

Responsibilities of Directors of Companies listed on the Main Board of the Stock Exchange of Hong Kong Limited



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The Major Sources of Directors' Obligations

1. common law and applicable legislation, including the Companies Ordinance and the Securities and Futures Ordinance (“**SFO**”);
2. the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (the “**Listing Rules**”), including the Code on Corporate Governance Practices (the “**Code**”) and the Model Code for Securities Transactions by Directors of Listed Companies contained therein;
3. the Code on Takeovers and Mergers and the Code on Share Repurchases;
4. the directors' Declaration and Undertaking to the Exchange; and
5. the Companies Registry's Guide on Directors' Duties.

Directors' Obligation to Ensure Issuers' Compliance with Listing Rules

- ▶ A listed issuer undertakes in its application for listing to comply with the Listing Rules once its securities are listed on the Exchange.
- ▶ Under Listing Rule 13.04, the directors of a listed issuer are collectively and individually responsible for ensuring that the listed issuer complies fully with the requirements of the Listing Rules.

Directors' Declaration and Undertaking

A director undertakes that he will:

- ▶ comply to the best of his ability with the Listing Rules and use his best endeavours to ensure that the listed issuer complies with the Listing Rules;
- ▶ comply to the best of his abilities with the requirements of Part XV of the SFO (in relation to the disclosure of interests in the shares and debentures of the listed issuer and its associated companies), the Code on Takeovers and Mergers, the Code on Share Repurchases and all other securities laws and regulations from time to time in force in Hong Kong; and
- ▶ cooperate in any investigation conducted by the Listing Division and/or the Listing Committee of the Exchange.

Fiduciary Duties of Directors

1. Duty to act honestly and in good faith in the interests of the company as a whole
2. Duty to act for a proper purpose
3. Duty in relation to the assets of the listed issuer
4. Duty to avoid actual and potential conflicts of interest and duty
5. Duty to disclose fully and fairly his interests in contracts with the listed issuer
6. Duty to apply such degree of skill, care and diligence as may reasonably be expected of a person with his knowledge and experience and acting as a director of a listed issuer (Rule 3.08)

Rule 3.08 also requires directors to take an active interest in the issuer's affairs, obtain a general understanding of its business and follow up anything untoward that comes to his/her attention. Delegating these functions is permissible but does not absolve directors from his/her responsibilities or from applying the required skill, care, and diligence

Duties summarised in the Guide on Directors' Duties

Consequences of Non-Compliance with Main Board Rules

If there has been a breach of the Listing Rules, the Exchange may:

- ▶ issue a private reprimand;
- ▶ issue a public statement which involves criticism;
- ▶ issue a public censure;
- ▶ report offender's conduct to a regulatory authority (e.g. the SFC) or an overseas regulatory authority;
- ▶ require a breach to be rectified or other remedial action taken within a stipulated period; and
- ▶ take (refrain from taking) such other action as the Exchange thinks fit. (Rule 2A.09)

If the Exchange considers the issuer failed in a material manner to comply with the Listing Rules, it can suspend dealings in, or cancel the listing of, the issuer's securities (Rule 6.01(1)).

Consequences of Non-Compliance with Main Board Rules

It is a criminal offence to intentionally or recklessly provide information which is false or misleading in a material particular in any public disclosure document filed with the Exchange or SFC (section 384 of the SFO). The maximum penalty is 2 years' imprisonment and a fine of HK\$1 million.

Under section 214 of the SFO, a person can be disqualified from being a director of any corporation for up to 15 years if he is wholly/ partly responsible for the misconduct of a company's affairs. Misconduct includes where shareholders are not given all the information re. a company which they might reasonably expect. In 2010, the SFC disqualified two directors for failing to inform the company's shareholders that the company was in a substantially depleted financial position.

Directors' Liability for Misstatements in Prospectus

The Listing Rules require an issuer's directors to take full responsibility for the contents of a prospectus. The prospectus must contain a responsibility statement which states that:

“the directors, having made all reasonable enquiries, confirm that to the best of their knowledge and belief the information contained in this document is accurate and complete in all material respects and not misleading or deceptive, and there are no other matters the omission of which would make any statement herein or this document misleading.”

Directors' Liability for Misstatements in Prospectus

(Cont'd)

Untrue statements contained in a prospectus or the omission of material information ("Misstatements") may result in criminal and/or civil liability for the issuer's directors. The principal areas of liability include:

- ▶ **Section 342E Companies Ordinance** – imposes civil liability for prospectus misstatements on specified persons (including directors)
- ▶ **Section 342F Companies Ordinance** – imposes criminal liability for prospectus misstatements on persons who "authorized the issue of a prospectus" (which may include the directors)
- ▶ **Section 108(1) SFO** – imposes civil liability for making any fraudulent, reckless or negligent misrepresentation which induces others to invest money
- ▶ **Sections 277 & 281 SFO** – impose civil liability for disclosing false or misleading information to induce dealings in securities
- ▶ **Section 391 SFO** – imposes civil liability for false or misleading public communications

Directors' Liability for Misstatements in Prospectus

(Cont'd)

Untrue statements contained in a prospectus or the omission of material information (“Misstatements”) may result in criminal and/or civil liability for the issuer’s directors. The principal areas of liability include (Cont’d):

- ▶ **Section 107 SFO** – imposes criminal liability for making any fraudulent or reckless misrepresentation to induce others to deal in securities
- ▶ **Section 298 SFO** – imposes criminal liability for disclosure of false or misleading information to induce dealings
- ▶ **Section 384 SFO** – imposes criminal liability for provision of false or misleading information in a prospectus or other document filed with the Exchange or the SFC

Liability can also arise: (i) under the Misrepresentation Ordinance or the Theft Ordinance; (ii) in tort; or (iii) under contract.

For further information, please see the attached note “Potential Liabilities under Hong Kong Law in Connection with the Publication of a Prospectus on the Listing of a Company on the Stock Exchange of Hong Kong”.

Restriction on Disclosure of Material Information to Analysts

The Hong Kong prospectus is the sole document by which the Company sells its shares in the Hong Kong IPO.

Any other additional document by which securities are offered to the public (or members of the public) could constitute a “prospectus” under Hong Kong law, in which case:

- ▶ the prospectus content requirements will apply;
- ▶ the translation requirements will apply; and
- ▶ the registration requirement will apply.

Breach of the prospectus laws is a criminal offence.

Restriction on Disclosure of Material Information to Analysts (Cont'd)

To avoid the risk of liability, the directors and senior management of the Company must ensure that no material information about the Company or its securities is provided to any investment research analyst, unless the information is reasonably expected to be included in the prospectus or is publicly available.

When assessing whether any such information is “material” information, the test that should be applied is whether the information is material to an investor in forming a valid and justifiable opinion of the Company and its financial condition and profitability.

This restriction covers any information provided to an analyst, directly or indirectly, formally or informally, in writing or verbally. It covers all communications in a meeting, during a presentation, site visit or interview, or in any other context.

Restriction on Disclosure of Material Information to Analysts (Cont'd)

It is of utmost importance that no additional material non-public information is provided to other persons, including analysts.

- ▶ In case of disclosure (whether intentional or not) to analysts, the Company may be compelled to disclose the same information in the prospectus;
- ▶ Such information may not be appropriate for a prospectus and may not be verifiable.

Restriction on Disclosure of Material Information to Analysts (Cont'd)

Consequences of putting such a statement in the prospectus

- ▶ Any untrue statement (including any statement that is false, misleading or deceptive) in a prospectus may give rise to criminal and civil liability, including personal liabilities of each director and any other person who authorised the issue of the prospectus; and
- ▶ the directors must likewise take personal liability for the truthfulness, accuracy and completeness of any information the Company may be compelled under the SFC rules to insert into the prospectus under the above circumstances.

The restriction covers any information provided to an analyst, directly or indirectly, formally or informally, in writing or otherwise.

The Company is strongly advised to seek the guidance and assistance of its sponsor(s), its Hong Kong legal advisers and those of the sponsor if there are any uncertainties.

New Statutory Regime for PSI - Highlights

- ▶ Excellent links and networks with law firms worldwide;
- ▶ A **statutory obligation** on corporations to disclose PSI to the public as soon as reasonably practicable after PSI has come to their knowledge;
- ▶ Breaches of the PSI disclosure requirement will be dealt with by the **MMT**;
- ▶ A number of civil sanctions will be imposed incl. **a maximum fine of HK\$ 8 million** on the corporation, its directors/chief executive;
- ▶ The SFC has published **Guidelines on Disclosure of Inside Information (SFC Guidelines)** to assist compliance with the new requirements;
- ▶ SFC will be able to institute proceedings directly before the MMT (without referral to the Financial Secretary);

New Statutory Regime for PSI – Key Features

- ▶ The adoption of the concept of “**relevant information**” used under the insider dealing regime to define PSI.
- ▶ The application of an **objective test** in determining whether information is inside information: whether a reasonable person, acting as an officer of the corporation, would consider that the information is inside information in relation to the corporation.
- ▶ Statutory obligation to disclose inside information **as soon as reasonably practicable** upon knowledge.
- ▶ An obligation on directors and officers to take reasonable measures to ensure **proper safeguards** exist to prevent corporations' breach of statutory requirements.

New Statutory Regime for PSI – Key Features

- ▶ Individual liability on directors/officers for corporation's breach of the requirement if such breach is a result of their intentional, reckless or negligent conduct or failure to ensure proper safeguards.
- ▶ The provision of “**safe harbours**” for legitimate circumstances where non-disclosure or late disclosure is permitted.
- ▶ The SFC will be able to **investigate** suspected breached and to **institute proceedings** before the MMT.
- ▶ Civil sanctions: a **fine** up to **HKD 8 million** or **disqualification** order up to **5 years**.
- ▶ Liability to pay compensation to persons who suffer financial loss as a result of the breach.

Definition of “Inside Information”

- ▶ A **statutory obligation** on corporations to disclose PSI to the public as soon as reasonably practicable after PSI has come to their knowledge;
- ▶ Breaches of the PSI disclosure requirement will be dealt with by the **MMT**;
- ▶ A number of civil sanctions will be imposed incl. **a maximum fine of HK\$ 8 million** on the corporation, its directors/chief executive;
- ▶ The SFC has published **Guidelines on Disclosure of Inside Information (SFC Guidelines)** to assist compliance with the new requirements;
- ▶ SFC will be able to institute proceedings directly before the MMT (without referral to the Financial Secretary);

Definition of “Inside Information” (Cont’d)

Key elements of the definition

The three key elements of the definition are that:

- ▶ the information must be **specific**;
- ▶ the information **must not be generally known** to that segment of the market which deals or which would likely deal in the corporation’s securities; and
- ▶ the information would, if generally known be **likely to have a material effect on the price of the corporation’s securities**;
- ▶ SFC guidelines provide guidance on interpretation.

Definition of “Inside Information” (Cont’d)

Specificity of Information

- ▶ The information must be capable of being identified, defined and unequivocally expressed
- ▶ The information need not be precise; information may be specific even though the particulars or details are not precisely known
- ▶ Information on a transaction that is only contemplated or under negotiation, while not yet subject to a final agreement, can be specific information
- ▶ Mere rumours, vague hopes, or worries, wishful thinking and unsubstantiated conjecture are not specific information

Definition of “Inside Information” (Cont’d)

Generally known to the market

- ▶ Rumours, media speculation and market expectation about an event cannot be equated with information generally known to the market.
- ▶ Clear distinction drawn between market having actual knowledge through proper disclosure and speculation/expectation on an event which require proof.
- ▶ Where information is the subject of media comments/analysts’ reports, the corporation should consider the accuracy/completeness/reliability of the information in determining whether it is “generally known to the market”.
- ▶ Should material omissions/doubts as to its bona fides exist, the information is not generally known to the market and requires full disclosure.

Definition of “Inside Information” (Cont’d)

Likely to have a material effect on the price of listed securities

- ▶ Test: whether the inside information would influence persons who are accustomed to or would be likely to deal in the corporation’s shares, in deciding whether to buy or sell the securities
- ▶ The test is necessarily a hypothetical one since it must be applied at the time the information becomes available.

Timing of Disclosure

Inside information has come to the corporation's knowledge if:

- (a) the inside information has, or ought reasonably to have, come to the knowledge of an officer of the corporation in the course of performing functions as an officer of the corporation; **and**
- (b) a reasonable person, acting as an officer of the corporation, would consider that the information is inside information in relation to the corporation (section 307B(2)SFO).

Corporations must therefore have effective systems and procedures in place to ensure that any material information which comes to the knowledge of any of their officers is promptly identified and escalated to the board to determine whether it needs to be disclosed.

Meaning of “as soon as reasonably practicable”

According to SFC Guidelines, the corporation should immediately take all steps necessary to disclose the information to the public, which may include:

- ▶ Ascertaining sufficient details;
- ▶ Internal assessment of the matter and its impact;
- ▶ Seeking professional advice; and
- ▶ Verification of the facts

The corporation must ensure that the information is kept strictly confidential until it is publicly disclosed. If the corporation believes that confidentiality cannot be maintained or has been breached, it should immediately disclose the information.

SFC also raises the possibility for corporation to issue “holding announcement” to give the corporation time to clarify the details and likely impact of an event before full announcement.

Who Is An “Officer”?

- ▶ Officer: a director, manager or company secretary of a corporation or any other person involved in its management (Part 1 of Schedule 1 to the SFO).
- ▶ For the purpose of the new PSI regime, “manager” generally connotes a person who, under the immediate authority of the board, is charged with management responsibility affecting the whole or a substantial part of the corporation.
- ▶ The formulation “in course of performing functions as an officer of the corporation” implies that only information being known in situations **where the officer is acting in capacity as an officer** is subject to the new PSI disclosure requirement.

Manner of Disclosure

- ▶ Disclosure must be made in a manner that can provide equal, timely and effective access by the public (s307C(1) SFO).
- ▶ Publication via the electronic publication system operated by the Exchange will meet the above requirements (s307C(2)).
- ▶ On top of publication via the Exchange, press releases issued through news, wire services, press conferences in HK and/or posting an announcement on the corporation's own websites are also allowed.
- ▶ If a corporation is listed on more than one stock exchange, the corporation must ensure information disclosed in overseas markets is simultaneously disclosed in HK. If the HK market is closed, the corporation must issue an announcement in HK before the HK market opens.
- ▶ The information contained in the disclosure announcement must be complete and accurate in all material respects and not be misleading or deceptive.

Safe Harbours

- ▶ Safe Harbours: 4 situations where corporations are permitted not to disclosure or delay disclosing inside information (s307D SFO).
- ▶ Except for Safe Harbour A, corporations may only rely on the safe harbours if they have taken reasonable precautions to preserve the confidentiality of the inside information and the inside information has not been leaked.

Safe Harbour A

Corporations are granted safe harbour if disclosure would **breach an order by a HK court or any provisions of other HK statutes.**

Safe Harbours (Cont'd)

Safe Harbour B

Corporations are granted safe harbour for information relating to an **incomplete proposal or negotiation**.

Examples:

- ▶ when a contract is being negotiated but has not been finalised;
- ▶ when a corporation decides to sell a major holding in another corporation;
- ▶ when a corporation is negotiating a share placing with a financial institution; or
- ▶ when a corporation is negotiating the provision of financing with a creditor.

Safe Harbours (Cont'd)

Safe Harbour C

Corporations are granted safe harbour for information being a **trade secret**. Trade secret generally refers to proprietary information owned by a corporation:

Examples:

- ▶ used in a trade or business of the corporation;
- ▶ which is confidential (i.e. not already in the public domain);
- ▶ which, if disclosed to a competitor, would be liable to cause real or significant harm to the corporation's business interests; and
- ▶ the circulation of which is confined to a limited number of persons on a need-to-know basis.

Trade secrets may concern inventions, manufacturing processes or customer lists. However a trade secret does not cover the commercial terms and conditions of a contractual agreement or the financial information of a corporation.

Safe Harbours (Cont'd)

Safe Harbour D

Corporations are granted safe harbour for information concerning the provision of **liquidity support** from the Government's Exchange Fund or a Central Bank (or institution performing such functions, inside or outside HK).

The purpose of this safe harbour is to ward off financial contagion.

Safe Harbours (Cont'd)

Safe harbour condition of confidentiality:

Except for Safe Harbour A, the safe harbours are only available if and so long as:

- ▶ Reasonable precautions for preserving confidentiality are taken; and
- ▶ The confidentiality is preserved.

If confidentiality is lost or information leaked, the safe harbour will cease to be available and disclosure is required as soon as practicable.

If confidentiality is lost, the corporation will not be regarded as in breach of the disclosure requirement in respect of inside information if it can show that it:

- ▶ Has taken reasonable measures to monitor the confidentiality of information in question; and
- ▶ Made disclosure as soon as reasonably practicable.

