Hutchison Telecom
Hong Kong Holdings

Hutchison Telecommunications Hong Kong Holdings Limited
和記電訊香港控股有限公司
19/F, Hutchison Telecom Tower, 99 Cheung Fai Road, Tsing Yi, Hong Kong
T +852 2128 2828 F +852 2128 3388
www.hthkh.com

28 June 2010

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

Attention: Corporate Finance Division

Dear Sirs

Response to Securities and Futures Commission Consultation Paper on the Draft Guidelines on Disclosure of Inside Information

1. We are responding in detail, in parallel with this submission, to the Government's legislative proposals concerning Disclosure of Price Sensitive Information. While we support certain aspects of the Government's proposals, there are other aspects on which we have expressed significant concerns. Since the draft Guidelines are predicated on the Government's proposals as they currently stand, we shall comment on the draft Guidelines in fairly general terms, but may choose to respond in more detail depending on how the Government's proposals evolve.

2. The purpose of the Guidelines is to 'assist corporations to comply with their obligations to disclose inside information'. However, the first main section of the Guidelines – 'what may constitute inside information' (paragraphs 11 to 31) provides limited assistance in this respect. This may not be the fault of the Guidelines themselves, but may be due to the following factors:

   - As the draft provides, the decision whether to disclose, and in particular what constitutes 'inside information', is very case-specific and is a question of assessment.

   - The draft states that, even in an individual case, 'the SFC is not in a position to judge whether in the circumstances of a particular corporation certain information is likely to materially affect the price of a corporation's listed securities and therefore cannot advise a corporation on whether a particular piece of information is inside information'.

- Perhaps due to the above factors and/or the way in which decisions by the Insider Dealing Tribunal were drafted, this part of the Guidelines is couched in many parts in tentative, qualified terms. For example, at paragraph 16(c) 'The fact that a transaction is only contemplated or under negotiation and has not yet been subjected to any formal or informal agreement does not necessarily cause the information concerning that contemplated course of action or negotiation to be non-specific'.

3. What does come out clearly in this section is the need to give reasonable deference to a company's judgment in deciding whether information is price-sensitive, and hence whether it is disclosable, since these decisions in many cases involve difficult, marginal and subjective assessments. The draft itself says that the SFC cannot advise the corporation on this matter, and that this is a matter for the company's assessment (see paragraphs 10 and 23). We have therefore recommended to Government that the absolute liability on the company currently proposed under Clause 101B(1) is inappropriate (for the above reason) and needs to allow for the exercise of reasonable, good faith judgment. We have suggested that this could be done through an additional safe harbour, to the effect that a company does not need to disclose where it has followed proper internal processes to ensure that the matter is escalated to the Board, and the Board has decided in good faith, on reasonable grounds, and as soon as reasonably practicable, that the information is not disclosable. An alternative, albeit less specific way of doing so would be to provide that, as with individual liability under Clause 101G(2), the company would be liable only if it had acted intentionally, recklessly or negligently.

4. In paragraph 29, the long list of potential disclosure situations includes some which many would have previously thought were not disclosable, such as changes in directors' service contracts. Paragraph 30 does state that inclusion on the list does not mean that it is 'automatically' inside information, but it would also be useful to state that (a) inclusion on the list creates no presumption that it is inside information, and that (b) failure to disclose any of these items will not in itself provide grounds for suspecting a breach of the disclosure requirement, and thereby justify the opening of an investigation. Otherwise there is a real danger of over-disclosure, causing unnecessary disruption to businesses, and disclosure of information which should properly be treated as commercially sensitive.

5. Regarding the timing of disclosure, we believe that paragraphs 32 to 34 would benefit from further clarification. Paragraph 32 states that 'as soon as practicable' means 'immediately' ensuring that the company should take all necessary steps which are reasonable to disclose. However, it should be made clear in these paragraphs that (a) the company will be allowed time to escalate the matter to the Board of Directors to consider the matter (as recognized in paragraph 44), and that (b) the Board will be allowed time to consult external advisers (as recognized in paragraph 2).

6. Paragraphs 41 to 46 deal with the proposed obligation on every officer to ensure proper safeguards are in place to ensure compliance with the disclosure obligation. We do not see why such an obligation is necessary. The sanctions for non-disclosure will give companies a sufficient incentive in any event to make sure proper safeguards are in place at all times. Such an obligation is therefore disproportionate, unduly intrusive and (as far as we are aware) unprecedented as far as regulation in this area is concerned. Clause 101G(1) should therefore be deleted, and we have so recommended in our submission to the Government. In any event, even if such an obligation was appropriate (which it is not) it should be on the company, not on individual officers: the company should have a discretion as to how best to organize compliance.

7. More generally, the reference to 'officers' should be replaced by 'directors'. This is because:

   - it is ultimately the directors' decision as to whether or not to disclose: placing individual liability on managers below director level is inappropriate and unfair. In the UK it is only directors (not officers) who are subject to individual liability, and only if they have acted knowingly, not recklessly or negligently;

   - the disclosure 'clock'- for the purpose of assessing individual liability of directors- should not start ticking until the directors are in possession of the information, not individual officers.

8. Safe Harbours. There are two points where the wording of the draft Guidelines does not reflect the Government's proposed legislative provisions. We agree with the wording in the Guidelines, and have brought these discrepancies to the Government's attention. The points are as follows:

   - In paragraph 49, the SFC states that the safe harbours will no longer apply if the company becomes aware that confidentiality has been lost. However, as currently drafted, Clause 101ID(1)(b) would mean that the safe harbours would no longer apply, and the disclosure obligation triggered, even if the company had no knowledge of the leak. The latter position is unfair: we agree with the SFC's position.

   - Paragraph 55 states that the safe harbour in question will apply not just where the outcome of a proposal or negotiation may be prejudiced but also where its normal pattern may be prejudiced. However, Clause 101ID(1)(c)(ii) states that the safe harbour will only apply where the outcome may be prejudiced. We believe the latter position is unduly restrictive, and that paragraph 55 should be reflected in the legislation.

9. In paragraph 59, we believe it would be helpful for the draft Guidelines to indicate when the SFC would consider it appropriate, and inappropriate, to grant a waiver of disclosure.

10. In our view, paragraph 73 is too prescriptive. It is conceivable that there may be circumstances where it is not reasonably practicable, or would serve no useful purpose, to disclose inside information before the prescribed structured document is issued, such as where the inside information comes to light within a very short time before the full document is issued. So immediate disclosure in a literal sense may not always be necessary.

Yours faithfully,
For and on behalf of
Hutchison Telecommunications Hong Kong Holdings Limited

EDITH SHIH