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

Attention: Corporate Finance Division

Dear Sirs,

**Response to Consultation Paper on the Draft Guidelines on Disclosure of Inside Information**

We refer to the Consultation Paper on the Draft Guidelines on Disclosure of Inside Information issued by The Securities and Futures Commission (SFC) on 29 March 2010 ("Guidelines").

In general, we welcome the SFC's initiative to formulate a set of guidelines to explain "inside information" and its application, with a view to facilitating issuers to comply with the proposed statutory codification of price sensitive information disclosure. This letter sets out our views on the draft Guidelines:

Introduction and Background

(1) The Guidelines on Disclosure of Inside Information, which are intended to provide clarity as to the nature of "relevant information" are not legally drafted nor have legal standing and effect. On the contrary, as mentioned in paragraph 3 of the Guidelines, they only provide examples and discuss issues on particular situations to illustrate the Securities and Futures Commission's (SFC's) views. Moreover, as appeared in paragraph 5, the summary is not intended to be exhaustive, is included for guidance only, and may not represent the latest legal authority.

(2) Generally the drafting of the Guidelines appears to have been driven by ease of enforcement rather than ease of compliance. There is an element of the SFC both having its cake and eating it in the drafting, with words and phrases being given the widest meaning that the SFC can contemplate, rather than their natural meaning. Two examples will suffice to illustrate the point. Paragraph 16(a) says that information must be "capable of being identified, defined and unequivocally expressed." At the same time, paragraph 16(b) says that "information may not be precise". Despite the ingenuity of the explanation given, these two notions on any accepted meaning are not consistent. In similar vein paragraph 32 says that information must be disclosed "as soon as practicable" but then goes on to say that "as soon as practicable" mean "immediately take all necessary steps that are reasonable in the circumstances to disclose the information to the public". It does not – as soon as practicable means as soon as practicable.

(3) We do not understand why the SFC proposes to limit informal consultation to a period of twelve months after the commencement of the statutory regime. Whilst the Consultation Paper contemplates a review on continuing the service for an additional period, the test that is expressed for that extension to occur is whether it is "necessary" to do so. We would have thought that the consultation should be extended if it proves appropriate and helpful to do so.

(4) As regard the nature of that consultation, it seemed that the SFC envisages the service being limited to a bare minimum, rather than offering feedback and guidance on a more useful and constructive basis. In particular, we understand that

(a) the SFC will not advise on particular cases. Instead, they will merely explain the meaning of the Guidelines on Disclosure of Inside Information. On the basis that a listed corporation is as capable of reading the Guidelines as the SFC, it is not apparent what benefits such consultation will bring.

(b) the SFC will usually ask an issuer to explain why it cannot disclose the information under consideration. That is not a question which should be the subject of a consultation. The question is whether an issuer has a statutory duty to disclose an element of "inside information" – not why it cannot disclose any particular information. There is a difference.

(5) We understand that the reason the SFC is unwilling to extend the scope of consultation (and in any event intends this to relate primarily to the application of "safe harbours") is based on its concern about either the volume of consultations or the consequences of having been consulted, in terms of the SFC's subsequent ability, through the Market Misconduct Tribunal, to punish breach. We do not see on what basis the SFC should avoid the duty to assist listed companies in compliance with their statutory obligations – as opposed to the duty to punish breaches. Preventing breach is more valuable than punishing breach. If the SFC is concerned about possible excessive use or abuse of a consultation service, there would seem to us to be no reason why listed companies should not pay for that service – as it is already the case with the granting of waivers under the Takeovers Code.

<u>What may constitute inside information</u>?

(6) We believe it is appropriate that "inside information" should only be information that a director or officer has come into possession of in the course of the performance of his duties – as opposed to through any other route. However, and this relates to (1) above also, it is unclear from the draft Guidelines what would be the categorisation of information such as business plans and budgets (which would not readily seem to fall within the distinction contemplated in paragraph 26 of the draft Guidelines).

When and how should inside information be disclosed?

(7) We are unsure how the Guidelines would apply to, for example, discussions with credit rating agencies who, for the purposes of granting, maintaining or amending a credit rating may well request access to information on the basis and at a time that may be different from that to which disclosure is made to other parties.