SFC's Power to Grant Waiver

- ▶ The SFC will be empowered to grant waivers where the disclosure of PSI in Hong Kong would be prohibited under a court order or legislation of another jurisdiction or would contravene a restriction imposed by a law enforcement agency or government authority in another jurisdiction (section 307E(1)SFO). The SFC will grant waivers on a case-by-case basis and may attach conditions.
- ▶ During an application for a waiver, confidentiality must be maintained. Should an information leakage occur, the corporation would be obliged to suspend trading prior to making a disclosure. The waiver application fee will be HK\$24,000.

SFC's Power to Grant Waiver

The officers of a corporation are required to take all reasonable measures to ensure that proper safeguards exist to prevent the corporation's breach of the PSI disclosure requirement (section 307G(1)).

Although an officer's breach of this provision is not actionable of itself, an officer will be regarded as having breached the PSI disclosure obligation if the listed corporation has breached such obligation and either:

- ▶ the breach resulted from the officer's intentional, reckless or negligent conduct; or
- ▶ the officer has not taken all reasonable measures to ensure that proper safeguards exist to prevent the breach (section 307G(2) SFO).

The SFC Guidelines focus on the responsibility of officers, including non-executive directors, to ensure that appropriate systems and procedures are put in place and reviewed periodically to enable the corporation to comply with the disclosure requirement. Officers with an executive role will also have a duty to oversee the proper implementation and functioning of the procedures and to ensure the detection and remedy of material deficiencies in a timely manner.

Sanctions

Possible penalties imposed by the MMT:

- ▶ a fine of up to HK\$8 million on the corporation, a director or chief executive (but not officer);
- ▶ disqualification of the director or officer for up to 5 years;
- ▶ a “cold shoulder” order on the director or an officer for up to 5 years;
- ▶ a “cease and desist” order on the corporation, director or officer;
- ▶ an order that any body of which the director or officer is a member be recommended to take disciplinary action against him; and
- ▶ payment of costs of the civil inquiry and/or the SFC investigation by the corporation, director or officer.

Sanctions (Cont'd)

To prevent the occurrence of further breaches, the MMT may require:

- ▶ the appointment of an independent professional adviser to review the corporation's procedures for disclosure of PSI and advise it on matters relating to compliance; and
- ▶ the officer to undertake a training programme approved by the SFC on compliance with Part XIVA SFO, directors' duties and corporate governance.

Civil Liability – Private Right of Action

A corporation or officer found to be in breach of the statutory disclosure obligation may be found liable to pay compensation to any person who has suffered financial loss as a result of the breach in separate proceedings brought by such person under Section 307Z SFO.

The corporation or officer will be liable to pay damages provided that it is fair, just and reasonable that it/he should do so. A determination by the MMT that a breach of the disclosure requirement has taken place or identifying a person as being in breach of the requirement will be admissible in evidence in any such proceedings to prove that the disclosure requirement has been breached or that the person in question has breached that requirement.

The courts may also impose an injunction in addition to or in substitution for damages.

Listing Rule Obligations

The role and duties of the SFC and the Exchange

The SFC will take over the enforcement of the statutory PSI disclosure regime, but the Exchange will remain responsible for maintaining an orderly, informed and fair market.

The Exchange will not give any guidance as to the interpretation or operation of Part XIVA of the SFO or the Guidelines on Disclosure of Inside Information published by the SFC.

An issuer will not face enforcement action by the SFC and the Exchange at the same time, in respect of the same set of facts.

The Exchange will refer cases of possible breach of the statutory disclosure obligation to the SFC when the Exchange becomes aware of it.

The Exchange will not take disciplinary action unless the SFC considers it inappropriate to pursue the matter under the SFO and the Exchange considers there to have been a breach of the Listing Rules.

Listing Rule Obligations (Cont'd)

Obligation to avoid false market (MB 13.09(1))

Issuers are required to disclose information necessary to avoid a false market as soon as reasonably practicable when:

- (i) in the view of the Exchange, there is or there is likely to be a false marketing in the issuer's securities; and
- (ii) after consultation with the Exchange.

- ▶ An issuer is also required to contact the Exchange as soon as reasonably practicable if it believes that there is likely to be a false market in its securities.
- ▶ Under Main Board Rule 13.09(2), where an issuer is required to disclose inside information under the SFO, it must simultaneously announce the information. An issuer is also required to simultaneously copy to the Exchange any application to the SFC for a waiver from the requirement to disclose PSI and to promptly copy to the Exchange the SFC's decision whether to grant such a waiver.

Listing Rule Obligations (Cont'd)

Obligation to respond to the Exchange's enquiry

- ▶ Main Board Rule 13.10 requires an issuer that receives an enquiry concerning unusual movements in the price or trading volume of an issuer's listed securities, the possible development of a false market in its securities, or any other matters from the Exchange, must respond promptly in one of two ways:
 - provide (and announce, if so required by the Exchange) any information it has that is relevant to the subject matter of the enquiry, so as to inform the market or to clarify the situation; or
 - if appropriate and if requested by the Exchange, issue a standard announcement confirming that the directors, **having made such enquiry with respect to the issuer as may be reasonable in the circumstances**, are not aware of any information that is or may be relevant to the subject matter of the enquiry or of any inside information that needs to be disclosed under the SFO.
- ▶ The latter response should be made in a standard form that is set out in Note 1 to the revised Main Board 13.10.

Listing Rule Obligations (Cont'd)

“This announcement is made at the request of The Stock Exchange of Hong Kong Limited.

We have noted [the recent increases/decreases in the price [or trading volume] of the [shares/warrants] of the Company] or [We refer to the subject matter of the Exchange’s enquiry]. Having made such enquiry with respect to the Company as is reasonable in the circumstances, we confirm that we are not aware of [any reasons for these price [or volume] movements] or of any information which must be announced to avoid a false market in the Company’s securities or of any information which must be announced to avoid a false market in the Company’s securities or of any inside information that needs to be disclosed under Part XIVA of the Securities and Futures Ordinance.

This announcement is made by the order of the Company. The Company’s Board of Directors collectively and individually accept responsibility for the accuracy of this announcement.”

- ▶ A note to Rule 13.10 – an issuer does not need to disclose inside information under the Rules if disclosure of the information is exempted under the statutory regime.

Trading Halts

The SFO does not stipulate whether a trading halt is required pending the disclosure of PSI. Currently, an issuer is required to apply for a trading suspension where disclosure under Main Board Rules 13.09(1) and/or 13.10 cannot be made as soon as reasonably practicable. This requirement is not expressly set out as a rule.

The Exchange is currently consulting on its proposal to expressly require an issuer to request a trading halt if an announcement cannot be made promptly in any of the following circumstances:

- a) where an issuer has information which must be disclosed under the new Main Board Rule 13.09;
- b) an issuer reasonably believes that there is PSI or inside information which must be disclosed under the new statutory disclosure obligation under the SFO; or
- c) PSI may have been leaked where it is the subject of an application to the SFC for a waiver from compliance with the new statutory disclosure obligation or where it is exempt from the new statutory disclosure obligation (except if the exemption concerns disclosure prohibited by Hong Kong law or an order of a Hong Kong court).

Suspension of Trading

Exchange Imposed Suspension

The Exchange may suspend trading or cancel a listing where necessary for the protection of investors or the maintenance of an orderly market and where:

- ▶ the issuer fails to materially comply with the Listing Rules;
- ▶ there is insufficient public float;
- ▶ the issuer has insufficient operations or assets to warrant its continued listing; or
- ▶ the issuer or its business is no longer suitable for listing (Rule 6.01).

Issuer Request for Suspension

An issuer request for suspension must be supported by specific reasons. The Exchange will only grant a request for suspension where it is necessary in the interests of all parties. It will not be granted if the matter can be adequately dealt with by publication of an announcement.

Suspension of Trading (Cont'd)

Practice Note 11 sets out circumstances in which a request for suspension of trading will normally be granted including where:

- ▶ for a reason acceptable to the Exchange price-sensitive information cannot be disclosed at that time;
- ▶ the issuer has received a takeover offer, but only where terms have been agreed in principle and require discussion with and agreement by one or more major shareholders. Suspensions will normally only be appropriate where no previous announcement has been made. Otherwise, either details of the offer should be announced or, if not yet possible, a warning announcement should be published to the effect that the issuer is in discussions which could lead to an offer.
- ▶ suspension of trading is necessary to maintain an orderly market;
- ▶ there is a substantial change in the nature, control or structure of the issuer, where publication of full details is necessary to permit a realistic valuation to be made of the securities concerned;
- ▶ the issuer is no longer suitable for listing, or becomes a “cash” company;
- ▶ the issuer has entered into receivership or liquidation; and
- ▶ the issuer has confirmed that it will not be able to publish its financial information on time.

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Announcements

The Listing Rules require listed companies to publish announcements in a wide range of situations. The Exchange's Guide on Pre-vetting Requirements and Selection of Headline Categories for Announcements ("Pre-Vetting Guide")^[1] (attached at Appendix C) sets out the situations in which an announcement is required under the Main Board Rules, whether or not the announcement is required to be vetted by the Exchange before publication and the headline categories which will generally apply. The following is a summary of the main situations in which a listed issuer is required to inform the Exchange and publish an announcement.

[1]

http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/listpp/eppguid/Documents/2012_prevet_guide.xls

Announcements (Cont'd)

- ▶ **Price-sensitive information** – any price-sensitive information caught under Main Board Rule 13.09 must be announced and kept strictly confidential until a formal announcement is made.
- ▶ **Notifiable transactions** – any notifiable transaction within Chapter 14 of the Main Board Rules.
- ▶ **Connected transactions** – any connected transaction (unless an exemption is available) within Chapter 14A of the Main Board Rules.

Announcements (Cont'd)

Advances and financial assistance to third parties – the listed issuer or any of its subsidiaries makes a “relevant advance to an entity” which:

- ▶ exceeds 8% of the total assets of the listed issuer (Main Board Rule 13.13); or
- ▶ is greater than the previously disclosed relevant advance by 3% or more of the listed issuer’s total assets (Main Board Rule 13.14).

The expression “relevant advance to an entity” means the aggregate of amounts due from and all guarantees given on behalf of an entity, its controlling shareholder, its subsidiaries and affiliated companies. An advance to a subsidiary of the listed issuer, or between subsidiaries of the listed issuer, is not regarded as a relevant advance to an entity.

Announcements (Cont'd)

Financial assistance to affiliated companies - financial assistance and guarantees of financial assistance given by the listed issuer or any of its subsidiaries to affiliated companies (being those which are equity accounted for by the issuer) of the listed issuer together exceed 8% of the listed issuer's total assets (Main Board Rule 13.16).

Pledge of controlling shareholder's interest - the controlling shareholder of the listed issuer has pledged its interest in shares of the company to secure debts of the company or to secure guarantees or other support of obligations of the company (Main Board Rule 13.17).

Announcements (Cont'd)

Loan agreements – where:

- ▶ the listed issuer (or any of its subsidiaries) enters into a loan agreement that imposes specific performance obligations on any controlling shareholder (e.g. a requirement to maintain a specified minimum holding in the share capital of the listed issuer) and breach of such obligation will cause a default in respect of loans that are significant to the operations of the listed issuer (Main Board Rule 13.18); or
- ▶ the listed issuer or any of its subsidiaries breaches the terms of a loan that is significant to the operations of the listed issuer, such that the lender may demand immediate repayment and the breach has not been waived by the lender (Main Board Rule 13.19).

Takeover offers – an announcement must be made once a takeover offer is made or accepted, as required by the Takeovers Code.

Announcements (Cont'd)

Accounts and auditors

Board meeting for approval of results – an issuer must inform the Exchange and publish an announcement at least 7 clear business days in advance of the date fixed for any board meeting at which the profits or losses for any period are to be approved for publication (Main Board Rule 13.43).

Annual and half-year results – must be published by way of announcement under Main Board Rule 13.49.

Change in auditor or financial year end – any change in a listed issuer's auditors or financial year end, the reason(s) for the change and any other matters that need to be brought to the attention of holders of the company's securities. The issuer's announcement must state whether the outgoing auditors have confirmed that there are no matters that need to be brought to the attention of holders of the company's securities (Main Board Rule 13.51(4)). The issuer must appoint an auditor at each annual general meeting (AGM) to hold office until the next AGM. Any proposal to remove an auditor before the end of its term of office must be approved by shareholders in general meeting (Main Board Rule 13.88).

Announcements (Cont'd)

Company matters

Change of company name – once the board decides to change the company name (Main Board Rules 13.51).

Memorandum and Articles of Association – any proposed alteration of the memorandum or articles of association of the listed issuer Main Board Rule 13.51(1)).

Registered office – any change in the company's registered address, agent for service of process in Hong Kong or registered office or registered place of business in Hong Kong (Main Board Rule 13.51(5)).

Share registrar – any change of the company's share registrar (including any overseas branch share registrar) (Main Board Rule 13.51(5)).

Announcements (Cont'd)

Company matters (Cont'd)

Dividends – an issuer must inform the Exchange and publish an announcement at least 7 clear business days in advance of the date fixed for any board meeting at which the declaration, recommendation or payment of a dividend is expected to be decided (Main Board Rule 13.43). Any decision of the board to declare, recommend or pay a dividend or not to do so must be announced immediately (Main Board Rule 13.45(1) and (2)).

Change in nature of business – an announcement must be published of any decision to change the general character or nature of the issuer or the group (Main Board Rule 13.43(5)).

Winding-up or Liquidation – the appointment of a receiver or manager, the presentation of any winding-up petition or the passing of any resolution authorising the winding up of the listed issuer, its holding company or any of its major subsidiaries (i.e. a subsidiary representing 5% under any of the percentage ratios (please see “Notifiable transactions” below) or any similar insolvency events (Main Board Rule 13.25(1)).

Decision to withdraw listing – a proposed withdrawal of listing must be notified to shareholders by way of publication of an announcement (Main Board Rule 6.15).

Announcements (Cont'd)

Corporate governance

Audit committee – if the issuer fails to set up an audit committee or does not meet the membership requirements (Main Board Rule 3.23).

Directors and officers

Board composition and independent non-executive directors – an announcement must be made if the issuer does not have at least 3 independent non-executive directors (“INEDs”) or does not have at least one INED with appropriate professional qualifications or accounting or related financial management expertise (Main Board Rule 3.11).

Change in company secretary – an announcement must be made once the board has decided to change the company secretary (Main Board Rule 13.51(5)).

- *New Main Board Rule 3.10A (effective 31 December 2012)* modifies Main Board Rule 3.11 to also require that at least one-third of an issuer’s board should be INEDs. If an issuer fails to meet this one-third rule, it must publish an announcement and will have a three-month period to appoint a sufficient number of INEDs to comply with the rule.

Announcements (Cont'd)

Corporate governance (Cont'd)

Change in compliance officer – an announcement must be made as soon as a compliance officer resigns, and arrangements must be made immediately to appoint a new compliance officer. Once a new compliance officer has been appointed, another announcement must be made (Main Board Rules 13.51(6) and 3A.29).

Change in directors or supervisors – any change of directors or the chief executive, including, in the case of the resignation or removal of a director or the chief executive, the reasons given by or to him for his resignation or removal (Main Board Rule 13.51(2)). An announcement of the appointment of a new director or chief executive or re-designation of a director or the chief executive must include the information specified in Main Board Rule 13.51(2).

Announcements (Cont'd)

Corporate governance (Cont'd)

Change in disclosed information about directors – any change to the information specified in paragraphs (h) to (v) of Main Board Rule 13.51(2) previously disclosed about a director must be announced (Main Board Rule 13.51B). Such information relates mainly to matters which may cast doubt on the integrity of the directors involved and their suitability for continuing to serve as directors. Any change in the information specified in paragraphs (a) to (e) and (g) of Main Board Rule 13.51(2) must be set out in the next published annual or interim report. The Rules include an obligation for directors to immediately inform the issuer of any information specified in Main Board Rule 13.51(2) and any change to such information (Main Board Rule 13.51C).

Announcements (Cont'd)

Meetings

Notice of general meetings – notice of an issuer's annual general meeting and other general meetings must be announced (Main Board Rules 13.37 and 13.73).

- ▶ *Per new CP E.1.1 (effective 1 April 2012)*, issuers should avoid “bundling” resolutions and, where they are “bundled”, explain the reasons and material implications in the notice of meeting.

Results of general meetings – the poll results must be published before commencement of trading on the business day following the meeting (Main Board Rule 13.39(5)).

Announcements (Cont'd)

Shares

Issues of securities – an issue of securities (including convertible securities or warrants, options or similar rights) will almost always require an announcement (except an exercise of options under an employee share scheme) either as price sensitive information under Main Board Rule 13.09, or under Chapter 14 or 14A, or under Main Board Rule 13.28.

Changes in issued share capital – certain changes to an issuer's issued share capital must be reported to the Exchange for publication on the Exchange's website on the following business day (Main Board Rule 13.25A). Issuers must also submit a monthly return of changes in its equity securities, debt securities and other securitised instruments (Main Board Rule 13.25B).

