

OUTLINE OF PART XV
OF THE SECURITIES AND FUTURES ORDINANCE (CAP. 571) -
DISCLOSURE OF INTERESTS

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OUTLINE OF PART XV
OF THE SECURITIES AND FUTURES ORDINANCE (CAP. 571) (“SFO”) -
DISCLOSURE OF INTERESTS

(Published by the Securities and Futures Commission under section 5(4)(f) of the SFO)

This outline is intended to be a practical guide to the situations in which a notice will have to be filed under Part XV of the SFO (“Part XV”). However, it is not a Code, a Guideline, or an exhaustive examination of Part XV nor can it be relied upon as an authoritative legal opinion on the contents of Part XV¹. The disclosure obligations depend upon the facts in each case and you should seek detailed legal advice if you are in doubt.

There have been some amendments to the statutory framework for Part XV over the last 10 years and this revision is prompted by –

- the change in the definition of “business day” which, since 2012, has excluded Saturdays;
- the commencement of the Companies Ordinance (Cap. 622) on 3 March 2014 (which provides that shares in a company incorporated in Hong Kong will have no longer have a nominal value); and
- the need to address comments and queries received since the publication of the previous version of this outline in August 2003.

The prescribed forms and other useful materials relating to the disclosure regime under Part XV are published on our web site at the following address:<http://www.sfc.hk/web/EN/rule-book/sfo-part-xv-disclosure-of-interests/> (Under Rule book/ Securities and Futures Ordinance Part XV - Disclosure of Interests).

1. INTRODUCTION

1.1 Overview

1.1.1. Part XV replaces the repealed Securities (Disclosure of Interests) Ordinance (Cap. 396) (“S(DI)O”) and seeks to modernize the regime for the disclosure of interests in securities. The overriding objective of the new disclosure regime is to provide investors in listed corporations² with more complete and better quality information on a timely basis to enable them to make informed investment decisions. This includes requiring the disclosure of information that can affect perceptions of the value of listed corporations.

1.1.2 The regime is also designed to enable investors to identify the persons who control, or are in a position to control, interests in shares in listed corporations and those who may benefit from transactions involving associated corporations of listed corporations. It

¹ Some commentators have read this outline as if it were a statute and have taken general statements written for the lay reader as determinative of fine legal points. Care should be taken not to adopt such an approach to the outline as fine legal points are determined by the words of Part XV, not the words of this outline.

² A listed corporation is any corporation that has any of its securities (i.e. shares or other securities) listed on the Stock Exchange regardless of where the corporation is incorporated.

brings the disclosure requirements in Hong Kong in line with international and regional standards while trying to keep the compliance cost low.

1.1.3 Part XV requires corporate insiders to give notice to The Stock Exchange of Hong Kong Limited (“the Stock Exchange”) and the listed corporation concerned on the occurrence of certain events :

- (i) **Substantial shareholders** – that is individuals and corporations who are interested in 5% or more of any class of voting shares³ in a listed corporation – must disclose their interests, and short positions, in voting shares of the listed corporation; and
- (ii) **Directors and chief executives** of a listed corporation must disclose their interests, and short positions in any shares in a listed corporation (or any of its associated corporations) and their interests in any debentures of the listed corporation (or any of its associated corporations).

1.1.4 The disclosure requirements apply regardless of whether the substantial shareholder, director or chief executive is resident in Hong Kong or elsewhere⁴.

Recent legislative amendments

1.1.5 The Companies Ordinance (Cap. 622) (“CO 2012”) came into effect on 3 March 2014. Section 135 of the CO 2012 stipulates that shares in a company have no nominal value. As the disclosure obligations of substantial shareholders under Part XV were linked to the nominal value of their shares, a consequential amendment to Part XV was required.

1.1.6 An alternative means of calculation of when a disclosure obligation arises has been specified that does not rely on the nominal value of the shares. With effect from 3 March 2014 the disclosure obligation is based upon the number of voting shares in which you are interested (expressed as a percentage of the number of voting shares of the same class which have been issued) held rather than the nominal value of those shares. Mathematically the result is the same as the calculation based upon nominal value and it is simpler to understand. The amendments to Part XV are contained in the Companies Ordinance (Amendment of Schedule 10) Notice 2013 made on 21 October 2013 (L.N. 162 of 2013)

1.1.7 The forms which substantial shareholders are required to use for giving notices under section 324 of the SFO already only require disclosure of the **number** of voting shares in which a person is interested (as opposed to the nominal value of those shares) and the disclosure obligations are similarly described in the outline by reference to the number of shares. The data given in the notices is also reflected in the online database maintained by the Hong Kong Exchanges and Clearing Limited (“HKEx”). Accordingly, there are no implications on a practical level arising from this change.