(8) It is unclear how any individual director (and this is important, because the liabilities contemplated by the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations (FSTB Consultation Paper) apply to individuals) could actually himself or herself arrange for equal timely and effective access by the public to inside information.

Responsibility for compliance and management controls

(9) We do not think that an intentional act or omission, based on proper consideration by an individual director or officer, followed by a decision to act or omit to act, should constitute a breach. The concept set out in paragraph 46 of the Guidelines contemplates that officers would be liable for the failure to take all reasonable measures to prevent the listed corporation from breaching the statutory disclosure requirements (i.e. the breach would take the form of a failure to prevent a company from failing to do something (namely disclose information)). This is troubling. We can understand the concept of a breach which takes the form of a failure to do something. It is considerably more difficult to grapple with the notion of a breach which takes the form of a failure to fail to do something.

(10) Moreover, it is unclear to us what reasonable measure an individual director might take to prevent non-disclosure. The proposal seems to contemplate that he himself would unilaterally disclose the information – an unusual course to take. However the director would still be liable if he had expressed his opposition to the board's collective decision not to disclose that information (bearing in mind that this is not a safe harbour envisaged by the FSTB Consultation Paper). Expressing a dissenting view and having that recorded in a meeting's minutes, would not appear to be taking a step to prevent non-disclosure as presently expressed in the Guidelines – even though, in practice this might be all he could do.

Safe Harbours that allow non-disclosure of inside information

(11) We do not consider that waivers should be limited only to the circumstances where disclosure under Hong Kong legislation would mean a contravention of a court order or legislation in other jurisdictions. Given the importance of an effective and sensible regime for disclosure of price-sensitive information, the immense variety of circumstances which may arise and the severe sanctions attached to any non-compliance, we believe that the SFC should take on a broader authority to grant waivers – even if these might be sparingly exercised.

(12) We would welcome the provision of additional safe harbours, having regard to the nature of the statutory obligation and the consequences of non-compliance. There are at least two additional safe harbours which should be considered.

(a) Information provided to or by the Government of the Hong Kong Special Administrative Region (or any department or authority within Government) whether pursuant to a specific statutory obligation or not. The reason is that, as a matter of course, Government, and its various agencies and officials, is party to (and often requires or expects) significant, substantial and frequent exchanges of information and views with listed corporations, their directors and officers. We doubt whether it would be the intention of the legislation contemplated in the FSTB Consultation Paper that any communication with Government, which might constitute "inside information" would be required to be immediately disclosed to the public at large. In fact, a requirement to maintain confidentiality in such exchanges is often requested by Government itself and is a pre-requisite for those exchanges to be made or to continue.

(b) Given the severity of the sanctions for non-compliance and the inherent difficulty in the definition of inside information we believe that it should be a safe harbour that the individual concerned considered on reasonable grounds that a particular piece of information did not constitute inside information. We do not believe (and refer to paragraph 2.30 of the FSTB Consultation Paper in this regard) that any individual director or officer who gave proper consideration to a decision whether to release inside information and, on reasonable grounds, formed the intention not to disclose that information, should be found to have breached statutory disclosure requirements.

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Guidance on particular situations and issues

(13) Paragraph 62 of the Guidelines suggests that a formal announcement, rather than a press release, would be required if a corporation wishes to respond to market rumours. A press release (with the publication of this on the corporation's website and possibly on the HKEx's website) has a wide circulation. We suggest that clarifications, can be made by way of a press release or a formal announcement, provided it is published on the HKEx's and the listed corporation's websites. After all such a method of dissemination is permitted under S.101C(2) of the Securities and Futures Ordinance (see paragraph 37). If it is still the intention of the SFC to only accept clarification by way of a formal announcement, the SFC should include the requirements of the content of the announcement in the Guidelines.

We have welcomed the opportunity to comment on the Guidelines and to support the objective of enhancing transparency and the quality of our securities market. We note that the Guidelines are published to assist corporations (not directors and officers) to comply with their obligations to disclose inside information under Part IIIA of the Securities and Futures Ordinance. In light of the directors' and officers' liabilities and severity of punishments in case of a breach, as contemplated in the proposals of the FSTB Consultation Paper, we would welcome the SFC publishing another set of Guidelines to assist directors and officers to comply with their obligations to disclose inside information or extend these Guidelines to cover the same.

Yours faithfully,

April Chan
Company Secretary