Announcements (Cont'd)

Shares (Cont'd)

Share option schemes – an employee share option scheme must be approved by shareholders in general meeting and a listed issuer must publish an announcement of the outcome of the meeting as soon as possible and no later than the business day following the meeting (Main Board Rule 17.02(1)). Further announcements must be published on the grant of share options pursuant to a share option scheme specifying the information required by Main Board Rule 17.06A.

Basis of allotment of securities – the basis of allotment of any securities offered to the public for subscription or sale or an open offer and of the results of any rights issue and, if applicable, of the basis of any acceptance of excess applications. The company must notify the Exchange of such matters no later than the morning of the next business day after the allotment letters or other relevant documents of title are posted (Main Board Rule 13.30).

Announcements (Cont'd)

Shares (Cont'd)

Public float – The company must inform the Exchange immediately if it becomes aware that the number of listed securities required to be held by the public has fallen below the prescribed minimum percentage (i.e. 25% unless a lower percentage of between 15% and 25% was approved by the Exchange on listing for a company having an expected market capitalisation at the time of listing of more than HK\$10 billion) (Main Board Rule 13.32(1)(a)).

Lack of genuine open market – if the Exchange believes that the issuer's securities lack a genuine open market or are concentrated in the hands of a few shareholders, it may require the issuer to publish an announcement (Main Board Rule 13.34(a)).

Share Repurchases – any purchase, sale, drawing or redemption by the company or its group members of its listed securities (whether on the Exchange or not) (Main Board Rule 13.31). The company should also be aware of the provisions of the Code on Share Repurchases which sets out detailed rules governing any offer to purchase, redeem or otherwise acquire the shares of a listed issuer made by or on behalf of the listed issuer to any of its shareholders.

Announcements (Cont'd)

Announcements which Require Pre-vetting by the Exchange

Announcements of the following matters or transactions must be submitted to the Exchange for review and approval before publication under Main Board Rule 13.52(2):

- a. very substantial acquisitions, very substantial disposals or reverse takeovers under Main Board Rules 14.34 and 14.35;
- b. transactions or arrangements within 12 months after listing which would result in a fundamental change in principal business activities under Main Board Rules 14.89 to 14.91; and
- c. cash companies under Main Board Rules 14.82 and 14.83.

Announcements other than those specified in Main Board Rule 13.52(2) do not need to be pre-vetted by the Exchange, although companies may consult the Exchange regarding rule compliance issues. The Exchange also reserves the right under Main Board Rule 13.52A to require listed companies to submit for review any draft announcement, circular or other document in individual cases.

For a summary of the pre-vetting requirements for announcements, reference should be made to the Exchange's Pre-vetting Guide at Appendix C.

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Matters Requiring Prior Consultation with Exchange Prior to Announcement

There are a number of Rule compliance issues relating to notifiable transactions or issues of securities which need the Exchange's prior consent or confirmation prior to publication of an announcement. These include, but are not limited to, the following:

- i. whether the Exchange will allow the listed issuer to adopt alternative size test(s) to classify a transaction under Main Board Rule 14.20;
- ii. whether the Exchange will deem a party to a transaction to be a connected person of the listed issuer under Main Board Rule 14A.06 or 14A.11(4). Main Board Rule 14A.11(4)(c) requires a listed issuer to notify the Exchange of any proposed transaction with the parties described in such rules unless the transaction is exempt;

Matters Requiring Prior Consultation with Exchange Prior to Announcement (Cont'd)

- iii. whether the transaction/matter falls under the special or exceptional circumstances described in the Listing Rules, e.g. a rights issue or open offer proposed by a Main Board issuer without underwriting under the notes to Main Board Rule 7.19 or 7.24; a proposed issue of securities for cash under general mandate at a price representing a discount of 20% or more to the benchmarked price under Main Board Rule 13.36(5); or a proposed issue of warrants that would not meet certain specific requirements under Main Board Rule 15.02; and

Matters Requiring Prior Consultation with Exchange Prior to Announcement (Cont'd)

- iv. In the case of matters affecting trading arrangements (including suspension or resumption of trading, and cancellation or withdrawal of listing), Main Board Rule 13.52B requires that:
 - a. listed issuers must consult the Exchange before issuing the relevant announcement; and
 - b. the announcement must not include any reference to a specific date or timetable which has not been agreed in advance with the Exchange.

Announcements (Cont'd)

Publication of Announcements under Rule 2.07C

- ▶ Announcements are published by publication on the website of the Exchange and on the listed issuer's own website.
- ▶ Listed companies must submit an electronic copy of the announcement through the Exchange's electronic submission system (HKEx-EPS).
- ▶ When doing so, companies must select all appropriate headlines from the list of headline categories which are set out in Appendix 24 to the Main Board Rules.
- ▶ Unless stated otherwise in the Rules, all announcements must be in English and Chinese.

Announcements (Cont'd)

Publication of Announcements (Cont'd)

With the exception of certain limited types of announcements that can be published at all times during the operational hours of the e-Submission System, announcements must only be submitted during the designated publications windows which are:

On a normal business day:

- ▶ 6.00 a.m. to 8.30 a.m.
- ▶ 12.00 p.m. to 1.00 p.m.
- ▶ 4.15 p.m. to 11.00 p.m.

On the eves of Christmas, New Year and Lunar New Year when there is no afternoon session:

- ▶ 6.00 a.m. to 8.30 a.m.
- ▶ 12.00 p.m. to 11.00 p.m.

On a non-business day preceding a business day:

- ▶ 6.00 p.m. to 8.00 p.m.

Announcements (Cont'd)

The categories of announcements which can be published during trading hours as well as outside trading hours are:

- i. suspension announcements;
- ii. announcements made in response to unusual movements in share price or trading volume;
- iii. announcements denying the accuracy of news reports or clarifying that only its published information should be relied upon; and
- iv. overseas regulatory announcements.

Listing Documents and Circulars which require Pre-Vetting

Main Board Listing Rule 13.52(1) requires the following documents to be submitted to the Exchange for review and approval before publication:

- ▶ listing documents (including prospectuses);
- ▶ circulars relating to cancellation or withdrawal of listing of listed securities;
- ▶ circulars for notifiable transactions which are subject to shareholders' approval;
- ▶ circulars for connected transactions;
- ▶ circulars to the company's shareholders seeking their approval of issues of securities that require specific mandates from the shareholders (under Main Board Rule 13.36(1));

Listing Documents and Circulars which require Pre-Vetting (Cont'd)

- ▶ circulars to the issuer's shareholders seeking their approval of transactions or arrangements that require independent shareholders' approval and the inclusion of separate letters from independent financial advisers to be contained in the relevant circulars under Main Board Rule 13.39(7), which include:
 - a. spin-off proposals;

Listing Documents and Circulars which require Pre-Vetting (Cont'd)

- b. transactions which the Rules require to be subject to independent shareholders' approval (see Main Board Rule 13.39(4)(b)) such as:
 - 1. rights issues under Main Board Rule 7.19(6) or 7.19(7);
 - 2. open offers under Main Board Rule 7.24(5) or (6);
 - 3. refreshments of general mandates before next AGM under Main Board Rule 13.36(4);
 - 4. withdrawal of listings under Main Board Rule 6.12; and
 - 5. transactions or arrangements that would result in a fundamental change in the principal business activities of the listed issuer within 12 months after listing under Main Board Rules 14.89 to 14.91;

Listing Documents and Circulars which require Pre-Vetting (Cont'd)

- ▶ circulars to shareholders seeking their approval of any matter in relation a share option scheme which is required under Chapter 17 of the Main Board Listing Rules;
- ▶ circulars to shareholders seeking their approval of proposals to explore for natural resources as an extension to or change from the listed issuer's existing activities under Main Board Rule 18.07;
- ▶ circulars to shareholders seeking their approval of warrant proposals involving approvals by shareholders and all warrant holders under paragraph 4(c) of Practice Note 4 to the Main Board Listing Rules; and
- ▶ circulars or offer documents issued by the issuer in connection with takeovers, mergers or offers.

Disclosure of Changes in Issued Share Capital

- ▶ **Next Day Disclosure Requirements**

The Listing Rules require next day disclosure on the Exchange website of 2 categories of changes in issued share capital.

Disclosure of Changes in Issued Share Capital (Cont'd)

The first category of changes which always require next day disclosure on the next business day, include:

- ▶ placings
- ▶ consideration issues
- ▶ open offers
- ▶ rights issues
- ▶ bonus issues
- ▶ scrip dividends
- ▶ repurchases of shares or other securities
- ▶ exercise of an option under the issuer's share option scheme/other than under the issuer's share option scheme by a director of the listed issuer
- ▶ capital reorganisation
- ▶ changes in issued share capital not falling within any of the categories above or any of the categories requiring disclosure in specified circumstances described below.

Disclosure of Changes in Issued Share Capital (Cont'd)

Categories of Changes Requiring Next Day Disclosure in Specified Circumstances

- ▶ exercise of an option under a share option scheme other than by a director of the listed issuer;
- ▶ exercise of an option other than under a share option scheme not by director of the issuer;
- ▶ exercise of a warrant;
- ▶ conversion of convertible securities; or
- ▶ redemption of shares or other securities.

The specified circumstances include:

- ▶ where the event results in a change of 5% or more of the listed issuer's existing issued share capital; or
- ▶ where the listed issuer is required to make disclosure of a first category change and an event has occurred but not been disclosed (either as a second category change or in a monthly return (e.g. because the 5% *de minimis* threshold has not been reached)).

Disclosure of Changes in Issued Share Capital (Cont'd)

Monthly Return

- ▶ in relation to movements in the listed issuer's equity securities, debt securities and any other securitised instruments during the period to which the monthly return relates
- ▶ the return must be submitted no later than 8.30 a.m. on the fifth business day next following the end of each calendar month
- ▶ the monthly return must be submitted irrespective of whether there has been any change in the information provided in the previous monthly return.

Disclosure of Financial Information

Annual Report and Accounts

A listed issuer must send a copy of its annual report including its annual accounts (and, if the company prepares group accounts, its group accounts) together with a copy of the auditors' report to every shareholder of the company and every holder of the company's listed securities not less than **21 days** before the date of the company's AGM and not later than **4 months** after the end of the financial year.

The annual accounts, directors' report and auditors' report must be prepared in English and Chinese and must be laid before the AGM.

In the case of overseas shareholders, the company may mail the English version only provided that a statement is included that a Chinese language version is available from the company on request.

- ▶ *Per new CP C.1.4 (effective 1 April 2012)*, the annual report should include an explanation of the basis on which the company generates or preserves value over the longer term and strategy for delivering the objectives of the company.

Disclosure of Financial Information (Cont'd)

Annual Report and Accounts

- ▶ Appendix 16 to the Listing Rules sets out the minimum disclosure requirements for annual reports.
- ▶ Annual accounts must comprise (at minimum) a balance sheet, income statement, cash flow statement, statement of changes in equity, comparative figures and accounting policies and explanatory notes.
- ▶ Annual accounts must be prepared in accordance with Hong Kong Financial Reporting Standards or International Financial Reporting Standards.

Disclosure of Financial Information (Cont'd)

Half Year Reports

- ▶ Listed companies are also required to prepare half-year reports and must send either the half-year report or a summary half-year report to the company's shareholders and holders of the company's listed securities within 3 months of the end of the first 6 months of each financial year.
- ▶ Financial statements in the half-year report are generally unaudited. This fact must be stated. If audited, the auditors' report and any qualifications must be included.
- ▶ Half-year reports must be reviewed by the Audit Committee.

Disclosure of Financial Information (Cont'd)

Quarterly Reporting

- ▶ Quarterly reporting is a Recommended Best Practice under the Code on Corporate Governance Practices – not a mandatory obligation under the Listing Rules.
- ▶ If quarterly results are published, they should be published within 45 days of the quarter end.
- ▶ Once an issuer decides to publish quarterly results, an announcement is required disclosing the reasons for any decision not to publish results for any particular quarter.

Disclosure of Financial Information (Cont'd)

Preliminary Announcements of Results

A preliminary announcement of the company's annual and half-year results must be published on the business day after their approval by the board and:

For Annual Results

- ▶ within 3 months of the financial year end.

For Half-year Results

- ▶ within 2 months of the financial year end.

The announcement must be published on the websites of the Exchange and the issuer.

The Exchange will normally require trading in a listed issuer's shares to be suspended if it fails to publish its financial information on time (Rule 13.50).

Financial Reporting for Mineral Companies

Mineral Companies must include in their half-yearly and annual reports details of exploration, development and mining production activities and a summary of expenditure incurred during the relevant period (if there has been no such activities, this must be stated) (Main Board Rule 18.14)

- ▶ Note however that companies must update shareholders immediately of material changes in funding requirements or exploration activity under the general disclosure requirements.

Mineral companies must provide an annual update of their resources and/or reserves in annual reports (Main Board Rule 18.15). Updates must be prepared in accordance with the accepted reporting standard under which they were previously disclosed or, if none, in accordance with one of the recognised reporting standards. Annual updates need not be supported by a competent person's report and may take the form of a no material change statement.

Other (non-Mineral Company) listed issuers that publicly disclose details of resources and/or reserves are also required to provide annual updates of those resources/reserves in their annual reports. Such updates must be prepared in accordance with the reporting standard under which they were previously disclosed or one of the accepted reporting standards. They may also be achieved by way of a no material change statement

Voting at General Meetings

Mandatory Voting by Poll on all Resolutions at General Meetings

Voting by poll is mandatory on all resolutions at all general meetings under Main Board Rule 13.39(4). A chairman at a general meeting may exempt certain prescribed procedural and administrative matters from a vote by poll.

Listed issuers must therefore comply with the requirements under Main Board 13.39(5) relating to:

- i. the appointment of a scrutineer (who may be the issuer's auditors or share registrar or external accountants who are qualified to serve as auditors) to oversee the voting procedures;
- ii. the submission of an announcement of the results of the poll for publication on the Exchange website at least 30 minutes before the earlier of the commencement of the morning trading session or any pre-opening session on the business day following the general meeting.

Voting at General Meetings (Cont'd)

The chairman of a shareholders' general meeting should ensure that the detailed procedures for conducting a poll are explained at the beginning of the meeting (Code Provision E.2.1). Following amendments to the Code, effective 1 April 2012, the Chairman may explain these procedures at any point during the meeting.

Code Provision Specifies Minimum Notice Periods for General Meetings

Code Provision E.1.3 in the Code on Corporate Governance Practices requires:

- i. at least 20 clear business days' notice for AGMs; and
- ii. at least 10 clear business days' notice for all other General Meetings.

Under the “comply or explain” principle underlying the Code, issuers must explain any failure to comply with these requirements in their interim and annual reports.

Voting at General Meetings (Cont'd)

Parties Required to Abstain from Voting:

Any shareholder that has a “material interest” in a transaction or arrangement to be approved at a general meeting of shareholders, is required to abstain from voting on the resolution (Main Board Rule 2.15).

Factors relevant to determining whether a shareholder has a “material interest” include:

- ▶ whether the shareholder is a party to the transaction or an associate of such a party; and
- ▶ whether the transaction confers upon the shareholder or his associate a benefit not available to other shareholders of the issuer (Rule 2.16).

Pre-exemption Rights

Except for a pro rata offer to existing shareholders, the directors of a listed issuer are required to obtain the consent of shareholders in general meeting prior to the allotment, issue or grant of shares, securities convertible into shares or options, warrants or similar rights to subscribe for shares.

A general mandate may however be obtained from shareholders at a general meeting of shareholders to issue up to 20% of the issued share capital of the company and, if separately authorised by the shareholders in general meeting, shares repurchased (up to 10% of the issued share capital).

Rule 13.36 restrictions do not apply to *pro rata* offers made to all existing shareholders **excluding** those resident in a place outside Hong Kong if the directors consider such exclusion necessary or expedient due to legal restrictions or requirements of any relevant regulatory authority or stock exchange in the relevant place. Directors must make enquiry as to relevant restrictions.

An EGM may be called to approve a share issue for a specific purpose.

Restrictions on Issues of Securities in 6 Months after Listing

A listed issuer is prohibited from issuing (or entering into any agreement to issue) any further shares or securities convertible into its equity securities within 6 months of the commencement of dealing in its securities on the Exchange (whether or not the issue will be completed within 6 months from commencement of dealing) except for:

- i. The issue of shares, the listing of which has been approved by the Exchange, under a Ch. 17 share option scheme;
- ii. The exercise of conversion rights attaching to warrants issued as part of the IPO;
- iii. Any capitalisation issue, capital reduction or consolidation or sub-division of shares; and
- iv. The issue of shares or securities under an agreement entered into before the commencement of dealing, the material terms of which were disclosed in the IPO prospectus (Rule 10.08).

