevant factor in determining whether the corporation has breached the statutory duty to disclose PSI, but not as a separate offence.

Part B – Our general comments on the draft Guidelines

(1) Interpretation of the meaning of "as soon as practicable"

We agree in principle that a listed corporation must, as soon as practicable after any inside information has come to its knowledge, disclose the information to the public (draft section 101B of the SFO). However, under paragraph 32 of the draft Guidelines, the SFC interprets "as soon as practicable" to mean "immediate". This has created inconsistencies as between section 101B and the Guidelines. It will be helpful to the market if the SFC can substitute this "immediate" requirement with examples which can illustrate what are the standard and practices that are expected from listed corporations and its officers to discharge the legal requirement under section 101B. For instance, when an officer suspects that a piece of information may constitute inside information and escalate this to the board of directors, which may need some time to discuss the matter internally, and externally with professional advisers, before a decision can be made as to whether or not disclosure is required, would going through this process amount to a failure to meet the "immediate" or "as soon as practicable" requirement? In practice, the checking and verification of inside information, consultations with advisers and internal assessment and discussions take time and are necessary to avoid the risk of misleading the public. Issuing a holding announcement, as suggested in paragraph 34 of the draft Guidelines, would also be inappropriate before validity of the inside information is established. We urge the SFC to give more guidance and examples on what is "immediate" and how long is "practicable" in the Guidelines.

(2) Guidelines relating to the proposed safe harbours

In respect of the safe harbour that allows listed corporations not to disclose or delay the disclosure of certain PSI when the disclosure would constitute a breach against an order made by a Hong Kong court or any provision of other Hong Kong statutes, we have suggested to the FSTB that it should be made clear in the law that this safe harbour should not be lost even when there is a leakage say by a third party thus contravening the proposed section 101D(1)(b). In the absence of such protection, the listed corporation and its officer will either have to breach the court order/relevant Hong Kong statutes or the PSI requirements. We suggest that paragraphs 53 and 54 of the Guidelines should be amended to resolve this dilemma.

As trade secrets may vary from industry to industry, its interpretation should not only be restricted to inventions, manufacturing processes or customer lists. Further, a listed corporation should not be required to disclose its trade secrets to the public even if there is a leakage as disclosure will only be aggravating the damage already made to the listed corporation. Paragraph 57 of the draft Guidelines should be amended to reflect the above comments.

(3) More guidance on duty to maintain compliance safeguards

Listed corporations are expected to establish and maintain appropriate and effective systems and procedures to ensure compliance with the PSI requirements. The draft Guidelines fail to give the market helpful guidance on what may or may not constitute adequate compliance safeguards. Reference is made to a director's compliance checklist for continuous disclosure obligation procedures attached with a letter issued to listed issuers by the HKSE dated 31 October 2008. This checklist has set out a non-exhaustive list of questions for issuers to consider in assessing the adequacy of the internal procedures they have put in place to ensure compliance with the continuous disclosure obligations under the Listing Rules. We recommend the SFC to issue similar and more detailed guidelines to inform listed corporations on the standard expected of them when establishing their compliance and management controls.

The Securities and Futures Commission
Letter dated 28th June, 2010

We hope that the above comments are helpful. For any queries in relation to the above, please contact the undersigned at telephone no. (852)2122 2033, or at email address eirene.yeung@ckh.com.hk or my colleague Nicole Pao at telephone no. (852)2122 2771, or at email address nicole.pao@ckh.com.hk.

Yours faithfully,
For and on behalf of
Cheung Kong (Holdings) Limited

Eirene Yeung
Director, Corporate Strategy Unit &
Company Secretary