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

By email (response@hkex.com.hk) and by post

9 October 2012

Our Ref.:

Corporate Communications Department
Hong Kong Exchanges and Clearing Limited
12th Floor, One International Finance Centre
1 Harbour View Street
Central, Hong Kong

Re: Consultation Paper on Rule Changes Consequential on the Enactment of the Securities and Futures (Amendment) Ordinance 2012

Dear Sirs,

Consultation Paper on Rule Changes Consequential on the Enactment of the Securities and Futures (Amendment) Ordinance 2012

--- Please find attached a completed questionnaire on the above consultation paper from the Hong Kong Institute of Certified Public Accountants.

The Institute supports the aims of the Stock Exchange to review the listing rules relating to price sensitive information ("PSI") disclosure in the light of the impending implementation of the statutory regime for disclosure of inside information, under the Securities and Futures (Amendment) Ordinance 2012, and to provide procedures in the listing rules to facilitate implementation of the statutory regime, where such procedures are not provided for in the law.

We also agree on the need to ensure that no significant regulatory gaps emerge after removing the rules relating to PSI.

However, we have strong reservations about several of the consultation proposals, in particular the proposal to require listed companies to make an announcement to prevent or correct the creation of a "false market". We do not feel that the concept of creating a false market has been explained sufficiently clearly and how this is to be distinguished from circumstances that would give rise to an obligation to disclose inside information. As such, we are concerned that the result could be to set up a parallel disclosure regime, which may overlap with and duplicate the statutory disclosure regime.

The examples of proposed general disclosure requirements, which the consultation paper suggests should be elevated from notes in the existing listing rule 13.09(1) into new listing rules, appear to give cause for this concern, as we explain further in our responses to the questionnaire.

37th Floor, Wu Chung House,
213 Queen's Road East, Wanchai, Hong Kong
香港灣仔皇后大道東213號胡忠大廈三十七樓

Tel 電話 : (852) 2287 7228
Fax 傳真 : (852) 2865 6776
(852) 2865 6603

Web 網址 : www.hkicpa.org.hk
E-mail 電郵 : hkicpa@hkicpa.org.hk

We are also wary of any potential inconsistencies between the proposed amendments to the listing rules and procedures envisaged in the SFC's guidelines on statutory inside information disclosure, or the introduction of procedures relating to statutory disclosures in the listing rules which may increase the regulatory burden on listed companies unduly. Again we elaborate on these points in our responses to the questionnaire.

Should you have any questions on this submission, please feel free to contact me on or at .

Yours faithfully,

Encl.

Part B Consultation Questions

Please indicate your preference by checking the appropriate boxes. Please reply to the questions below on the proposed changes discussed in the Consultation Paper downloadable from the HKEx website at:
http://www.hkex.com.hk/eng/newsconsul/mktconsul/Documents/cp201208.pdf

Where there is insufficient space provided for your comments, please attach additional pages.

CHAPTER 2: PROPOSED AMENDMENTS

Main Features of Proposed New Rules

1. Do you agree with our proposed inclusion of express statements regarding the SFC's and the Exchange's role and responsibilities for enforcement of the obligation to disclose inside information under the SFO in MB Chapter 13 and GEM Chapter 17?

   ☑ Yes

   ☐ No

   Please give reasons for your views.

This helps clarify the respective role and responsibilities of the SFC and the Stock Exchange in relation to the enforcement of the statutory inside information disclosure regime.

2. Do you agree with our proposed deletion of MB Rules 13.09(1)(a) and 13.09(1)(c) (GLRs 17.10(1) and 17.10(3))?

   ☑ Yes

   ☐ No

   Please give reasons for your views.

We agree, on the basis that they are already covered by the statutory inside information disclosure obligation.

3. Do you agree to delete some of the notes to Rule 13.09(1) (GLR17.10) and elevate some of them to rules, as proposed?

   ☑ Yes (in respect of making notes 1 and 2 become rules 13.06B and 13.06A, and deleting notes 3 to 8, 11 and the paragraph below note 11)

   ☑ No (in respect of making notes 9 and 10 become rules 13.24B(1) and 13.24B(2))

Please give reasons for your views.