Issues of Securities for Cash

- ▶ An announcement containing the information required by Rule 13.28 must be published on the next business day of the directors' decision to issue securities for cash.
- ▶ In the case of a placing of securities for cash, securities cannot be issued under the general mandate if the price is at a discount of 20% or more to the benchmarked price of the securities (i.e. the higher of the closing price on the date of the agreement and the average closing price for the 5 trading days immediately before the earlier of:
 - i. the date of announcement of the transaction;
 - ii. the date of the agreement; and
 - iii. the date on which the price is fixed).

An exception applies where the issuer can satisfy the Exchange that it is in a serious financial position and can only be saved by an urgent rescue operation involving the issue of securities at a discount or that other exceptional circumstances exist (Rule 13.36(5)).

Issues of Securities for Cash (Cont'd)

Where securities are issued for cash under a general mandate at a discount of >20% to the securities' benchmarked price, the issuer must publish an announcement no later than 30 minutes before the opening of the morning trading session on the business day following the signing of the relevant agreement disclosing (among others):

- ▶ If there are <10 allottees, the name of each allottee (or its beneficial owner) and confirmation of its independence from the issuer; and
- ▶ If there are > 10 allottees, the name of each allottee (or its beneficial owner) subscribing 5% or more of the issued securities and a generic description of all other allottees, and a confirmation of their independence from the issuer. In calculating the 5% limit, the number of securities subscribed by the allottee, its holding company and any of their subsidiaries must be aggregated.

Notifiable Transactions

Chapter 14 of the Listing Rules specifies certain transactions (principally acquisitions and disposals), particulars of which have to be notified to the shareholders, the Exchange and the general public. In some cases, shareholders' approval is also required. The term "listed issuer" means the listed issuer itself **and** its subsidiaries. Where a transaction is both "notifiable" and "connected", the issuer must comply with both Ch. 14 and Ch.14A.

A transaction is widely defined and includes:

- an acquisition or disposal of assets, including a deemed disposal
- certain transactions in relation to options to acquire or dispose of assets or to subscribe for securities
- entering into or terminating finance leases where their financial effects have an impact on the listed issuer's balance sheet and/or profit and loss account
- entering into or terminating operating leases which, by virtue of their size, nature or number, have a significant impact on the listed issuer's operations

Notifiable Transactions (Cont'd)

- granting an indemnity or a guarantee or providing financial assistance other than to the listed issuer's subsidiaries
- any arrangement or agreement involving the formation of a joint venture entity in any form

The definition excludes (to the extent not specifically referred to above) transactions of a revenue nature in the ordinary and usual course of business and also the issue of new securities for cash (but these are within the definition of transaction which applies for connected transactions under Ch.14A).

Notifiable Transactions (Cont'd)

▶ Transactions of a “Revenue Nature”

Relevant non-exhaustive factors include:

- whether previous transactions of same nature treated as of a revenue nature
- historical accounting treatment of previous transactions of same nature
- whether accounting treatment is in accordance with generally accepted accounting standards
- whether transaction is a revenue or capital transaction for tax purposes (Note 4 of Rule 14.04(1)(g))

Transactions involving the acquisition and disposal of properties are generally not considered to be of a revenue nature unless carried out as one of the principal activities and in the ordinary and usual course of business of the listed issuer (Note 2 to Rule 14.04(1))

Notifiable Transactions (Cont'd)

- ▶ **Transactions in the “Ordinary and Usual Course of Business”**

“Ordinary and usual course of business” = the existing principal activities of the listed issuer or an activity wholly necessary for its principal activities. Financial assistance is only provided “in the ordinary and usual course of business” of (i) a “banking company” (i.e. an authorized financial institution under the Banking Ordinance) or (ii) a licensed securities house providing financial assistance on normal commercial terms for a purpose specified in Rule 14.04(1)(e)(iii) (Rule 14.04(8))

Notifiable Transactions (Cont'd)

Classification of Notifiable Transactions

Notifiable transactions are classified using the percentage ratios calculations set out in Rule 14.07.

Transaction Type	Assets ratio	Consideration ratio	Profits ratio	Revenue ratio	Equity capital ratio
Share transaction	less than 5%	less than 5%	less than 5%	less than 5%	less than 5%
Discloseable transaction	5% or more but less than 25%	5% or more but less than 25%	5% or more but less than 25%	5% or more but less than 25%	5% or more but less than 25%
Major transaction disposal	25% or more, but less than 75%	25% or more, but less than 75%	25% or more, but less than 75%	25% or more, but less than 75%	Not Applicable
Major transaction acquisition	25% or more, but less than 100%	25% or more, but less than 100%	25% or more, but less than 100%	25% or more, but less than 100%	25% or more, but less than 100%
Very Substantial Disposal	75% or more	75% or more	75% or more	75% or more	Not applicable
Very Substantial Acquisition	100% or more	100% or more	100% or more	100% or more	100% or more

Note: The equity capital ratio relates only to an acquisition (and not a disposal) by a listed issuer issuing new equity capital.

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Notifiable Transactions (Cont'd)

Chapter 14 sets out six categories of notifiable transactions:

1. A **share transaction** is an acquisition of assets (excluding cash) by a listed issuer where the consideration includes securities for which listing will be sought and where all percentage ratios are less than 5%;
2. A **discloseable transaction** is a transaction or a series of transactions by a listed issuer where any percentage ratio is 5% or more, but less than 25%;
3. A **major transaction** is a transaction or a series of transactions by a listed issuer where any percentage ratio is 25% or more, but less than 100% for an acquisition or 75% for a disposal;

Notifiable Transactions (Cont'd)

4. A **very substantial disposal** is a disposal or a series of disposals of assets by a listed issuer where any percentage ratio is 75% or more;
5. A **very substantial acquisition** is an acquisition or a series of acquisitions of assets by a listed issuer where any percentage ratio is 100% or more; and
6. A **reverse takeover** is “**an acquisition or a series of acquisitions** which, in the opinion of the Exchange, constitutes, or is part of a transaction or arrangement or series of transactions or arrangements which **constitute, an attempt to achieve a listing of the assets to be acquired and a means to circumvent the requirements for new applicants** set out in Chapter 8 of the Listing Rules and normally refers to:
 - (a) an acquisition/series of acquisitions of assets **constituting a very substantial acquisition** where there is or which will result in a **change in control** (i.e. 30% or more of the voting rights) of the listed issuer; or
 - (b) an acquisition/series of acquisitions of assets **from the incoming controlling shareholder(s) or his/their associates within 24 months after the change in control** that had not been regarded as a reverse takeover, which individually or together **reach the threshold for a very substantial acquisition**.

Notifiable Transactions (Cont'd)

▶ *Reverse Takeovers (Cont'd)*

In determining whether an acquisition(s) constitute(s) a very substantial acquisition, the lower of:

- i. the latest published figures of the asset value, revenue and profits shown in the listed issuer's accounts and the market value of the listed issuer at the time of the change in control; and
- ii. The latest published figures of the asset value, revenue and profits shown in the listed issuer's accounts and the market value of the listed issuer at the time of the acquisition(s),

is used as the denominator of the percentage ratios (Rule 14.06(b))

Notifiable Transactions (Cont'd)

Percentage Ratios

To determine the category into which a transaction falls, the listed issuer must calculate the following ratios:

(i) Assets ratio =
$$\frac{\text{Total assets of the subject of the transaction}}{\text{Total assets of the listed issuer}}$$

Total assets = current assets + non-current assets + fixed assets + intangible assets **(Rule 14.04(12))**

Intangible assets include goodwill (whether positive or negative)

(ii) Profits ratio =
$$\frac{\text{Profits attributable to the assets of the subject of the transaction}}{\text{Profits of the listed issuer}}$$

Profits = net profits after deducting all charges except taxation and before minority interests and extraordinary items

Notifiable Transactions (Cont'd)

Percentage Ratios

(iii) Revenue ratio =
$$\frac{\text{Revenue attributable to the assets of the subject of the transaction}}{\text{Total revenue of the listed issuer}}$$

Revenue = Revenue arising from the principal activities of a company, excluding revenue and gains that arise incidentally

(iv) Consideration ratio =
$$\frac{\text{Fair value of the consideration*}}{\text{Total market capitalization of listed issuer**}}$$

*Determined at the date of the agreement according to Hong Kong Financial Reporting Standards or International Financial Reporting Standards (**Rule 14.15(1)**)

Total market capitalization = average closing price of the listed issuer's securities for the 5 business days preceding transaction (Rule 14.07(4)**)

(v) Equity capital ratio =
$$\frac{\text{Nominal value of the listed issuer's equity capital issued as consideration}}{\text{Nominal value of the listed issuer's issued equity capital immediately before the transaction}}$$

Notifiable Transactions (Cont'd)

Percentage Ratios

The value of the listed issuer's debt capital (if any), including any preference shares, is not included in the calculation of the equity capital ratio.

If any size test produces an anomalous result or is inappropriate to the issuer's sphere of activity, HKEx may substitute other relevant size indicators or industry specific tests (Rule 14.20).

Notifiable Transactions (Cont'd)

Percentage Ratios

▶ **Classification of Transactions**

Transactions involving acquisition and disposal

- ▶ Where a transaction involves both an acquisition and a disposal, the Exchange will apply the percentage ratios to both the acquisition and the disposal. The transaction will be classified based on the larger of the acquisition or disposal, and subject to the requirements applicable to that classification.
- ▶ Where a shareholders' circular is required, each of the acquisition and disposal will be subject to the content requirements applicable to their respective transaction classification (Rule 14.24).

Notifiable Transactions (Cont'd)

Aggregation of Transactions

HKEx may require a listed issuer to aggregate a series of transactions and treat as one if they were all completed within 12 months or are otherwise related (Main Board Rule 14.22).

Relevant factors include:

- are entered into by the listed issuer with the same party or with parties connected or otherwise associated with one another;
- involve the acquisition or disposal of securities or an interest in one particular company or group of companies;
- involve the acquisition or disposal of parts of one asset; or
- together lead to substantial involvement by the listed issuer in a business activity which did not previously form part of the listed issuer's principal business activities.

(Main Board Rule 14.22)

Notifiable Transactions (Cont'd)

Requirements: Summary of requirements for different categories of notifiable transactions

	Notification to Exchange	Short suspension of dealings	Publication of an Announcement	Circular to shareholders	Shareholder approval	Accountants' report
Share transaction	Yes	Yes	Yes	No	No ¹	No
Discloseable transaction	Yes	No, unless there is PSI	Yes	No	No	No
Major transaction	Yes	Yes	Yes	Yes	Yes ²	Yes ³
Very substantial disposal	Yes	Yes	Yes	Yes	Yes ²	No ⁵
Very substantial acquisition	Yes	Yes	Yes	Yes	Yes ²	Yes ⁴
Reverse takeover	Yes	Yes	Yes	Yes	Yes ^{2, 6}	Yes ⁴

Notes: 1. Shareholder approval is not required if the consideration shares are issued under a general mandate.

2. Any shareholder and his associates must abstain from voting if such shareholder has a material interest in the transaction.

3. For acquisitions of businesses and/or companies only. The accountants' report is for the 3 preceding years.

4. An accountants' report for the preceding 3 financial years is required.

5. An accountants' report on the listed issuer's group is required.

6. Approval of the Exchange is also necessary.

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Notifiable Transactions (Cont'd)

Requirements for Announcements

Announcement

- ▶ As soon as possible after the terms of the notifiable transaction have been finalised, the issuer must:
 - inform the Exchange; and
 - publish an announcement on the Exchange's website and issuer's own website (Rule 14.34)
- ▶ Where a listed issuer has signed an agreement for a notifiable transaction and an announcement has not been published on a business day, the issuer must request a short suspension of dealings pending publication of the announcement.
- ▶ Where a listed issuer has signed an agreement for a notifiable transaction which is expected to be price sensitive, the issuer must immediately request a short suspension of dealings pending publication of an announcement. Once an issuer has finalised the major terms of a notifiable transaction which is expected to be price sensitive, it must ensure confidentiality of relevant information until publication of an announcement (Rule 14.37).

Notifiable Transactions (Cont'd)

Announcement Requirements

Announcement

- ▶ Rule 14.58 requires all notifiable transaction announcements to include:
 - a prominent disclaimer of the liability of Hong Kong Exchanges and Clearing Limited and the Stock Exchange of Hong Kong Limited
 - a description of the principal business activities of the issuer and the counterparty date of the transaction
 - confirmation that the counterparty and its ultimate beneficial owner are third parties independent of the listed issuer and its connected persons
 - aggregate consideration, how it will be satisfied and any arrangements for deferred payment
 - basis for determination of consideration
 - value (book value and valuation, if any) of assets the subject of the transaction
 - where applicable, the net profits (before and after tax and extraordinary items) attributable to the assets the subject of the transaction for 2 preceding financial years
 - reasons for entering into the transaction, benefits expected to accrue to issuer and statement that directors believe that the terms of the transaction are fair and reasonable and in the interests of shareholders as a whole
 - details of any guarantee and/or other security given or required

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Notifiable Transactions (Cont'd)

Additional Requirements for Share Transaction Announcements

Announcements of Share Transactions must include the following additional information:

- ▶ The amount and details of the securities being issued and details of any restrictions on the subsequent sale of such securities
- ▶ Brief details of the assets being acquired, including the name of any company or business or the assets or properties and, if the assets include securities, the name and general description of the activities of the company in which the securities are held
- ▶ If the transaction involves an issue of securities by a subsidiary of the listed issuer, a declaration as to whether the subsidiary will continue to be a subsidiary after the transaction
- ▶ A statement that the announcement appears for information purposes only and does not constitute an invitation or offer to acquire, purchase or subscribe for the securities
- ▶ A statement that application has been or will be made to HKEx for listing and permission to deal in the securities (Rule 14.59)

Notifiable Transactions (Cont'd)

Announcement Requirements (Cont'd)

Additional Requirements for announcements of notifiable transactions (other than share transactions) are:

- ▶ the general nature of the transaction including, if securities are involved, details of any restrictions applying to subsequent sale of the securities
- ▶ brief details of the assets being acquired or disposed of, including the name of the company/business or assets or properties and if the assets include securities, the name and general activities of the company in which the securities are held
- ▶ in the case of a disposal:
 - details of the gain or loss expected and the basis of its calculation (the gain or loss should be calculated by reference to the carrying value); and
 - the intended application of the sale proceeds
- ▶ for a major transaction to be approved by written shareholders' approval of a shareholder or a closely allied group of shareholders, the name of the shareholder(s), the number of shares held by each and the relationship between the shareholders

Notifiable Transactions (Cont'd)

Announcement Requirements (Cont'd)

- ▶ Additional Requirements for announcements of notifiable transactions (other than share transactions) transaction involves the disposal of an interest in a subsidiary, a declaration as to whether the subsidiary will continue to be a subsidiary after the transaction
- ▶ (except for disclosable transactions) the expected date of dispatch of the circular to shareholders is more than 15 days after the announcement date

Notifiable Transactions (Cont'd)

Shareholders' Approval Requirements

- ▶ Major Transactions, Very Substantial Disposals, Very Substantial Acquisitions and Reverse Takeovers must be made conditional on shareholders' approval.
- ▶ All voting at general meetings must be taken by poll (Rule 13.39(4)) and the results of the poll must be announced on the next business day following the meeting.
- ▶ The issuer must appoint its auditor, share registrar or external accountants to act as scrutineer for the vote taking.
- ▶ Any shareholder that has a material interest in the transaction must abstain from voting.
- ▶ Factors relevant to determining whether a shareholder has a "material interest" include:
 - whether the shareholder is a party to the transaction or an associate of such a party
 - whether the transaction confers upon the shareholder or his associate a benefit not available to other shareholders of the issuer (Rule 2.16)

Notifiable Transactions (Cont'd)

Shareholders' Approval Requirements (Cont'd)

- ▶ On a reverse takeover where there is a change in control of the listed issuer, and any person/group of persons will cease to be a controlling shareholder ("outgoing controlling shareholder") by virtue of a disposal of shares to a person/group of persons gaining control ("incoming controlling shareholder"), any of the incoming controlling shareholder's associates or an independent third party, the outgoing controlling shareholder and his associates are prohibited from voting in favour of a resolution approving an injection of assets from the incoming controlling shareholder or his associates at the time of the change in control. The prohibition does not apply if the decrease in the outgoing controlling shareholder's holding results solely from dilution through a new issue of shares to the incoming controlling shareholder.