³ The term “voting shares” refers to shares of a class that carry a right to vote in all circumstances at general meetings of a listed corporation and includes unissued shares which, if issued, would have such rights. Thus Part XV applies not only issued shares but also to shares that do not yet exist or are unspecified.

⁴ See further paragraph 5.1 below.

1.2 Where can I get the disclosure Forms and where must I file them ?

1.2.1 You can download the DI forms and the Notes, in Chinese and in English, from HKEx web site which is at <https://sdinotice.hkex.com.hk> or the SFC web site at <http://www.sfc.hk/web/EN/rule-book/sfo-part-xv-disclosure-of-interests/di-notice.html>.

Forms are available in Adobe Portable Document format (“PDF”) for printing out and completion in manuscript or in Microsoft Excel format for completion offline using the Excel program. You may file a notice using either format. There is also a hyper-link from the HKEx web site Home Page (<http://www.hkex.com.hk/>) to the site for downloading notices and filing. Go to the HKEx Home Page and click “For investors” then “Disclosure of Interests” which can be found immediately under the principal heading “HKExnews Website”. Then click “Download and Submit DI Forms”. For further details on the forms, and the places that they must be filed, please see paragraphs 4.2 and 4.6 below.

1.2.2 If you have difficulties with downloading the forms from the SFC web site please send an email describing the problem that you have experienced to enquiry@sfc.hk If you have difficulties with downloading the forms from one of the HKEx web sites please send an email describing the problem that you have experienced to DI-Filings@hkex.com.hk

1.3 Where can I see the information filed with the Stock Exchange under Part XV ?

1.3.1 The key objective of the disclosure regime is to give investors in listed corporations with more complete and better quality information on a timely basis to enable them to make informed investment decisions. Details of all notices filed with the Stock Exchange under Part XV can be found on the HKEx web site. Go to the HKEx Home Page (<http://www.hkex.com.hk/>) and click “For investors” then “Disclosure of Interests” which can be found immediately under the principal heading ” “HKExnews Website”..

1.4 Defined terms

1.4.1 Unless otherwise stated all references to section numbers in this outline are references to sections of the SFO. Terms that are defined in section 308 of the SFO and Schedule 1 to the SFO have the same meaning in this outline. A listed corporation is any corporation whose securities are listed on the Stock Exchange. A corporation’s shares are “listed” from the point that the Stock Exchange grants listing of the shares and that grant has become unconditional (although trading may not have commenced).

1.4.2 The term “DI” is used in this outline and the HKEx and SFC web sites to refer to Disclosure of Interests.

2. DUTIES OF SUBSTANTIAL SHAREHOLDERS

2.1 What is meant by an “interest” in shares ?

2.1.1 Substantial shareholders only have to disclose their interests in “voting shares” of a listed corporation – not all types of shares. Shares that are “voting shares” are shares of a class that carry a right to vote in all circumstances at general meetings of a listed corporation. They also include unissued shares which, if issued, would have such rights. Voting shares of a corporation listed in Hong Kong refers to all classes of shares and would normally include “A shares”, “B shares” and “H shares” as well as “Ordinary shares” as these all normally carry a right to vote in all circumstances at general meetings of a listed corporation. For ease of reference we will use the term “shares” instead of “voting shares” when describing the obligations of substantial shareholders in this Outline – unless it is necessary to use the term “voting shares” for greater clarity. Directors have an obligation to disclose their interests in all shares – not just voting shares.