It is noted that the main objective of the proposed Listing Rule changes under this consultation is to remove the existing price sensitive information ("PSI") disclosure obligations (i.e., inside information under the law) which have become part of the statutory inside information disclosure regime, in order to minimise duplications and overlaps with the new legislation in respect of the inside information disclosure obligation. With this objective in mind, we agree the deletion of notes 3 to 8, 11 and the paragraph below note 11 of the existing rule 13.09(1), as they are related to the obligation to disclose PSI. We also agree with turning notes 1 and 2 of the existing rule 13.09(1) into rules 13.06B and 13.06A, as they complement the statutory obligation by clarifying that a listed issuer and its directors should preserve the confidentiality of inside information until the information is fully disclosed to the public.

We have serious reservations about elevating notes 9 and 10 of the existing rule 13.09(1), in respect of material matters which impact on profit forecasts, into rules 13.24B(1) and 13.24B(2). Notes 9 and 10 under the existing rule 13.09(1) appear to be examples of matters which would need to be disclosed according to the PSI disclosure obligation under the Listing Rules. We consider that such information should, more appropriately, be removed from the Listing Rules and addressed under the statutory inside information disclosure regime, in order to avoid overlaps between the Listing Rules and the new legislation.

It is noted that the SFC has published *Guidelines on Disclosure of Inside Information (June 2012)* ("Guidelines") to assist corporations to comply with their obligations to disclose inside information under the statutory regime. The Guidelines explain what may constitute inside information and provide, in paragraph 35, a list of common examples of events or circumstances where a corporation should consider whether a disclosure obligation arises. Many of the examples given may have an impact on profit forecasts, e.g.,

- Changes in the performance, or the expectation of the performance, of the business
- Changes in financial condition
- Changes in expected earnings or losses
- Withdrawal from or entry into new core business areas

In view of the above, we suggest that notes 9 and 10 of the existing rule 13.09(1) be addressed in the Guidelines. Otherwise, it could be confusing to the market if an obligation to disclose the same piece of information were to be enforceable by two different regulators under two different regimes.

More generally, we do not believe that the consultation explains sufficiently the concepts of "establishing a false market" and "correcting a false market", or distinguishes clearly enough between the obligation to disclose information to avoid the establishment of a false market or to correct a false market and the statutory obligation to disclose inside information. This will inevitably result in overlaps, duplication of efforts and uncertainty.

4. Do you agree with the proposed changes to Rule 13.10 (GLR17.11)?

☑ Yes

☐ No

Please give reasons for your views.

We consider that the current mechanism of requiring listed issuers to confirm in an announcement that there is no undisclosed price sensitive (inside) information should remain, in order to maintain an orderly, informed and fair market. It is also reasonable for directors to be required to make "due enquiry" before issuing such an announcement and to confirm in the announcement that they had done so.

5. Do you agree that the issuer should be required to confirm all the four negatives set out in the proposed new standard announcement under MB Rule 13.10 (GLR17.11), as proposed in paragraph 17?

☑ Yes

☐ No

Please give reasons for your views.

Subject to our comments regarding correcting or preventing a false market, in response to question 3 above, we have no objection to the proposed new standard announcement under rule 13.10. We understand from paragraph 17 of the consultation paper that if the Exchange's enquiry does not relate to unusual trading movements of the issuer's securities, the confirmation that the issuer is not aware of any reasons for the unusual movements will not be required in the standard announcement.

6. Do you agree that the obligation under Rule 13.09(1)(b) (GLR17.10(2)) should remain in the Rules despite implementation of Part XIVA of the SFO?

☑ Yes

☐ No

Please give reasons for your views.

While this may support the Stock Exchange in continuing to exercise its regulatory function, under section 21 of the Securities and Futures Ordinance ("SFO"), to maintain an orderly, informed and fair market for the trading of securities that are listed on the Stock Exchange, if it is to be retained, this obligation needs to be distinguished more clearly from the statutory obligation to disclose inside information. (See our response to question 3 above.)

7. Do you agree with the drafting in the proposed new MB Rule 13.09(1) (GLR17.10(1))?

☐ Yes

☑ No

Please give reasons for your views.

While we agree that the Stock Exchange continues to have regulatory function to maintain an orderly, informed and fair market in the trading of listed securities, we are not clear about the operation of the proposed new rule 13.09.

Rule 13.09(2)(b) requires a listed issuer to simultaneously copy to the Stock Exchange its application to the SFC for a waiver from disclosing inside information under the statutory inside information disclosure regime, and promptly notify the Stock Exchange of the SFC's decision. In this respect, what action would be taken by the Stock Exchange when a listed issuer is awaiting the SFC's decision over its waiver application? Would the listed issuer, during this period, still be required to respond promptly to any enquiries made by the Stock Exchange and be requested by the Stock Exchange to make a public announcement? Also, in the circumstance where a waiver from disclosure of inside information has been obtained from the SFC, could that piece of information still be subject to a requirement for disclosure if the Stock Exchange considers that such information should be disclosed under the new rule 13.09(1)?