Notifiable Transactions (Cont'd)

Written Shareholders' Approval and Requirement for Circular to Shareholders

Written Shareholders' Approval

Written shareholders' approval is allowed for Major Transactions only if:

- ▶ no shareholder would be required to abstain from voting;
- ▶ a “closely allied group of shareholders” holding more than 50% voting interest approves the transaction; and
- ▶ the reporting accountants' opinion given in the accountants' report is unqualified

Circular to Shareholders

- ▶ Required for Major Transactions, VSDs, VSAs and RTOs and must:
 - provide clear, concise and adequate explanation of subject matter;
 - contain all information necessary to allow shareholders to make an informed decision;

Notifiable Transactions (Cont'd)

Written Shareholders' Approval and Requirement for Circular to Shareholders

Circular to Shareholders (cont'd)

- confirm that to the best of the directors' knowledge, information and belief (having made all reasonable enquiry) the counterparty and the ultimate beneficial owner of the counterparty are third parties independent of the issuer and its connected persons.
- A Circular for a Major Transaction to be approved by written shareholders' approval must be sent to shareholders within 15 business days after publication of the announcement (Rule 14.41(a))
- Circulars for Major Transactions to be approved at general meeting, VSAs and VSDs must be sent to shareholders at the same time as or before the issuer gives notice of the general meeting (Rules 14.41(b) and 14.51)

Notifiable Transactions (Cont'd)

Requirement for Circular to Shareholders (Cont'd)

The issuer must send to shareholders any revised or supplementary circular and/or provide any material information that has come to the directors' attention after the issue of the circular (by way of announcement) not less than 10 business days before the date of the general meeting (Rules 14.42 and 14.52).

- ▶ Additional Requirements for Circulars for Major Transactions involving an acquisition of any business or company(ies)
 - an accountants' report on the business or company(ies) being acquired (although HKEx may relax this requirement if the company will not become a subsidiary of the issuer)
 - a pro forma statement of the assets and liabilities of the listed issuer's group combined with those of the business or company(ies) being acquired on the same accounting basis (Rule 14.67(6)(a))
 - a management discussion and analysis of the results of the business or company(ies) being acquired (Rule 14.67(7))

Notifiable Transactions (Cont'd)

Requirement for Circular to Shareholders (Cont'd)

- ▶ Additional Requirements for Circulars for Major Transactions involving an acquisition of any revenue generating assets (other than a business or company)
 - a profit and loss statement and valuation for the 3 preceding financial years (or less if asset held by vendor for shorter period) on the identifiable net income stream and valuation in relation to such assets, reviewed by the auditors or reporting accountants
 - a pro forma statement of the assets and liabilities of the listed issuer's group combined with the assets being acquired on the same accounting basis (Rule 14.67(6)(b))
 - a management discussion and analysis of the results of the business or company(ies) being acquired (Rule 14.67(7))

Notifiable Transactions (Cont'd)

Requirement for Circular to Shareholders (Cont'd)

- ▶ Additional Requirements for Circulars for VSAs and Reverse Takeovers involving an acquisition of any business or company(ies)
 - an accountants' report on the business or company(ies) being acquired
 - a pro forma income statement, balance sheet and cash flow statement of the enlarged group on the same accounting basis (Rule 14.69(4)(a))
- ▶ Additional Requirements for Circulars for VSAs and Reverse Takeovers involving an acquisition of any revenue generating assets (other than a business or company)
 - a profit and loss statement and valuation for the 3 preceding financial years (or less if, other than in the case of an RTO, the asset held by vendor for shorter period) on the identifiable net income stream and valuation in relation to such assets, reviewed by the auditors or reporting accountants
 - a pro forma profit and loss statement and net assets statement on the enlarged group on the same accounting basis (Rule 14.69(4)(b))
 - in relation to a VSA, a separate discussion and analysis of the performance of each of the group and any business or company acquired for the period referred to in Rule 4.06(1)(a) (Rule 14.69(7))

Notifiable Transactions (Cont'd)

Additional Requirements for Very Substantial Disposal Circulars

- ▶ Additional Requirements for VSD Circulars on a disposal of a business or company(ies) are:
 - financial information on either (a) the business or company(ies) being disposed of; or (b) the issuer's group with the business or company(ies) being disposed of shown separately as (a) disposal group(s) or (a) discontinuing operation(s) for the relevant period described in Rule 4.06(1)(a)
 - the financial information must include at least the income statement, balance sheet, cash flow statement and statement of changes in equity and must be reviewed by the issuer's auditors or reporting accountants
 - a pro forma income statement, balance sheet and cash flow statement of the remaining group on the same accounting basis (Rule 14.68(2)(a))
- ▶ Additional Requirements for VSD Circulars on a disposal of revenue-generating assets (other than a business or company(ies) are:
 - a profit and loss statement and valuation for the 3 preceding financial years (or less where asset held by issuer for a shorter period) on the identifiable net income stream and valuation in relation to such assets reviewed by the auditors or reporting accountants
 - a pro forma profit and loss statement and net assets statement on the remaining group on the same accounting basis (Rule 14.68(2)(b))

Notifiable Transactions (Cont'd)

Summary of historical financial information requirements applicable to acquisitions of any business, company, companies or revenue-generating asset with an identifiable income stream or asset valuation.

	Where the target is a business/ company	Where the target is a revenue- generating asset with an identifiable income stream or asset valuation
Major disposal	Not required	Not required
Major acquisition	Accountants' report on the <u>target</u>	Profit/ loss statement and (where available) valuation of the target
Very substantial disposal	Financial information of either the <u>target</u> or <u>the listed issuer group</u> with the target shown separately	Profit/ loss statement and (where available) valuation of the target
Very substantial acquisition or reverse takeover	Accountants' report on the <u>target</u>	Profit/ loss statement and (where available) valuation of the target

Notifiable Transactions (Cont'd)

Summary of pro forma financial information requirements applicable to acquisitions of any business, company, companies or revenue-generating asset with an identifiable income stream or asset valuation.

	Where the target is a business/ company	Where the target is a revenue- generating asset with an identifiable income stream or asset valuation
Major disposal	Not required	Not required
Major acquisition	Pro forma statement of assets and liabilities of the <u>enlarged</u> <u>group</u>	Pro forma statement of assets and liabilities of the <u>enlarged</u> <u>group</u>
Very substantial disposal	Pro forma income statement, balance sheet and cash flow statement of the <u>remaining group</u>	Pro forma profit and loss statement and net assets statement on the <u>remaining</u> <u>group</u>
Very substantial acquisition or reverse takeover	Pro forma income statement, balance sheet and cash flow statement of the <u>enlarged group</u>	Pro forma profit and loss statement and net assets statement on the <u>enlarged</u> <u>group</u>

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Notifiable Transactions (Cont'd)

Additional Requirements for Reverse Takeovers

- ▶ Exchange will treat an issuer proposing an RTO as a new listing applicant (Rule 14.54)
- ▶ Enlarged group or assets to be acquired must be able to meet one of the financial tests in Rule 8.05 and all other basic listing requirements
- ▶ Listed issuer must issue a prospectus and pay an initial listing fee
- ▶ Listing Committee Report 2010: The Application Of The RTO Rules To “Extreme Cases”

Listing Committee’s 2010 Report considered the handling of backdoor listings, inactive companies and cash shells. Overall conclusion was that RTO Rules should be applied to “extreme cases”.

Notifiable Transactions (Cont'd)

Additional Requirements for Reverse Takeovers

In evaluating whether a backdoor listing is an extreme case, the following factors are taken into account:

- the size of the acquisition relative to the size of the issuer;
- the quality of the acquired business – whether it can meet the trading record requirements for new listings, or whether it is unsuitable for listing (the example given here by the Committee is an early stage exploration company);
- the size and type of business that the issuer was engaged in prior to the acquisition (a key question here is whether it is merely a listed shell or not);

Notifiable Transactions (Cont'd)

Additional Requirements for Reverse Takeovers

▶ Listing Committee Report 2010: The Application Of The RTO Rules To “Extreme Cases” (Cont'd)

- any fundamental alteration to the issuer's principal business (e.g. the existing business would be discontinued or very immaterial to the enlarged group's operations post acquisition); and
- any other events and transactions, whether they be historical, proposed or intended, which, when considered alongside the acquisition, constitute a sequence of arrangements designed to circumvent the RTO Rules (e.g. a disposal of the issuer's original business simultaneous with a very substantial acquisition).

▶ Non-extreme cases

Where the acquired business is able to meet the track record requirements for new listing applicants, the acquisition is not generally treated as a new listing, as circumvention of the regulatory obligations on new listings is not considered a material concern. Instead, the Listing Division will require enhanced disclosure in the issuer's transaction circular and adopt a more stringent vetting approach.

▶ Acquisition of new business

Acquisitions of new businesses or assets cases are more likely to be regarded as new listings as enhanced disclosure is of limited use where the business/assets acquired have little in the way of operating history or track record.

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Notifiable Transactions (Cont'd)

- ▶ **Reverse Takeovers: Listing Committee Report 2008/09 - Reverse Takeovers and restriction on disposals after a change of control (Rules 14.92 and 14.93)**
 - The Listing Rules prohibit a listed issuer from disposing of its existing business within 24 months after a change in control unless assets acquired by the listed issuer after the change in control can meet the trading record requirement of Rule 8.05. If not, on a disposal by a listed issuer of its existing business within 24 months of a change in control, the issuer will be treated as a new listing applicant.
 - Aim of Rules 14.92/14.93 – prevent circumvention of reverse takeover rules by new controlling shareholder deferring sale of existing business until after asset injection, thereby avoiding classification as VSA.
 - A waiver of Rule 14.92 can be sought for a legitimate sale of an existing business w/in 24 months of a change of control provided that:
 - the incoming controlling shareholder has not injected assets into the listed issuer; and
 - after factoring in the disposal(s) of the issuer's existing business, the asset injection(s) before and after the change in control would not have constituted a VSA.
- ▶ *See Listing Committee's Annual Reports of 2008 and 2009 and Listing Decision HKEx-LD7-2011.*

Notifiable Transactions (Cont'd)

Additional Requirements for Transactions Involving Mineral Companies

A Mineral Company which proposes to acquire or dispose of assets which are solely or mainly mineral or petroleum assets as part of a major transaction (25% or more of existing activities) or above (a “Relevant Notifiable Transaction”) must:

- ▶ Comply with requirements for notifiable transactions of Main Board of Ch. 14 and requirements for connected transactions of Main Board Ch.14A;
- ▶ Prepare a Competent Person’s Report, which must form part of the circular to shareholders, on the resources and/or reserves being acquired or disposed of as part of the relevant transaction;
- ▶ For a major (or above) acquisition (but not disposal) - produce a Valuation Report, which must form part of the circular to shareholders, on the mineral or petroleum assets being acquired (Main Board Rule 18.09);
 - The Valuation Report must be prepared by a Competent Evaluator - i.e. someone who: (i) meets the independence test under Rule 18.22; (ii) has at least 10 years’ relevant and recent general mining/petroleum experience; (iii) has at least 5 years’ relevant and recent experience in assessment and/or valuation of mineral or petroleum assets; and (iv) has all necessary licenses (Main Board Rule 18.23); and
 - Valuation Reports must be prepared under the VALMIN Code, SAMVAL Code, or CIMVAL (Main Board Rule 18.34).
- ▶ Comply with the requirements of Main Board Rules 18.05(2) to 18.05(6) in relation to the assets being acquired (Main Board Rule 18.09).

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Notifiable Transactions (Cont'd)

Additional Requirements for Transactions involving Mineral Companies

Other listed issuers (i.e. non-Mineral Companies) that propose to acquire assets which are solely or mainly mineral or petroleum assets as part of a Relevant Notifiable Transaction must also comply with the above requirements. On completion of the transaction, the listed issuer will be treated as a Mineral Company, unless the Exchange decides otherwise.

Competent Person's Report & Valuation Reports

It should be noted that the Exchange may dispense with the requirement to produce a new Competent Person's Report or a Valuation Report under Main Board Rules 18.05(1), 18.09(2) or 18.09(3), if the issuer already has a Competent Person's Report or Valuation Report (or equivalent) that complies with Rules 18.18 to 18.34 (where applicable) and is not more than six months old (Main Board Rule 18.12). In this case, the issuer must provide this document as a no material change statement in the listing document or circular.

Prior written consent must be obtained from the Competent Person(s) or Competent Evaluator before an issuer may include their reports in the listing document or circular for a Relevant Notifiable Transaction, regardless of whether the person or firm is retained by the listing applicant or issuer (Main Board Rule 18.13).

Notifiable Transactions (Cont'd)

Additional Requirements for Transactions involving Mineral Companies

- ▶ Mineral companies must comply with the requirements of Rules 18.05(2) to 18.05(6) in relation to the assets being acquired (Rule 18.09). These require a statement of no material change since the effective date of the Competent Person's report; a description of exploration/exploitation/land use and mining rights and relevant properties; statement of legal claims/proceedings potentially affecting exploration/mining rights; and risk disclosure.
- ▶ HKEx may dispense with the requirement to produce a new Competent Person's Report or a Valuation Report (Rules 18.05(1), 18.09(2) or 18.09(3), if the issuer already has a Competent Person's Report or Valuation Report (or equivalent) that complies with Rules 18.18 to 18.34 (where applicable) and is not more than six months old (Rule 18.12).
- ▶ Prior written consent must be obtained from the Competent Person(s) or Competent Evaluator before an issuer may include their reports in the listing document or circular for a Relevant Notifiable Transaction, regardless of whether the person or firm is retained by the listing applicant or issuer (Rule 18.13).

Notifiable Transactions (Cont'd)

Pre-Vetting Requirements for Notifiable Transaction Circulars

Circulars or listing documents in respect of notifiable transactions must be pre-vetted (that is, reviewed and approved by the Exchange) before publication, including listing documents and prospectuses (e.g. for reverse takeovers, that are treated as new listings). (Rule 13.52(1))

Connected Transactions

Introduction

The rules on connected transactions are set out in Chapter 14A of the Main Board Listing Rules.

Their objectives are:

- a) to ensure that a listed issuer takes into account the interests of shareholders as a whole when it enters into connected transactions; and
- b) to provide safeguards against the directors, chief executive and substantial shareholders (or their associates) taking advantage of their positions. This is achieved by the general requirement of independent shareholders' approval for connected transactions.

Connected Transactions (Cont'd)

Generally, a connected transaction is any transaction between a listed issuer and a **connected person**.

For classification purposes, the Exchange may aggregate a series of transactions that are completed over a 12-month period or are otherwise related (Rule 14A.25).

Factors which the Exchange takes into account in determining whether connected transactions should be aggregated are whether they:

- i. are entered into by the listed issuer with the same party or parties connected/associated with one another;
- ii. involve the acquisition or disposal of securities or an interest in one particular company or group of companies;
- iii. involve the acquisition or disposal of parts of one asset; or
- iv. together lead to substantial involvement by the listed issuer in a business activity not previously part of its principal business activities (Rule 14A.26).

The Exchange may consider aggregating continuing connected transactions with a single connected person (Rule 14A.27).

Connected Transactions (Cont'd)

► Definitions

Transaction

The term “transaction”, **whether or not** it is of a revenue nature in the ordinary and usual course of business, includes:

- a) the acquisition or disposal of assets (including deemed disposals under Rule 14.29)
- b) any transaction involving an option to acquire or dispose of assets or to subscribe for securities;
- c) entering into or terminating finance/ operating leases;
- d) granting an indemnity or a guarantee or providing financial assistance;
- e) entering into a joint venture;
- f) issuing new securities;
- g) provision or receipt of services;
- h) sharing of services;
- i) providing or acquiring raw materials, intermediate products and finished goods; and
- j) a qualified property acquisition.