2.1.2 You will have an “interest” in shares for the purposes of Part XV if you have an interest of any kind whatsoever in the shares (s.322(2))⁵. For example :

- (i) If your name is listed in the register of members maintained by a corporation.
- (ii) If the shares are held for you by another person such as your stockbroker, a custodian, a trustee or a nominee (e.g. in the Central Clearing and Settlement System (“CCASS”) or with HKSCC Nominees Limited, the CCASS depository).
- (iii) If you are deemed by Part XV to be interested in the shares (see paragraph 2.2 below).
- (iv) If you enter into a contract (for example if you hold, write or issue financial instruments including equity derivatives) that gives you a right to shares, a right of first refusal of shares, or to a payment in the event of a change in the price of shares (see paragraph 2.3 below).
- (v) If you hold shares as security.
- (vi) If you are entitled to exercise rights attaching to the shares or control their exercise (e.g. voting rights) or the right to sell the shares themselves. Hence if you are a fund manager you would normally have an interest in the shares in the fund(s) that you manage (see also paragraph 2.12.15).

2.1.3 You have an interest in shares for the purposes of Part XV if you have any right whatsoever in relation to the shares, you have a right to receive a payment in the event of a change in the price of shares or may be required to take the shares, even if your right to the shares (or payment) or obligation to take the shares is conditional or is subject to any restraint or restriction. For example, if on 3 April 2003 you agreed to buy 5% of a listed corporation’s shares, subject to approval by the shareholders of the listed corporation at a meeting on 15

⁵ Section 322 applies to all interests (and short positions) in shares be they direct interests (and short positions) and indirect interests (and short positions) e.g. interests in shares which are the underlying shares of equity derivatives. This is clear from the many references to “equity derivatives” and “underlying shares” in section 322 and the references in section 322(1) to “short positions” (which are principally positions arising under equity derivatives).

April 2003, you will be taken to have an interest in the shares on 3 April 2003. It is also irrelevant whether the condition has a reasonable chance of being met or whether you or the seller can influence the outcome of the condition. You will cease to be interested in the shares on 15 April 2003 if the shareholders do not approve the resolution. You must then file a notice stating that you ceased to be interested in 5% of the shares of the listed corporation.

Time of acquiring/ceasing to have an interest in shares

2.1.4 There is an important difference in the point at which the buyer of shares acquires an interest in the shares and seller ceases to have an interest in the same shares. The buyer acquires an interest when he contracts with the seller to buy the shares. However, the seller normally only ceases to have an interest in the shares 2 or 3 days later, on the settlement day - the point when he transfers the shares to the buyer (see also paragraph 4.1.4). Accordingly, the date that each party must notify the Stock Exchange (and the listed corporation concerned) will often be 2 or 3 days apart. The distinction is particularly important in the case of contracts made off-exchange when the difference between the date of the contract and the date of completion may be several months.

2.2 What are deemed interests ?

2.2.1 In calculating the total number of shares in which you are interested you must include any interests, and derivative interests, in shares of the same listed corporation that any of the following persons and trusts have :

- (i) Your spouse and any child of yours under the age of 18. For example, if you hold 5% of the shares of a listed corporation and your husband holds 1% each of you is deemed to be interested in 6%. If your husband then buys a further 1% both you and your husband must file a notice as you each are now interested in 7% of the shares of the listed corporation as a result of the purchase.
- (ii) A corporation which you control (a corporation is a “controlled corporation” if you control, directly or indirectly, one-third or more of the voting power at general meetings of the corporation, or if the corporation or its directors are accustomed to act in accordance with your directions) including interests of a corporate fund manager that you control in the shares held by the various funds that it manages and interests of a corporate trustee or custodian that you control in the shares that it holds on trust or in custody (subject to certain exemptions which are covered in paragraph 2.12 below).
- (iii) A trust, if you are a trustee of the trust (other than a trust where you are a bare trustee i.e. where you have no powers or duties except to transfer the shares according to the directions of the beneficial owner).
- (iv) A discretionary trust, if you are the “founder” of the trust (e.g. you had the trust set up or put assets into it – see paragraph 2.2.4), and can influence how the trustee exercises his discretion.
- (v) A trust of which you are a beneficiary (discretionary interests may be ignored).

- (vi) All persons who have agreed to act in concert to acquire interests in shares in the listed corporation, if you are a party to the agreement (the rules are complicated and legal advice should be sought).

2.2.2 You must also count as your short position any short positions that such persons and trusts have. This may create a short position (if you do not have a short position already) or increase the size of your short position.

2.2.3 Where two or more persons are interested in the same shares they must each make separate disclosures of their interests. For example, if you control A Ltd. which holds 6% of the shares of a listed corporation and A Ltd. buys a further 1% then you, your spouse and A Ltd. should all file separate notices (disclosing that you are each interested in 7% of the shares of the listed corporation).

