

**Re: Consultation Paper on Rule Changes Consequential on the Enactment
of the Securities and Futures (Amendment) Ordinance 2012 to Provide
Statutory Backing to Listed Corporations Continuing Obligation to
Disclose Inside Information**

Response of the Hong Kong Bar Association

1. The Hong Kong Bar Association (“the Bar”) has previously stated its support ¹ for the proposal to entrust the Securities and Futures Commission (“SFC”) with the responsibility of administering the new statutory provisions and investigating and prosecuting cases of non-disclosure or false or misleading disclosure. The present consultation concerns the implementation of that proposal in the context of amendments to the Main Board Rules and the GEM Listing Rules.
2. The Bar is in general agreement with the proposed changes and only wishes to highlight the following matter.
3. The proposed amendments to Main Board Rule 13.05 and GEM Listing Rule 17.06 are as follows:-

“(1) The Exchange has a duty under section 21 of the Securities and Futures Ordinance to ensure, so far as reasonably practicable, an orderly, informed and fair market.

(2) The Inside Information Provisions in the Ordinance impose statutory obligations on listed issuers and their directors to disclose inside information as soon as reasonably practicable after the information has come to the listed issuers’ knowledge, and gives the Commission the responsibility for enforcing those obligations. The Commission has issued Guidelines on Disclosure of Inside Information. The Exchange will not give guidance on the interpretation or operation of the Ordinance or the Guidelines.

¹ The Bar’s Response to the Consultation Paper on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations dated 27 August 2010

(3) Where the Exchange becomes aware of a possible breach of the Inside Information Provisions, it will refer it to the Commission. The Exchange will not itself take disciplinary action under the Listing Rules unless the Commission considers it not appropriate to pursue the matter under the Ordinance and the Exchange considers action under the Rules for a possible breach of the Rules appropriate.” (emphasis added)

4. The Bar has reservations as to whether it is appropriate or desirable to include the underlined sentence in the Rules.
5. Although the SFC has the responsibility of taking enforcement action against non-disclosure or misleading disclosure of price sensitive information (“PSI”) under the new statutory scheme, that the Stock Exchange of Hong Kong Limited (“SEHK”) still has a statutory duty, under section 21 of the Securities and Futures Ordinance (“SFO”), to maintain an orderly, informed and fair market, and in that context the issue of PSI continues to be of relevance to the SEHK: see paragraph 15 of the Consultation Paper.
6. Given the SEHK has a statutory duty to discharge and to that end it will have a discretion to decide what steps should be taken to discharge that duty (including, in an appropriate case, to direct a trading halt), we are concerned that elevating what appears to be a policy or an administrative practice – namely not taking disciplinary action unless it is clear that the SFC will not take action – into a Rule may create an unnecessary fetter on the SEHK’s discretion and may undermine the SEHK’s discharge of its statutory duty.

7. In a case where the SEHK takes the view that there has been non-disclosure of PSI and some form of action is required to prevent the creation of a false market, if the SFC is unable (for whatever reason) to come to a view or confirm whether it will take enforcement action in respect of such PSI, the SEHK may find itself in a position where its hands are tied by the proposed Rule 13.05(3) (Main Board), which may undermine its discharge of its section 21 duty. If the SEHK decides to take action notwithstanding the SFC's non-commitment or confirmation, its decision may be open to challenge on the ground of non-compliance with the Listing Rules.

8. Moreover, in the event that the SEHK decides to take action, it may be construed (or rather misconstrued) as a representation or commitment that the SFC would not be taking enforcement action. The Bar is concerned that this may create unnecessary arguments over the actions which the SFC may see fit to take in discharge of its duties under the SFO.

9. Further, considerations for enforcement action in respect of PSI *simpliciter* and for maintaining an orderly market may well differ, and to rule out the possibility of parallel actions by the SFC and the SEHK altogether may not be desirable, in particular at this early stage when it is yet to be seen how the SFC is to operate under the new regime.

10. In the premises, the Bar believes there is much to be said for excluding the underlined sentence from the proposed amendments to the Listing Rules.

Hong Kong Bar Association

4th October 2012