(Rule 14A.10)

Connected Transactions (Cont'd)

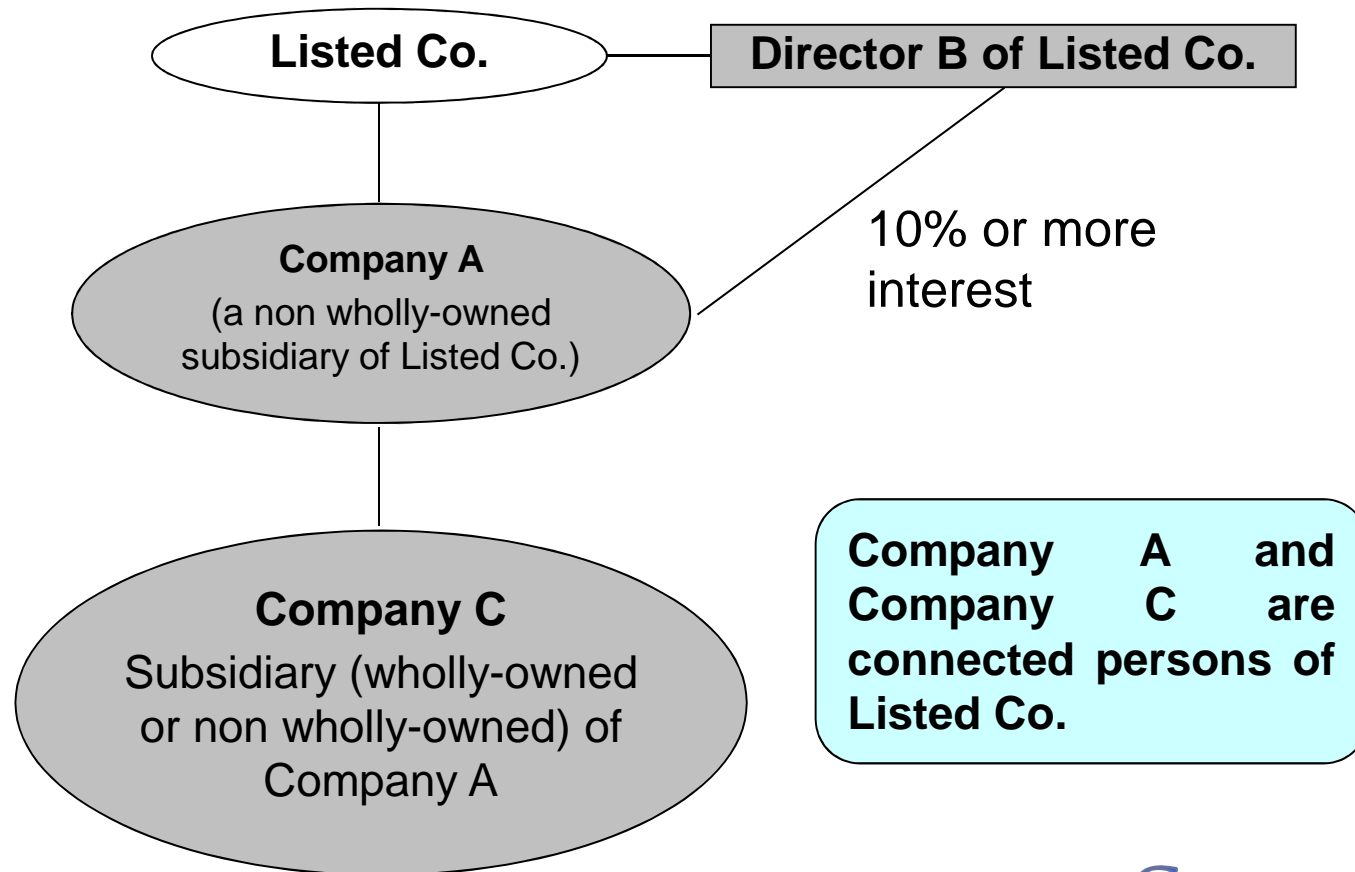
► Definitions (Cont'd)

Connected Person

- a) a **director, chief executive or substantial shareholder** (holding 10% or more of the voting rights) of the listed issuer or any of its subsidiaries, or an **associate** of any such persons;
- b) a **person who was a director** of the listed issuer or any of its subsidiaries in the past 12 months, or an **associate** of such a person; or
- c) a **non-wholly owned subsidiary** of the listed issuer where any connected person(s) of the listed issuer (other than at the level of its subsidiaries) are entitled to exercise, or control the exercise of, **10% or more of the voting power** at general meetings of the non-wholly owned subsidiary or a **subsidiary of such a non-wholly owned subsidiary**.

Connected Transactions (Cont'd)

► Definitions (Cont'd)



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Connected Transactions (Cont'd)

► Definitions (Cont'd)

Associate of an individual

- a) spouse or person cohabiting as a spouse with the connected person;
- b) a child, step-child, parent, step-parent, sibling, or step-sibling of the connected person;
- c) a company controlled by any of the people in (a) and (b) taken together;
- d) a parent-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, grandparent, grandchild, uncle, aunt, nephew, niece or cousin of the connected person (or a company controlled by any of those people taken together) whose association with the connected person is such that, in the opinion of the Exchange, the proposed transaction should be subject to the connected transaction requirements;

Connected Transactions (Cont'd)

► Definitions (Cont'd)

Associate of an individual (Cont'd)

- e) a **trustee** of any trust of which the **connected person, his spouse, child under 18 or step-child under 18** is a beneficiary or discretionary object;
- f) a **company** in which the people/entities in (e) above, taken together, can:
 - a) exercise or control the exercise of **30% or more of the voting power** at general meetings; or
 - b) **control the composition** of a majority of the board of directors.
- g) a **subsidiary** of a company in (f); or
- h) a person/entity who has entered, or proposes to enter, into an **arrangement** with the connected person with respect to the transaction which is such that, in the opinion of the Exchange, that person/entity should be considered a connected person.

Connected Transactions (Cont'd)

► Definitions (Cont'd)

Associate of a company

- a) a **subsidiary, holding company, or fellow subsidiary** of such a holding company;
- b) a **trustee** of any trust of which the company is a beneficiary or discretionary object;
- c) a **company** in which the entities in (a) and (b) above, taken together, can:
 - a) exercise or control the exercise of **30% or more of the voting power** at general meetings; or
 - b) **control the composition** of a majority of the board of directors; and
- d) a **subsidiary** of a company in (c).

Connected Transaction Where There Is No Transaction With A Connected Person

The following transactions with non-connected persons are also connected transactions.

Acquisition or disposal of interest in a company in which a Controller has an interest

- a) acquisition or disposal of an interest in a company where a substantial shareholder of that company is, or is proposed to be a controller (i.e. a director, chief executive or controlling shareholder of the listed issuer) or an associate of a controller;
- b) acquisition of an interest (or option to acquire such interest) in a company of which a controller (or its associate) is, or will become, a shareholder where the interest is:
 - i. of a fixed income nature;
 - ii. shares to be acquired on less favourable terms than those granted to the controller or its associate; or
 - iii. shares which are of a different class from those held by, or to be granted to, the controller or its associate.

Connected Transaction Where There Is No Transaction With A Connected Person

Controller's subscription on favourable terms

- c) a transaction between a listed issuer and a non-connected person involving a controller (or its associate) subscribing on specially favourable terms shares in a company in which the listed issuer is a shareholder; or

Controller's subscription of different class of shares

- d) a transaction between a listed issuer and a non-connected person involving a controller (or its associate) subscribing shares in a company in which the listed issuer is a shareholder but which are of a different class from those held by the listed issuer.

Connected Transaction (Cont'd)

▶ **Financial assistance**

Financial assistance includes granting credit, lending money, providing security for, or guaranteeing a loan (Rule 14A.10(4)).

Commonly Held Entity

A company in which both the listed issuer and a connected person are shareholders and where any connected person(s) of the listed issuer at the issuer level can (individually or together) exercise or control the exercise of 10% or more of the voting power at a general meeting (Rule 14A.13(2)(a)(ii)) (“Commonly Held Entity”).

Connected Transaction (Cont'd)

► **Financial assistance**

Financial assistance provided by a listed issuer

- a) to a connected person; or
- b) to a Commonly Held Entity.

Financial assistance provided to a listed issuer

- a) by a connected person; or
- b) by a Commonly Held Entity.

Rule 14A.13(2)

Connected Transaction (Cont'd)

▶ Financial assistance

Financial assistance for the benefit of connected interests

An indemnity or guarantee granted, or financial assistance provided, by the listed issuer to and/or for the benefit of a connected person or a Commonly Held Entity (Rule 14A.13(3))

Granting security to connected interests

Security granted by a listed issuer over its assets in respect of any financial assistance made to the listed issuer by a connected person or Commonly Held Entity (Rule 14A.13(4))

Connected Transaction (Cont'd)

► Options involving connected persons

The grant, acquisition, transfer or exercise of an option involving a listed issuer and its connected person is a connected transaction and is classified by reference to the percentage ratios (except the profits ratio) (Rule 14A.68)

Termination of an option by a listed issuer is a “transaction” unless termination is in accordance with the terms of the original agreement and there is no payment of any penalty, damages or other compensation.

If exercise of the option is **not** at the listed issuer’s discretion:

- on grant of the option, transaction is classified as if the option had been exercised – for the purposes of calculating the percentage ratios, consideration includes both the premium and exercise price
- the exercise or transfer of the option must be announced if the grant of the option was announced
- if the grant of the option is required to be announced, the issuer must announce the expiry of the option, notification from the option holder that the option will not be exercised and the transfer of the option to a third party. (Rule 14A.60)

Connected Transaction (Cont'd)

► Options involving connected persons (Cont'd)

Where an option is exercisable at the discretion of the listed issuer:

- on acquisition by, or grant of the option to, the listed issuer only the premium is taken for the purpose of the percentage ratios. Where the premium represents 10% or more of the sum of the premium + the exercise price, the value of the underlying assets + the revenue attributable to such assets + the premium and the exercise price are used for the purpose of the percentage ratios.
- on exercise of the option by the listed issuer, the exercise price, value of the underlying assets + the revenue attributable to such assets are used for the purpose of the percentage ratios.
- non-exercise of the option or transfer of the option to a 3rd party are treated as if the option was exercised. The exercise price, value of the underlying assets, the revenue attributable to such assets and (if applicable) the premium for transferring the option are used for the purpose of the percentage ratios.

(Rule 14A.70)

Connected Transaction (Cont'd)

▶ **Joint venture arrangements involving connected persons**

Entering into any agreement or arrangement involving the formation of a joint venture entity in any form, such as a partnership or a company, or any other form of joint arrangement by a listed issuer and a connected person constitutes a connected transaction (Rule 14A.10(13)(f)).

▶ **Continuing Connected Transactions**

Continuing connected transactions are connected transactions that:

- i. involve the provision of goods, services or financial assistance;
- ii. are carried out on a continuing or recurring basis; and
- iii. are expected to extend over a period of time.

Continuing connected transactions are governed by Rules 14A.33 to 14A.41.

Connected Transaction (Cont'd)

► Classification of Connected and Continuing Connected Transactions

Connected and continuing connected transactions fall into 3 categories:

- 1) Non-exempt transactions
- 2) Transactions exempt from the reporting, announcement and independent shareholders' approval requirements ("**wholly exempt**" transactions)
- 3) Transactions exempt from the independent shareholders' approval requirement only (but subject to the reporting and announcement requirements) ("**partially exempt**" transactions)

Connected Transaction (Cont'd)

▶ Connected Transaction Requirements

Written agreement requirement

The listed issuer must enter into a written agreement with all relevant parties in respect of the connected transaction.

Reporting requirements

The listed issuer's next published annual report and accounts must include the details of the connected transaction specified in Rule 14A.45:

- the transaction date;
- the transaction parties and a description of their connected relationship;
- a brief description of the transaction and its purpose;
- total consideration and terms; and
- the nature and extent of the connected person's interest.

Connected Transaction (Cont'd)

▶ Connected Transaction Requirements (Cont'd)

Notification and Announcement requirement

The listed issuer must **notify the Exchange** as soon as possible after the terms of the connected transaction have been agreed upon and **publish an announcement** as soon as possible (Rule 14A.47).

Independent shareholders' approval requirement

Connected transactions and continuing connected transactions must be approved by the issuer's independent shareholders. Voting on the resolution approving the connected transaction must be **by way of poll**.

Any connected person or person falling within Rules 14A.13(1)(b)(i) to (iv) with a material interest in the transaction(s) must **abstain from voting** (Rule 14A.18).

Connected Transaction (Cont'd)

▶ Connected Transaction Requirements (Cont'd)

Independent board committee and financial adviser requirements (Cont'd)

An **independent board committee** (consisting only of INEDs) must be established to advise shareholders as to:

- whether the terms of the connected transaction are **fair and reasonable**;
- whether the transaction is **in the interests of the listed issuer and the shareholders** as a whole; and
- how to vote, taking into consideration the views of the independent financial adviser (Rule 13.39(6)(a)).

An **independent financial adviser** must be appointed to advise the independent board committee and independent shareholders on the matters set out above (Rule 13.39(6)(b)).

Connected Transaction (Cont'd)

▶ Connected Transaction Requirements (Cont'd)

Written Independent Shareholders' Approval

Written independent shareholders' approval is acceptable (in lieu of a general meeting) if:

- i. no shareholder would be required to abstain from voting if a general meeting were held; and
- ii. the written independent shareholders' approval is obtained from a shareholder or closely allied group of shareholders who (together) hold >50% in nominal value of securities giving the right to attend and vote at that general meeting to approve the connected transaction. (Rule 14A.43)

Shareholders' Circular Requirement

The listed issuer must send a circular to shareholders:

- at the same time as it gives notice of the general meeting to approve the transaction; or
- if the transaction is to be approved by way of written shareholders' approval from a shareholder or closely allied group of shareholders, within 15 business days of publication of the announcement (Rule 14A.49).

The shareholders' circular must comply with the contents requirements of Rules 14A.58 and 14A.59 and must include the letter from the independent board committee and the independent financial adviser's opinion.

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Connected Transaction (Cont'd)

▶ Continuing Connected Transaction Requirements (Cont'd)

Additional requirements for continuing connected transactions

The written agreement governing the transaction must be on **normal commercial terms** and be for a **fixed period**, usually not exceeding 3 years.

The reporting requirements must be followed for **each subsequent financial year** during which the listed issuer undertakes the continuing connected transaction.

Connected Transaction (Cont'd)

▶ Continuing Connected Transaction Requirements (Cont'd)

Annual cap requirement for continuing connected transactions

The listed issuer must set a **maximum aggregate annual cap** expressed in **monetary terms**, the basis of which must be disclosed.

The annual cap must be determined by reference to **previous transactions and figures** or be based on **reasonable assumptions** if no previous transaction exists.

If the annual cap is exceeded, or if the relevant agreement is renewed or its terms are changed materially, the listed issuer must re-comply with the reporting, announcement and independent shareholders' approval requirements.

Connected Transaction (Cont'd)

▶ Continuing Connected Transaction Requirements (Cont'd)

Annual review requirements for continuing connected transactions

Each year, the listed issuer's INEDs must confirm that the transaction has been entered into:

- a) in the **ordinary and usual course of business** of the listed issuer;
- b) either on **normal commercial terms** or terms **no less favourable** to the listed issuer than those available to/from independent third parties; and
- c) in accordance with the governing agreement on terms that are fair, reasonable and in the interests of the shareholders as a whole.

Connected Transaction (Cont'd)

▶ Continuing Connected Transaction Requirements (Cont'd)

Annual review requirements for continuing connected transactions (Cont'd)

Each year, the auditors must provide a letter to the board of directors confirming that each non-exempt transaction:

- a) has received the **approval of the board**;
- b) is in accordance with the **pricing policies of the listed issuer** if the listed issuer is providing goods or services;
- c) has been entered into **in accordance with the relevant agreement**; and
- d) has not exceeded the **annual cap**.

Connected Transaction (Cont'd)

▶ Exemptions from Connected Transaction Requirements

Wholly exempt connected transactions

Connected transactions exempt from the reporting, announcement and independent shareholders' approval requirements include, but are not limited to:

- intra-group transactions
- certain issues of new securities
- *de minimis* transactions
- purchase of own securities
- directors' service contracts
- sharing of administrative services
- transactions with persons connected with an "insignificant" subsidiary
- transactions with associates of a passive investor

Connected Transaction (Cont'd)

▶ Exemptions from Connected Transaction Requirements (cont'd)

Intra-group transactions

Transactions between a listed issuer and a non wholly-owned subsidiary or between its non wholly-owned subsidiaries where:

- a) none of the subsidiaries concerned is itself a connected person;
- b) no connected persons at the issuer level exercise or control the exercise of 10% or more of the voting power at any general meeting of any of the subsidiaries concerned (Rule 14A.31(1)); and

Transactions between the issuer's non wholly-owned subsidiary of which a connected person of the issuer (at the issuer level) controls 10% or more of the voting power at any general meeting of such subsidiary and any of its subsidiaries which are connected persons only by virtue of being the subsidiaries of such non wholly-owned subsidiary or where the transaction is between any of these subsidiaries (Rule 14A.31(1A)).

Connected Transaction (Cont'd)

▶ Exemptions from Connected Transaction Requirements (cont'd)

De minimis transactions

Transactions on normal commercial terms where each or all of the percentage ratios except the profits ratio is/are:

- i. less than 0.1%;
- ii. less than 1% and the transaction is a connected transaction only because the connected person is connected by virtue of its relationship(s) with one or more of the listed issuer's subsidiaries; or
- iii. less than 5% and the total consideration is less than HK\$1 million.

This exemption does not apply to the issue of new securities by an issuer to a connected person.

Connected Transaction (Cont'd)

▶ Exemptions from Connected Transaction Requirements (cont'd)

Certain issues of new securities

Issues of new securities to a connected person are exempt where:

- a) The connected person receives pro rata entitlement to securities in its capacity as shareholder;
- b) Securities are issued under a Chapter 17 share option scheme or under a share option scheme in existence before the issuer was listed for which approval for listing was granted at the time of listing;
- c) The connected person is acting as underwriter or sub-underwriter of an issue of securities by the listed issuer, provided Rules 7.21(2) and 7.26A(2) have been complied with; or
- d) Securities are issued to a connected person within 14 days after such connected person has executed an agreement to reduce its holding in that class of securities by placing securities to a third person who is not its associate. The securities must be issued at a price not less than the placing price. The number of securities issued to a connected person must not exceed the number of securities placed by it (Rule 14A.31(3)).

Connected Transaction (Cont'd)

▶ Exemptions from Connected Transaction Requirements (cont'd)

Purchase of own securities

Share repurchases from a connected person on a recognised Stock Exchange (unless the connected person knowingly sells shares to the listed issuer) or under a general offer.