2.2.4 A trust company or corporation that is a trustee has the same duty of disclosure as a trustee who is an individual.

2.2.5 The term “founder” in relation to a discretionary trust is defined very broadly (see s.308). It includes a person who has:

- (i) provided, or undertaken to provide, shares or other property for the purpose of the trust;
- (ii) entered into a reciprocal arrangement or understanding with another person leading to the creation of the trust, or
- (iii) procured another person (e.g. a solicitor) to create the trust,

and -

- (a) whose consent is required as a condition of any trustee exercising his discretion in connection with the trust property; or
- (b) in accordance with whose wishes any trustee is :
 - (A) accustomed, or
 - (B) would be expected,to act.

2.2.6 A person is a founder even though the property is provided indirectly or the trust is created indirectly. Also it does not matter that the arrangements, understanding, requirement to obtain consent, or wishes referred to are not legally enforceable.

2.2.7 Accordingly, if the trustees of a discretionary trust are directly interested in shares of a listed corporation as trustees of the discretionary trust, or are taken to be interested in such shares by the application of the aggregation rules in s.316(2), then the founder of the discretionary trust is also taken to be interested in all such shares.

2.3 What are derivative interests and “underlying shares”?

2.3.1 The term “equity derivatives” is given an extended meaning in Part XV in order to ensure that all interests and short positions (see below) in shares of a listed corporation are disclosed. The term includes any contract or financial instrument -

- (i) giving a person rights, options or interests in, or in respect of, the underlying shares;
- (ii) giving a person rights, options or interests in, or in respect of the rights, options or interests arising under a contract or financial instrument referred to in paragraph (i); and
- (iii) whose price or value is calculated wholly or partly by reference to the price or value, or a change in the price or value, of the underlying shares or any rights, options or interests in the underlying shares.

2.3.2 Hence contracts or financial instruments such as those immediately below are all covered by the term “equity derivatives” -

- (i) warrants, callable bull bear contracts and other structured products;
- (ii) convertible bonds, exchangeable bonds and other equity linked instruments (equity linked deposits, funds, notes, certificates or other securities);
- (iii) American Depositary Receipts (“ADRs”) and Hong Kong Depositary Receipts (“HDRs”);
- (iv) stock options and stock futures;
- (v) over-the-counter (“OTC”) forwards, options or swaps;
- (vi) a derivative over another equity derivative; and
- (vii) credit derivatives that have reference obligations or deliverable obligations which are exchangeable or convertible bonds,

regardless of whether they are physically settled, by delivery of the underlying shares, or cash settled⁶. Depending on the particular derivative you hold you may have rights to acquire shares, rights to require another person to buy shares, or a right to a sum of money depending on the price of certain shares.

2.3.3 The term “underlying shares” is used in connection with “equity derivatives”. It refers –

- (i) in the case of physically settled equity derivatives, to the shares that may be delivered to you, or by you under the equity derivatives; or
- (ii) in the case of cash settled equity derivatives, to the shares by reference to the price or value of which, wholly or partly, the price or value of the equity derivatives is derived or determined⁷.

For example, in the case of an issue of :

⁶ For example where the settlement amount (the sum of money that you are paid or have to pay under the equity derivative) is calculated wholly or partly by reference to the price or value, or a change in the price or value, of shares of a listed corporation or any rights, options or interests in such shares.

⁷ The definition makes no distinction between whether the price of the equity derivatives is determined by reference to the price of certain shares expressly under the terms of the instrument, or whether the market value of the equity derivatives is, wholly or partly, derived from or determined by the price or value of specific shares. The shares by reference to the price or value of which, **wholly or partly**, the price or value of the equity derivatives is derived or determined are the “underlying shares”.

“European Style Cash Settled Call Warrants 2001-2002 relating to ordinary shares of HK\$10.00 each in XYZ Ltd. issued by ABC Investment Bank”,

the “underlying shares” are ordinary shares of HK\$10.00 each in XYZ Ltd.

In the case of an option to purchase :

“Convertible bonds issued by XYZ Ltd. paying 5% interest p.a. and giving the holder a right to acquire ordinary shares of HK\$10.00 each in XYZ Ltd. at a price of HK\$2 per share”,

even though the price of the option is partly determined by the coupon and partly by the conversion rights the “underlying shares” are ordinary shares of HK\$10.00 each in XYZ Ltd.