It is further noted, in the new rule 13.06(1), that "[t]*his Chapter [chapter 13] identifies specific circumstances in which an issuer must disclose information to the public. These are not alternatives to, and do not in any way detract from, the statutory disclosure obligation found in the Inside Information Provisions of the Ordinance."* In this respect, it appears that a listed issuer's obligation to disclose information would be regulated both by the SFC, in terms of inside information under the statute, and by the Stock Exchange, in terms of information specified in the Listing Rules. This could be confusing to the market when a piece of information specified in chapter 13 of the Listing Rules also falls within the definition of inside information under the SFO, as such information would then be subject to oversight by two regulatory bodies. Examples are:

- Material matters which impact on profit forecasts (new rules 13.24B(1) and 13.24B(2), see also our response to question 3 above).

- Pledge of shares by controlling shareholder (existing rule 13.17, which is also an example given in paragraph 35 of the Guidelines for corporations to consider a disclosure under the statutory inside information disclosure regime).

In our view, therefore, new rules 13.06 and 13.09 need to be redrafted to state clearly how a listed issuer's disclosure obligation under the Listing Rules will interface with the statutory inside information disclosure regime, so that a disclosure obligation in relation to specific information, which potentially falls under both the statutory disclosure regime and the Listing Rules, will be enforced by one regulatory body, as specified, in order to avoid misunderstandings and confusion and maintain consistency in interpretation.

We reiterate that the Stock Exchange should provide further clarification and explanations in relation to how it envisages new rule 13.09 and the chapter 13

disclosures will operate, in particular, disclosures which may fall also within the statutory disclosure regime. It should also give clear direction to the market about the mechanism and procedures that will apply in circumstances where a disclosure obligation arises under the Listing Rules and conceivably also under the statute. In fact, as suggested above, every effort should be made to avoid the occurrence of this kind of regulatory overlap altogether.

8. Do you agree to clarify the obligation to apply for a trading halt? Do you agree with the proposed new MB Rule 13.10A (GLR17.11A)?

☐ Yes

☑ No

Please give reasons for your views.

In principle, we agree to clarify the obligation to apply for a trading halt, with the aim of providing certainty, subject to the consultation conclusions of the trading halt proposal, which has been the topic of a concurrent market consultation conducted by the Stock Exchange. However, we have reservations about the circumstances specified under 13.10A whereby a listed issuer must apply for a trading halt (suspension).

Rule 13.10A(1) imposes an obligation on listed issuers to apply for a trading halt when they have information which must be disclosed under rule 13.09. Since the current drafting of new rule 13.09 covers information (i) to correct or prevent a false market and (ii) inside information under the statutory regime, cross-referencing to rule 13.09 in rule 13.10A(1) appears to overlap with rule 13.10A(2), which covers inside information under the statutory regime. In addition, given our views on the new rule 13.09 (see our responses to questions 3 and 7 above), we consider that rule 13.10A(1) may not be appropriate.

As regards our view on rule 13.10A(2), see our response to question 9 below.

We agree with rule 13.10A(3), which requires listed issuers to apply for a trading halt (suspension), pending release of an announcement, under the circumstances where confidentiality may have been lost in respect of inside information. This is consistent with the Guidelines (paragraph 44) and complementary to the statutory obligation.

Rule 13.10A states: "Subject always to the Exchange's ability to direct the halt and resumption of trading in an issuer's listed securities,… ". We find this wording to be ambiguous. It is not entirely clear whether it is intended to mean that (a) the Stock Exchange has the authority to direct the halt and resumption of trading in an issuer's listed securities in any circumstances (and if so, the source of this authority should be made clear), while a listed issuer itself has an obligation to apply for a trading halt under the circumstances set out in this rule, or (b) the Stock Exchange may direct the halt and resumption of trading in an issuer's listed securities in the specific circumstances outlined in this rule. We suggest that the wording should be revised to set out the position more clearly.

9. Do you agree that a trading halt will be required if an issuer reasonably believes there is inside information which requires disclosure under the SFO but it cannot disclose the information promptly? Do you agree with the proposed new MB Rule 13.10A(2) (GLR17.11A(2))?

☐ Yes

☑ No

Please give reasons for your views.