Directors' service contracts

Entering into of a service contract by a director of the listed issuer.

Sharing of administrative services

Sharing of administrative services between a listed issuer and a connected person on a cost basis.

Connected Transaction (Cont'd)

▶ Exemptions from Connected Transaction Requirements (cont'd)

Transactions with persons connected with an “insignificant” subsidiary

Connected transactions on normal commercial terms where:

- i. the transaction is connected only because it involves a person connected at the level of the issuer’s subsidiaries;
- ii. the value of the relevant subsidiary’s total assets, profits or revenue (or the aggregate value of those of the relevant subsidiaries) is:
 - a) < 10% for each of the 3 preceding financial years (or if less, the period since incorporation); or
 - b) < 5% for the latest financial year.

Connected Transaction (Cont'd)

▶ Exemptions from Connected Transaction Requirements (cont'd)

Transactions with associates of a passive investor

- i. the transaction is connected only because it involves an associate (the “**Relevant Associate**”) of a substantial shareholder of the listed issuer; and
- ii. the substantial shareholder is a passive investor in the listed issuer and meets the following criteria:
 - a) it is a sovereign fund, unit trust or mutual fund authorized by SFC/ appropriate overseas authority;
 - b) it has a wide spread of investments other than securities of the issuer and the Relevant Associate;
 - c) it and the Relevant Associate are connected persons only because it is a substantial shareholder of the listed issuer;
 - d) it is not a controlling shareholder of the listed issuer;
 - e) it does not have any representative on the board of directors of the listed issuer, and is not involved in the management of the listed issuer (including any influence over the listed issuer’s management through negative control on material matters); and
 - f) it is independent of the directors, chief executive, controlling shareholder(s) and any other substantial shareholder(s) of the listed issuer.

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Connected Transaction (Cont'd)

▶ Exemptions from Connected Transaction Requirements (cont'd)

Partially exempt continuing connected transactions

Continuing connected transactions are exempt from the independent shareholders' approval requirement (but subject to the reporting and announcement requirements) only where each or all of the percentage ratios except the profits ratio is/are on an annual basis:

- a. less than 5%; or
- b. less than 25% and the total consideration is less than HK\$10 million.

(Rule 14A.32)

Connected Transaction (Cont'd)

▶ Exemptions from Connected Transaction Requirements (cont'd)

Wholly exempt continuing connected transactions

Continuing connected transactions exempt from the reporting, announcement, independent shareholders' approval and annual review requirements under Rule 14A.33 include, but are not limited to:

- ▶ sharing of administrative services
- ▶ *de minimis* transactions

The rules in respect of the two exemptions above are similar to those for connected transactions. In the case of the *de minimis* exemption, the percentage ratios are calculated on an annual basis.

Connected Transaction (Cont'd)

▶ Exemptions for Financial Assistance

Wholly exempt financial assistance provided by a listed issuer which is **not** a bank

Financial assistance provided by a listed issuer for the benefit of a connected person or Commonly Held Entity is wholly exempt if:

- a) it is provided **on normal commercial terms** (or better to the listed issuer); and
- b) each or all of the percentage ratios (except the profits ratio) is/are: (i) <0.1%; (ii) <1% and the transaction is connected only because it involves a person connected at the level of the issuer's subsidiaries; or (iii) <5% and the total value of the assistance to the connected person or Commonly Held Entity is <HK\$1 million (Rule 14A.65(2)(b)).

Connected Transaction (Cont'd)

▶ Exemptions for Financial Assistance (cont'd)

Wholly exempt financial assistance provided by a listed issuer which is **not** a bank (Cont'd)

Financial assistance provided by a listed issuer for the benefit of a connected person in which it is a shareholder or a Commonly Held Entity is fully exempt if it is:

- a) provided on **normal commercial terms** (or better to the listed issuer); and
- b) the assistance provided is proportional to the issuer's equity interest in the connected person/ Commonly Held Entity and any guarantee is given on a several basis (Rule 14A.65(3)).

Connected Transaction (Cont'd)

▶ Exemptions for Financial Assistance (cont'd)

Wholly exempt financial assistance provided **to** a listed issuer

Financial assistance provided **to a listed issuer** by a connected person or commonly held entity is wholly exempt if it is provided on normal commercial terms or better to the listed issuer and no security is granted over the listed issuer's assets (Rule 14A.65(4)).

Connected Transaction (Cont'd)

▶ Exemptions for Financial Assistance (cont'd)

Partially exempt financial assistance provided by a listed issuer which is not a bank

Financial assistance provided by a listed issuer for the benefit of a connected person or Commonly Held Entity is exempt only from the independent shareholders' approval requirement if:

- a) the assistance is provided on normal commercial terms but the assistance is not proportional to the issuer's equity interest in the relevant company or guarantees given by the issuer are not several; and
- b) each or all of the percentage ratios (except the profit ratio) is/are (i) <5%; or (ii) <25% and total value of the assistance to connected person or Commonly Held Entity is <HK\$10 million.

Connected Transaction (Cont'd)

- ▶ **Exchange's Discretion**

In any situation, the Exchange reserves the right to specify that an exemption will not apply to a particular transaction.

The Exchange may also require that any connected transaction be subject to the independent shareholders' approval requirements.

(Rule 14A.30)

Corporate Governance Requirements

(a) Requirement for Independent Non-Executive Directors (INEDs)

- ▶ A listed issuer must have at least 3 INEDs, at least one of whom must have appropriate professional qualifications or accounting or related financial management expertise.
 - *New Main Board Rule 3.10A (effective 31 December 2012)* requires that at least one-third of an issuer's board should be INEDs. If an issuer fails to meet this one-third rule, the issuer is allowed a three-month period to appoint a sufficient number of INEDs to comply with the rule.
- ▶ Independence tests are set out in Rule 3.13.
- ▶ If a listed issuer fails to meet the requirement as to the minimum numbers of INEDs or the qualification of INEDs, it must immediately inform the Exchange and publish an announcement on the websites of the Exchange and the issuer.
 - With effect from 31 December 2012, an issuer also must inform the Exchange and publish an announcement if INEDs do not make up one-third of its board (Main Board Rule 3.10A).

Corporate Governance Requirements (cont'd)

b) Audit Committee

Every listed issuer is required to establish an audit committee comprising non-executive directors only. It must comprise a minimum of 3 members, at least one of whom must be an INED with appropriate professional qualifications or accounting or related financial management expertise.

The majority of audit committee members must be INEDs and it must be chaired by an INED (Rule 3.21). The duties of the audit committee are Code provisions under the Code on Corporate Governance Practices.

c) Directors' Service Contracts

Shareholders' prior consent is required before the grant of a service contract to a director of the listed issuer or any of its subsidiaries, if the contract:

- i. may last for 3 years or more; or
- ii. requires the listed issuer to give more than one year's notice or pay the equivalent of more than one year's remuneration on termination (Rule 13.68)

Corporate Governance Requirements (cont'd)

d) Directors' Remuneration

Fees and any other reimbursement or emolument payable to a director or a chief executive who is not a director must be disclosed in full in the annual reports and accounts of an issuer on an individual and named basis.

e) Remuneration Committee

It is a Code provision under the Code on Corporate Governance Practices that a listed issuer should establish a remuneration committee, a majority of whose members should be INEDs.

New Rules 3.25-3.27 (effective 1 April 2012) require:

- i. issuers to establish a remuneration committee with a majority of INED members;
- ii. an INED as chairman of remuneration committee;
- iii. written terms of reference for the remuneration committee; and
- iv. an issuer that fails to comply with these Rules to immediately announce its reasons for not doing so and any other relevant details. The issuer will have a three-month period to rectify its non-compliance.

Amendments to the Code will also require the remuneration committee to disclose in the Corporate Governance Report which of the two models for discharge of its responsibilities it has adopted. In the first model, the board delegates to the remuneration committee authority to determine the remuneration of executive directors and senior management. In the second model, the board retains that authority, with the remuneration committee taking an advisory role.

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Corporate Governance Requirements (cont'd)

f) Compliance Adviser (Cont'd)

An issuer must appoint a compliance adviser (licensed by the SFC to conduct sponsor work) from the date of listing until the publication date of its financial results for the first full financial year commencing after listing.

An issuer is required to consult and, if necessary, seek advice from its Compliance Adviser in the following situations:

- i. before publication of any regulatory announcement, circular or financial report;
- ii. where a transaction which might be a notifiable or connected transaction is contemplated (including share issues and repurchases);
- iii. where the listed issuer proposes to use the IPO proceeds in a manner different to that set out in the listing document;
- iv. where the business activities, developments or results of the issuer deviate from any forecast, estimate or other information in the listing document; and
- v. where the Exchange makes an inquiry of the issuer under Rule 13.10.

(Rule 3A.23)

Corporate Governance Requirements (cont'd)

g) Authorized Representatives

- ▶ Listed issuer must appoint 2 authorized representatives to act as principal channel of communication with Exchange
- ▶ Must be 2 directors or a director and the company secretary
- ▶ Must appoint suitable alternates whenever they are outside Hong Kong and provide Exchange with alternates' contact details
- ▶ Exchange must be given prior notification of an authorized representative's proposed termination of his role and the reasons for it

Corporate Governance Requirements (cont'd)

(h) Website Publication of Certain Documents

The following new Main Board Rules came into effect on 1 April 2012:

- ▶ New Main Board Rule 13.90 requires an issuer to publish an updated and consolidated version of its constitutional documents on its own website and the HKEx website; and
- ▶ New Main Board Rule 13.51D requires an issuer to publish on its own website the procedures for shareholders to propose a person for election as a director.

Amendments to the Code on Corporate Governance Practices (effective 1 April 2012) include new code provisions that an up-to-date list of directors and the terms of reference of the issuer's nomination and remuneration committees should be published on the websites of the issuer and HKEx. Documents published on the issuer's and HKEx website should be in English and Chinese.

The Code on Corporate Governance Practices

- ▶ The Code on Corporate Governance Practices (the “Code”) is set out in Appendix 14 of the Listing Rules.
- ▶ Two tiers of recommended practices.
- ▶ The first tier contains the “Code Provisions” which are the minimum standards with which listed companies are expected to comply.
- ▶ Companies must state in their half-year and annual reports whether they have complied with the Code Provisions. If they have chosen to deviate from the Code Provisions, considered reasons for each deviation must be stated.
- ▶ The second tier of recommended practices consists of recommended best practices which listed companies are encouraged to adopt. Listed companies are encouraged, but are not required, to include a statement as to compliance with the recommended best practices and considered reasons for any deviations from them in their financial reports.
- ▶ The Code covers 5 principal areas: Directors; Remuneration of Directors and Senior Management; Accountability and Audit; Delegation by the Board and Communication with Shareholders.

The Code on Corporate Governance Practices (cont'd)

New Code Principle (effective 1 April 2012):

- ▶ The board should regularly review the contribution by a director to performing his/her responsibilities to the issuer and whether he/she is spending sufficient time performing them.

New Code Provisions (effective 1 April 2012):

Directors:

- ▶ *CP A.6.6:* directors should inform the issuer of any change to their significant commitments in a timely manner.
- ▶ *CP A.6.5:* directors should provide records of training they received to issuers.
- ▶ *CP A.3.2:* a list of directors should be published on the issuer's website and published on the HKEx website.
- ▶ *CP A.1.8:* issuers should arrange appropriate insurance cover for directors.

INEDs:

- ▶ *CP A.4.3:* in the circular nominating an INED for election, issuers should include the reasons why the board considers an INED independent. Shareholders should vote on a separate resolution to retain an INED who has served on the board for more than nine years.

The Code on Corporate Governance Practices (cont'd)

New Code Provisions (effective 1 April 2012) (Cont'd):

Remuneration:

- ▶ *CPs B.1.1 and B.1.4:* the professional advice made available to a remuneration committee should be independent.
- ▶ *CP B.1.5:* senior management remuneration should be disclosed by band.

Nomination committee:

- ▶ *New CPs A.5.1 to A.5.5:* an issuer should:
 - Establish a nomination committee with a majority of INEDs, chaired by an INED or the board chairman;
 - Establish a nomination committee with written terms of reference, that performs the duties described;
 - Include, as one of the duties, a review of the structure, size and composition of the board at least annually to complement the issuer's corporate strategy;
 - Make the nomination committee's terms of reference available on both the issuer's and the HKEx website;
 - Ensure a nomination committee has sufficient resources; and
 - Enable a nomination committee to seek independent professional advice at the issuer's expense.

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The Code on Corporate Governance Practices (cont'd)

New Code Provisions (effective 1 April 2012) (Cont'd):

Corporate Governance Functions:

- ▶ *CPs D.3.1 and D.3.2:* the board should be responsible for corporate governance and an issuer should establish terms of reference on duties that should be performed by the board or committees delegated by the board.

Audit committee:

- ▶ *CPs C.3.7 and C.3.3(e)(i):* an audit committee should meet the external auditor at least twice a year and an audit committee's terms of reference should include arrangements for employees to raise concerns about financial reporting improprieties.
- ▶ *CP E.1.2:* issuer's management should ensure external auditors attend the AGM.

Board meetings:

- ▶ *CP A.1.7:* subject to the issuer's constitutional documents and other laws and regulations, the issuer may count attendance by electronic means as attendance at a physical board meeting.

Communications with shareholders:

- ▶ *CP E.1.4:* issuers should establish a shareholder communication policy.

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The Code on Corporate Governance Practices (cont'd)

New Code Provisions (effective 1 April 2012) (Cont'd):

Monthly updates:

- ▶ CP C.1.2: management should provide monthly updates of the issuer's performance, position, and prospects to board members sufficient to enable them to discharge their duties.

Annual Report:

- ▶ CP C.1.4: the annual report should include an explanation of the basis on which the company generates or preserves value over the longer term and the strategy for delivering the objectives of the company.

Meetings:

- ▶ CP E.1.1: issuers should avoid "bundling" resolutions and, where they are "bundled", explain the reasons and material implications in the notice of meeting.
- ▶ CPs A.6.7 and A.6.8: non-executive directors, including INEDs, should attend board, committee and general meetings and contribute to the issuer's strategy and policies.

The Code on Corporate Governance Practices (cont'd)

New mandatory disclosure requirements for inclusion in issuers' Corporate Governance Reports (effective 1 April 2012):

- ▶ *Paragraph I(i)* requires an issuer to disclose how directors complied with the CP on training.
- ▶ *Paragraph L(d)(iii)* requires an issuer to disclose the corporate governance policy and duties performed by the board or committees.
- ▶ *Paragraph (I)(c)* requires an issuer to disclose details of attendance at general meetings of each director by name.
- ▶ *Paragraph O* requires an issuer to disclose the following “shareholder rights” information:
 1. the way in which shareholders can convene an extraordinary general meeting;
 2. the procedures for sending enquiries to the board; and
 3. the procedures for making proposals at shareholders' meetings.
- ▶ *Paragraph P* requires an issuer to disclose any significant change to the issuer's constitutional documents during the year.

The Code on Corporate Governance Practices (cont'd)

Listed companies are required to adopt rules governing dealings by directors in their listed securities on terms no less stringent than the terms set out in the Model Code in Appendix 10 of the Listing Rules.

Absolute Prohibition

The Model Code prohibits a director of a listed issuer from dealing in the securities of the company:

- ▶ at any time when he is in possession of unpublished price-sensitive information in relation to those securities;
- ▶ on the publication date of the company's financial results;
- ▶ during the 60 days preceding the publication of the annual results or, if shorter, the period from the end of the relevant financial year up to the publication date of the results; and
- ▶ during the 30 days preceding the publication date of the quarterly or half-year results or, if shorter, the period from the end of the relevant quarter or half-year up to the publication date of the results.

The Model for Securities Transactions by Directors of Listed Companies (“Model Code”)

Listed companies are required to adopt rules governing dealings by directors in their listed securities on terms no less stringent than the terms set out in the Model Code in Appendix 10 of the Listing Rules.

Absolute Prohibition

The Model Code prohibits a director of a listed issuer from dealing in the securities of the company:

- ▶ at any time when he is in possession of unpublished price-sensitive information in relation to those securities;
- ▶ on the publication date of the company’s financial results;
- ▶ during the 60 days preceding the publication of the annual results or, if shorter, the period from the end of the relevant financial year up to the publication date of the results; and
- ▶ during the 30 days preceding the publication date of the quarterly or half-year results or, if shorter, the period from the end of the relevant quarter or half-year up to the publication date of the results.

The Model for Securities Transactions by Directors of Listed Companies (“Model Code”) (Cont’d)

A director of a listed issuer is also prohibited from dealing in the securities of a listed issuer if he is in possession of price-sensitive information in relation to those securities by virtue of his position as a director of another listed issuer.

The restrictions on dealings in the Model Code apply equally to dealings by directors’ spouses and children under the age of 18 and to any dealings in which they are deemed to be interested for the purposes of Part XV of the SFO.

The Model for Securities Transactions by Directors of Listed Companies (“Model Code”) (Cont’d)

Duty of Notification

The Model Code requires listed companies to establish a procedure requiring directors to provide written notification to the chairman or a director designated by the board and receive a dated written acknowledgement before dealing in any securities of the listed issuer.

A response to a request for clearance to deal must be given to the relevant director within 5 business days of the request being made and the clearance must not be valid for more than 5 business days of clearance being received.

The company must maintain a written record of notifications given by directors and acknowledgements of such notifications.

Disclosure of Interests under Part XV SFO

The directors and chief executive of a listed issuer are required to disclose:

- ▶ their interests and short positions in any shares of the listed issuer or its associated corporations;
- ▶ their interests in any debentures of the listed issuer or its associated corporations;
- ▶ any change in or cessation of any such interest.

Disclosure of Interests under Part XV SFO (Cont'd)

An “associated corporation” is defined to include the holding companies and subsidiaries of the listed issuer, subsidiaries of any holding company and any company in which the listed issuer holds more than 20% of any class of its issued shares.

In calculating the number of shares in which a director is interested, he/she must include any interests held by a spouse, children under the age of 18, a company controlled by the director and a trust.

Disclosure of Interests under Part XV SFO (Cont'd)

Directors must also disclose their interests in the underlying shares of equity derivatives.

The term “equity derivative” is defined to include any contract which gives a person rights, options or interests in respect of the underlying shares.

Directors must therefore disclose their interests under any options or warrants giving them rights to acquire shares in the company.

Disclosure of Interests under Part XV SFO (Cont'd)

On the listing of a company, directors have 10 business days (which include Saturdays) in which to notify their interests to the Exchange and the company.

Subsequent notifications must be given to the listed issuer and the Exchange within 3 business days of the relevant event.

Failure to make proper and timely disclosure as required by Part XV is a criminal offence which carries a maximum penalty of a fine of HK\$100,000 and imprisonment for up to two years.

The listed issuer also has a duty to keep registers of the interests and short positions of its directors, chief executive and substantial shareholders.

The interests and short positions of a listed issuer's directors and chief executive in the shares, underlying shares and debentures of the company and its associated corporations must also be disclosed in the company's annual accounts and half-year reports.

Insider Dealing

The SFO sets out 6 types of market misconduct which are prohibited in relation to shares listed on the Exchange.

Insider dealing takes place when:

- (i) a person connected with a listed issuer and having information which he knows is relevant information in relation to that listed issuer:
 - ▶ deals, or counsels or procures another to deal, in the company's listed securities or their derivatives or in those of a related corporation; or
 - ▶ discloses the information knowing or having reasonable cause to believe that the recipient will use the information to deal, or to counsel or procure another person to deal, in the company's listed securities or their derivatives or in those of a related corporation;

Insider Dealing (Cont'd)

- (ii) person who is contemplating or has contemplated making a take-over offer for a listed issuer and who knows that the information that the offer is contemplated or is no longer contemplated is relevant information in relation to the listed issuer:
- ▶ deals, or counsels or procures another to deal, in the company's listed securities or their derivatives or in those of a related corporation; or
 - ▶ discloses the information knowing or having reasonable cause to believe that the recipient will use the information to deal, or to counsel or procure another person to deal, in the company's listed securities or their derivatives or in those of a related corporation;

Insider Dealing (Cont'd)

- (iii) person who has received relevant information from a connected person or a person who is contemplating or has contemplated making a take-over offer for a listed issuer either deals, or counsels or procures another person to deal, in the company's listed securities or their derivatives or those of a related corporation;

Insider Dealing (Cont'd)

- (iv) person who has information which he knows is relevant information in relation to a listed issuer in any of the circumstances referred in paragraphs (i) to (iii) above:
- ▶ counsels or procures another person to deal, knowing or having reasonable cause to believe that the person will deal in the company's listed securities or their derivatives or in those of a related corporation outside Hong Kong on an overseas stock market; or
 - ▶ discloses the information knowing or having reasonable cause to believe that the recipient will use the information to deal, or to counsel or procure another person to deal, in the company's listed securities or their derivatives or in those of a related corporation outside Hong Kong on an overseas stock market.

Insider Dealing (Cont'd)

Key definitions

The term “securities” is defined widely and includes shares, stocks, debentures, loan stocks, bonds and notes as well as any rights, options or interests in respect of any of the foregoing.

“Persons connected with a corporation” or “connected persons” include the directors (including non-executive directors and shadow directors), employees and substantial shareholders (meaning those holding 5% or more of the issued voting share capital) of the listed issuer and its related corporations.

The term also includes persons who have a professional or business relationship with the listed issuer or its related corporation which give them access to inside information.

Insider Dealing (Cont'd)

“Related corporations” of a listed issuer include its subsidiaries and holding companies and other subsidiaries of any holding company of the listed issuer. In addition, where two or more companies are controlled by the same individual, each of those companies and their subsidiaries are regarded as “related corporations” of each other.

“Relevant information” in relation to a company (commonly termed “inside information”) means specific information about the company, a shareholder or officer of the company, the listed securities of the company or their derivatives, which is not generally known to the persons who are accustomed or likely to deal in the listed securities of the company but which would, if it were generally known to them, be likely to materially affect the price of the listed securities.

Insider Dealing (Cont'd)

The directors of a listed issuer will be “insiders” for the purposes of these provisions. In practical terms, this means that a director should immediately refrain from dealing or procuring another to deal in the listed securities of his own company once he is aware of, or privy to any negotiations, agreements or information which are or may be price-sensitive until a formal announcement of such information has been made.

Market Misconduct

OTHER TYPES OF MARKET MISCONDUCT

- ▶ False Trading
- ▶ Price rigging
- ▶ Stock Market Manipulation
- ▶ Disclosure of information about prohibited transactions
- ▶ Disclosure of false or misleading information inducing transactions
 - A person may not disclose information likely to induce transactions in securities or affect the market price where the information is false or misleading and the person knows that, or is reckless or negligent as to whether the information is false or misleading;
 - A statement may be false or misleading by omission; or
 - Directors should be prudent when issuing announcements or public statements to ensure that the information published is true, complete and accurate.

For further information, please see the note on Market Misconduct under the SFO.

Market Misconduct (Cont'd)

Dual civil and criminal regimes

The 6 forms of market misconduct may either be prosecuted as a criminal offence under Part XIV of the SFO or made the subject of civil proceedings before the Market Misconduct Tribunal.

Criminal penalties

The maximum criminal penalty for an offence of market misconduct is imprisonment for up to 10 years and/or a fine of up to HK\$10 million.

Market Misconduct (Cont'd)

Market Misconduct Tribunal Proceedings

The Market Misconduct Tribunal may make a number of orders in respect of a person identified as having engaged in market misconduct including a:

- ▶ *Disqualification Order*: an order that the person shall not be involved in the management of any listed corporation or any other specified corporation for a maximum period of 5 years;
- ▶ *Disgorgement Order*: an order that the person pay to the Government an amount up to the amount of any profit gained or loss avoided by the person as a result of the market misconduct;

Market Misconduct (Cont'd)

Civil Liability

A person who has suffered financial loss as a result of market misconduct can bring a civil action against any person who has committed market misconduct if it is fair, just and reasonable in the circumstances.

Liability of officers of a listed issuer

The officers of a listed issuer are required to take reasonable measures to ensure that proper safeguards exist to prevent the company from acting in a way that results in the company perpetrating any conduct which constitutes market misconduct.

If a company commits an act of market misconduct and that occurred with the “consent or connivance” of one of its officers, the officer may be liable to pay damages to any person who suffers financial loss as a result of the market misconduct.

Obligations under the Codes on Takeovers and Mergers and Share Repurchases

The Code on Takeovers and Mergers (the “Takeovers Code”) and the Code on Share Repurchases apply to takeovers, mergers and share repurchases affecting public companies in Hong Kong and companies with a primary listing of their shares in Hong Kong.

The primary purpose of the Codes is to ensure that all shareholders affected by takeovers, mergers and share repurchases of relevant companies are treated fairly. In order to achieve fair treatment, the Codes require equality of treatment of shareholders and disclosure of timely and adequate information to shareholders. The Takeovers Code in particular has the objective of protecting minority shareholders when control of their company changes.

Obligations under the Codes on Takeovers and Mergers and Share Repurchases (Cont'd)

THE TAKEOVERS CODE

The Takeovers Code is concerned with:

- (i) offers for, and takeovers and mergers of, all relevant companies; and
- (ii) partial offers, offers by a parent company for shares in its subsidiary and certain other transactions where control (as defined) of a company is to be obtained or consolidated.

Obligations under the Codes on Takeovers and Mergers and Share Repurchases (Cont'd)

Mandatory Offer Requirements: Rule 26

Except where a waiver has been granted, Rule 26 of the Takeovers Code requires a mandatory offer to be made to all the shareholders of the company in the following circumstances:

- (i) when any person (or two or more persons acting in concert) acquires, whether by a series of transactions over a period of time or not, 30% or more of the voting shares of a company; or
- (ii) when any person (or two or more persons acting in concert) who holds between 30% and 50% of the voting shares of a company, acquires additional voting shares that increase his or their holding of voting shares by more than 2% from the lowest percentage holding by that person (or the concert group) in the previous 12 month period.

Obligations under the Codes on Takeovers and Mergers and Share Repurchases (Cont'd)

Mandatory Offer Requirement: Rule 26 (Cont'd)

“Persons acting in concert”

A person will be taken to be acting in concert with an offeror if, pursuant to an agreement or understanding, he is actively co-operating through the acquisition of voting rights, to obtain or consolidate control of the offeree. In the absence of proof to the contrary, certain categories of persons are presumed to be acting in concert with others in the same category.

Offers under Rule 26 must be made in cash (or have a cash alternative) at not less than the highest price paid by the offeror (or any person acting in concert with it) for shares of the offeree in the previous 6 months.

Obligations under the Codes on Takeovers and Mergers and Share Repurchases (Cont'd)

Requirements of the Takeovers Code

- ▶ any offer of takeover of a listed issuer should be put in the first instance to the board of the listed issuer or its advisers before the offer is announced to the public. The identity of the offeror must also be disclosed. The board of the listed issuer must establish an independent committee of the board to make a recommendation (i) as to whether or not the offer is fair and reasonable and (ii) as to acceptance and voting. The board must also retain an independent financial adviser to advise the independent board committee as to those matters.

Obligations under the Codes on Takeovers and Mergers and Share Repurchases (Cont'd)

THE CODE ON SHARE REPURCHASES

The Code on Share Repurchases applies to share repurchases of all relevant companies (i.e. Hong Kong public companies and companies with a primary listing of their shares in Hong Kong).

Under Rule 32.1 of the Takeovers Code, a share repurchase is considered to be an **acquisition** by shareholders whose shares are **not** repurchased. This is because their percentage holding of shares increases even though the actual number of shares held does not.

Obligations under the Codes on Takeovers and Mergers and Share Repurchases (Cont'd)

The Share Repurchase Code distinguishes between 4 types of share repurchase:

1. **On-Market** – this is the most usual method and is normally carried out pursuant to the 10% general mandate normally granted at the AGM.
2. **Off-Market** – Off-market share repurchases must be approved by the Executive Director of the Corporate Finance Division of the Securities and Futures Commission (“SFC”) under Rule 2 of the Share Repurchase Code. Approval is normally conditional on the approval of at least 75% of the votes cast by “disinterested shareholders”.
3. **Exempt** – includes an employee share repurchase; a share repurchase made in accordance with the terms attached to the shares; and a share repurchase that is required by the law of the jurisdiction in which the offeror is incorporated or established.
4. **By General Offer** – this usually takes the form of a tender offer of a certain percentage of all shareholders’ holdings. A share repurchase by General Offer requires approval by at least 50% of shareholders in general meeting. A shareholder with a material interest in the share repurchase will not be allowed to vote. If the repurchase will result in privatisation or de-listing of the issuer, the approval of 75% of shareholders is required.

Obligations under the Codes on Takeovers and Mergers and Share Repurchases (Cont'd)

On-market repurchase

Rules 10.5 and 10.6 of the Listing Rules set out the relevant requirements in relation to on-market repurchases. An issuer whose primary listing is on the Exchange may only purchase shares on the Exchange in the following circumstances:

- ▶ the shares proposed to be repurchased are fully-paid up;
- ▶ an Explanatory Statement complying with the detailed contents requirements of Rule 10.06(1)(b) is issued to the shareholders;
- ▶ its shareholders have given specific approval or a general mandate to make the repurchase(s) by way of an ordinary resolution passed at a general meeting of the issuer duly convened.

Obligations under the Codes on Takeovers and Mergers and Share Repurchases (Cont'd)

The Explanatory Statement must contain all information reasonably necessary to enable the shareholders to make an informed decision on whether to vote for or against the ordinary resolution to approve the share repurchase. Such information includes, in summary, the following :

- ▶ total number and description of the shares to be repurchased, and reasons for the repurchase;
- ▶ the proposed source of funds for making the proposed repurchase;
- ▶ any directors or any associates of the directors who have an intention to sell shares to the issuer, or an appropriate negative statement;
- ▶ consequences arising under the Takeovers Code of which the directors are aware, if any;
- ▶ details of any purchases by the issuer of shares made in the previous 6 months (whether on the Exchange or not);
- ▶ whether or not any connected persons of the issuer have notified the issuer that they have an intention to sell their shares to the issuer; and
- ▶ the highest and lowest prices at which the relevant shares have traded on the Exchange during each of the previous 12 months.

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Obligations under the Codes on Takeovers and Mergers and Share Repurchases (Cont'd)

Dealing restrictions of on-market repurchase

On-market repurchases are subject to the following dealing restrictions:

- ▶ no shares shall be repurchased if the purchase price is higher by 5% or more than the average closing market price for the 5 preceding trading days;
- ▶ no shares shall be repurchased for non-cash consideration;
- ▶ the issuer shall not knowingly purchase its shares from a connected person;
 - i. no shares shall be repurchased at any time after a price sensitive event has occurred until such time as the price sensitive information is made public. In particular, repurchases are not allowed during the period of one month immediately preceded the date of the board meeting to approve the annual or interim financial results; and
 - ii. the deadline for publishing any such results under the Listing Rules, and ending on the date of the results announcement; and
- ▶ no shares may be repurchased if that purchase will result in the number of listed shares held by the public falling below the prescribed minimum percentage.

Obligations under the Codes on Takeovers and Mergers and Share Repurchases (Cont'd)

Reporting requirements for repurchases

The issuer must:

- ▶ file a return with the Exchange on the next business day following a share repurchase (on or off Exchange) showing the number of shares repurchased, the purchase price paid per share (or the lowest and highest prices paid); and
- ▶ include in its annual report and accounts a monthly breakdown of purchases of shares made during the financial year under review showing the number of shares purchased each month, the purchase price paid per share (or the lowest and highest prices paid) and the aggregate price paid.

Status of purchased shares

The listing of the repurchased shares will be automatically cancelled upon purchase and the issuer must apply for listing of any further issues of that type of shares.

The issuer must ensure that the documents of title of the repurchased shares are cancelled and destroyed as soon as reasonably practicable.

Obligations under the Codes on Takeovers and Mergers and Share Repurchases (Cont'd)

Off-market repurchase

Off-market repurchases must be approved by the SFC before a repurchasing company acquires any shares. Such approval will normally be conditional upon:

- ▶ approval given by at least 75% of votes cast on a poll by disinterested shareholders in attendance in person or by proxy at a general meeting of the issuer;
- ▶ notice of the shareholders' meeting accompanied by a circular containing :
 - i. details of the proposed offeree(s);
 - ii. terms and conditions of the agreement between the issuer and the proposed offeree(s); and
 - iii. advice of an independent financial adviser and the recommendation of an independent committee of the board in relation to the off-market repurchase
- ▶ certified copy of the shareholders' resolution approving the repurchase filed with the SFC within three days of the general meeting; and
- ▶ a copy of the agreement for the repurchase being available for inspection by the shareholders

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Obligations under the Codes on Takeovers and Mergers and Share Repurchases (Cont'd)

Repurchase by general offer

A share repurchase by general offer must be approved by a majority of the votes cast by independent shareholders in attendance in person or by proxy at general meeting.

If the share repurchase will result in delisting and privatization of the issuer :

- ▶ the directors of the offeror and any persons acting in concert will not be considered to be independent and therefore may not vote at the general meeting; and
- ▶ the share repurchase must be approved by at least 75% of votes attaching to the shares owned by independent shareholders cast in person or by proxy and the number of votes cast against the resolution must not be more than 10% of the votes attaching to the shares owned by independent shareholders

Disclaimer

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This presentation contains a summary only of certain Listing Rule requirements. It is intended for information and educational purposes only and should not be treated as a substitute for legal advice.

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The End



*Hope you enjoyed our
presentation...*

Julia Charlton

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