Rule 13.10A(2) requires listed issuers to apply for a trading halt when they reasonably believe that there is inside information which must be disclosed under the statutory regime. As the statutory disclosure obligation is to be enforced by the SFC, we doubt whether it is necessary and appropriate for the Listing Rules to cover this circumstance, which overlaps with the statutory regime. Furthermore, this rule may be inconsistent with the steps the SFC expects a listed issuer to take when it possesses inside information required to be disclosed under the statutory regime. If so, such inconsistencies in approach would create confusion for the market.

It is stipulated in the law that "*[a] listed corporation must, as soon as reasonably practicable after any inside information has come to its knowledge, disclose the information to the public*." The Guidelines, which have been published to assist corporations to comply with their statutory obligations, provide guidance on when and how inside information should be disclosed (paragraphs 38 – 49), setting out in further detail the necessary steps that a listed issuer is expected to carry out prior to the issue of a public announcement. The steps include ascertaining sufficient details, internal assessment of the matter and its likely impact, seeking professional advice, where required, and verification of the facts. If a corporation needs time to clarify the details of and the impact arising from an event before it is in a position to issue a full announcement to properly inform the public, the corporation could issue a holding announcement to set out as much detail as possible and the reasons why a full announcement cannot be made, and to make a full announcement as soon as reasonably practicable. Before the information is fully disclosed to the public, the corporation should ensure that the information is kept strictly confidential. In the circumstances where confidentiality has not been maintained and the corporation is not able to make an announcement, the corporation should consider applying for a suspension of trading in its securities until disclosure can be made.

We are of the view that rule 13.10A(2) may have the effect of imposing an obligation on listed issuers that appears to go beyond the statutory requirement, given the SFC's interpretation contained in the Guidelines. Rule 13.10A(2) imposes an obligation on a listed issuer to apply for a trading halt (suspension) when it believes that there is inside information to be disclosed, while the Guidelines allow time for listed issuers to carry out certain steps before issuing a public announcement and indicate that, in the interim, a holding announcement can be made on the basis that a full announcement would be made as soon as reasonably practicable. It is also not clear whether "announcement" in rule 13.10A(2) includes a holding announcement; if so this should be specified. The Guidelines also state that a listed issuer should consider applying for a suspension of trading in its securities in a specific set of circumstances, i.e., where confidentiality of inside information has not been maintained and a holding or full announcement cannot be made.

10. Do you agree to include MB Rule 13.06A (GLR17.07A) which imposes an obligation to preserve confidentiality of inside information until disclosure?

☑ Yes

☐ No

Please give reasons for your views.

We are of the view that this complements the statutory obligation by clarifying that a listed issuer and its directors should preserve confidentiality of inside information until the information is fully disclosed to the public. This is also consistent with the Guidelines, which state that, before the inside information is fully disclosed to the public, a corporation should ensure that the information is kept strictly confidential (paragraph 41).

Other Changes

Part A: New Defined Terms and Revise Some Defined Terms

11. Do you agree that we should define Part XIVA of the SFO as "Inside Information Provisions"?

☑ Yes

☐ No

Please give reasons for your views.

This accords with the subject of this part of the ordinance.

12. Do you agree with the proposed changes to the defined terms set out in paragraphs 26(b) and 26(c) of the Consultation Paper?

☐ Yes

☑ No

Please give reasons for your views.

We have doubts about using "Rules" as an alternative to the term "Exchange Listing Rules" and "GEM Listing Rules" for the main board rules and the GEM rules, respectively, as the word "Rules" is too generic. In addition, the use of "GLR" as an alternative to "GEM Listing Rules" may also not be appropriate, as it is not readily identifiable with the GEM Listing Rules. We would suggest using "SFO", which is probably more widely used and is also an abbreviation for the Securities and Futures Ordinance used by the SFC, instead of

"Ordinance", as an alternative to the term "Securities and Futures Ordinance" in the Listing Rules.

13. Do you agree with the proposed definition of the term “trading halt” and its use in the proposed Rule changes?

☐ Yes

☑ No

Please give reasons for your views.

We consider that it may not be appropriate to pre-determine the definition of the term "trading halt" at this stage, without the benefit of knowing the market response and consultation conclusions of the trading halt proposal, which has been the topic of a concurrent market consultation conducted by the Stock Exchange.

It is noted from the consultation paper on trading halts that implementation of the trading halt proposal will subject to market readiness. The paper also noted that the proposed trading arrangements under the trading halt proposal, including mid-session auction trading and orders handling, would require a significant change to the Exchange Participants' system process. In addition, even after the relevant system specifications are available to prepare for the implementation of the trading halt arrangements, sufficient lead time would be required to test and prepare for smooth implementation. Information vendors, under the trading halt proposal, would also need to change their system process in order to receive additional information arising from the implementation of the mid-session auctions and a higher volume of news during trading hours. Accordingly, we have doubts about whether the trading halt proposal could be finalised and implemented concurrently with the proposed Listing Rule changes under this consultation. If the trading halts arrangements cannot be introduced together with the proposed Listing Rule changes, it would be confusing to adopt the term "trading halt" rather than "suspension", which is a term currently used in the Listing Rules.

Part B: Other Consequential Changes

14. Do you agree with our proposal to replace the term “price sensitive information” in the Rules with the term “inside information”?

☑ Yes

☐ No

Please give reasons for your views.

This will help to maintain consistency with the statutory regime.

15. Do you agree with our proposal to retain provisions such as MB Rules 10.06(2)(e) and 17.05 (GLR13.11(4) and 23.05) by replacing the term "price sensitive information" with the term "inside information", although their enforcement would require the Exchange's interpretation of whether certain information is inside information?

☑ Yes

☐ No

Please give reasons for your views.

We agree that deletion of rules 10.06(2)(e) and 17.05 will create regulatory gap in areas covered by these rules. We would have no objection to the Stock Exchange, from time to time, interpreting whether certain information is inside information for operational and enforcement purposes, on the assumption that the Stock Exchange would ensure consistency in its interpretation and application.

16. Do you agree with our proposal to delete references to the obligation to disclose information under the current general disclosure obligation and in particular, MB Rules 13.09(1)(a) and (c) and GLR17.10(1) and (3)?

☑ Yes

☐ No

Please give reasons for your views.

See our response to question 2 above.

17. Do you agree with our proposal to create specific rules in respect of those matters which are currently discloseable under the general disclosure obligation, i.e. the proposed new MB Rules 13.24A, 13.24B, and the revised Practice Notes 15 and 17?

☐ Yes

☑ No

Please give reasons for your views.

In principle, we do not have any strong objection to the Stock Exchange creating specific rules under the general disclosure obligation in order to fill clear regulatory gaps, given that the main objective of this consultation is to remove the existing PSI disclosure obligations from the Listing Rules, which have become part of the statutory disclosure regime. However, we are wary about creating specific rules in the Listing Rules under the general disclosure obligation, if such information is likely to overlap with the interpretation of inside information, which is subject to the statutory disclosure regime.

In our responses to questions 3, 7 and 9 above, we have pointed out the problems and potential confusion caused by the situation where the disclosure obligation of a piece of information may be subject to enforcement by two different regulatory bodies, in particular where there may be differences in their respective approaches, or where two different enforcement regimes are in operation.

We strongly suggest that, in addition to inclusion of express statements regarding the SFC's and the Stock Exchange's roles and responsibilities for enforcement of the obligation to disclose inside information, there should be statements showing clearly how a listed issuer's disclosure obligations under the Listing Rules will interface with the statutory inside information disclosure regime, so that disclosure obligation of any specific information will be enforced by one regulatory body only, in order to avoid misunderstandings and confusion and maintain consistency in rulings.

Every effort should be made to avoid such overlaps of jurisdiction by, as far as possible, ring-fencing inside information disclosure and leaving this to be enforced under the statutory disclosure regime. Any additional Listing Rule requirements in relation to general disclosure, therefore, should aim to steer well clear of what is likely to fall into the definition of "inside information". Meanwhile, the Stock Exchange's role in relation to inside information disclosure should be limited to implementing complementary procedures, where procedures are not specified in the law. Such procedures should not be inconsistent with the Guidelines or extend unnecessarily the regulatory burden on listed companies, beyond what is envisaged in the law or under the Guidelines.

18. Do you agree with our proposed changes to the provisions and the Listing Agreements in respect of the issue of debt securities?

☐ Yes

☐ No

Please give reasons for your views.

We have no specific views.

19. Do you agree with our proposal to clarify the obligation on guarantors of debt securities to disclose information which may have a material effect on their ability to meet the obligations under the debt securities?

☐ Yes

☐ No

Please give reasons for your views.

We have no specific views.

Part C: Plain Writing Amendments

20. Do you have any comments on the plainer writing amendments? Do you consider any part(s) of these amendments will have unintended consequences? Please give reasons for your views.

☐ Yes

☐ No

Please give reasons for your views.

We have no specific views.

- End -