2.3.4 If you hold, write or issue financial instruments such as derivatives you will be taken to be interested in the underlying shares and these interests must be added to your other interests to determine your disclosure obligations. However, if the transaction in derivatives was between members of a wholly owned group of companies no duty of disclosure would arise (see paragraph 2.12.9).

2.3.5 When filing a DI notice you are required to disclose your interest in shares of listed corporations - not interests in instruments creating those interests. Hence the details should relate to the underlying shares. For example, if 100 ADRs are worth 150 shares you should disclose an interest in 150 shares not 100 ADRs.

Public offers

2.3.6 The underwriter of a public offer of shares will have an interest in the shares which are to be offered even though they are unissued. Depending upon the terms of the underwriting agreement each member of the underwriting syndicate may be taken to be interested in all shares to be issued or a defined number of shares. However, on an initial public offer, the interest will not be notifiable until the corporation concerned has any of its securities listed on the Stock Exchange (see paragraph 1.4.1) as it will not be a “listed corporation” until that point. If the underwriter has an option to require the original shareholders to sell more shares than originally planned if the offering is over-subscribed (known as an “over allotment option” or a “greenshoe option”) this option will be an equity derivative and the underwriter(s) must disclose their long positions under this option on listing of the corporation. Disclosure is also required when the option is exercised or expires.

2.3.7 An “over allotment option” or a “greenshoe option” are usually coupled with a securities borrowing and lending agreement (“SBL agreement”) under which the original shareholders agree to lend shares to the underwriter(s). The duties of the borrower and the lender of shares if the corporation is already listed are examined in paragraph 2.13 but, if the SBL agreement is entered into before shares in the corporation are listed, a duty of disclosure arises at the point that the corporation becomes listed (see s.310(2)(a)). It should be noted that the exemption for wholly owned subsidiaries and their holding companies is not available when a duty of disclosure arises under s.310(2) or (3) (i.e. an initial notification - see paragraphs 2.7.2 and 2.12.9.1)

2.3.8 When completing a disclosure form you are asked to give further information in respect of derivative interests. In particular, you are asked to select a code describing the derivatives. The codes that apply to derivatives are set out in Table 4 of the directions and instructions for completing each form. If the derivatives are listed or traded on the Stock Exchange or the Hong Kong Futures Exchange Limited you should choose code 401 or 402 depending on whether the derivatives are physically settled (i.e. shares are delivered on exercise of the derivative) or cash settled (cash is paid on exercise). If the derivatives are not listed then code 403 or 404 should be used. All warrants currently listed on the Stock Exchange are cash settled.

2.4 What are meant by the terms “long position” and “short position”?

2.4.1 You have a “long position” if you have an interest in shares because, for example, you have agreed to buy the shares or you are entitled to exercise any right conferred by the holding of shares or control the exercise of such right (see section 322(5) of the SFO). The term “long position” also includes interests through holding, writing or issuing financial instruments under which, for example :

- (i) you have a right to take the underlying shares;
- (ii) you are under an obligation to take the underlying shares;
- (iii) you have a right to receive money if the price of the underlying shares increases; or
- (iv) you have a right to avoid or reduce a loss if the price of the underlying shares increases.

2.4.2 The term “short position” is generally used in connection with a person who holds, writes or issues financial instruments such as equity derivatives. However, it is also used in the context of the position of the borrower under a securities borrowing and lending agreement who will have both a long and a short position when he borrows shares. You have a “short position” if you :

- (i) borrow shares under a securities borrowing and lending agreement (see further paragraph 2.13.2 below), or
- (ii) hold, write or issue financial instruments under which, for example:
 - (a) you have a right to require another person to take the underlying shares;
 - (b) you are under an obligation to deliver the underlying shares;
 - (c) you have a right to receive from another person an amount if the price of the underlying shares is below a certain level;
 - (d) you have an obligation to pay another person an amount if the price of the underlying shares is below a certain level; or
 - (e) you have any of the rights or obligations referred to in (a) to (d) embedded in a contract or instrument.⁸

⁸ We have received comments that the definition of “short position” in section 308 of the SFO is difficult to follow and is incomplete. We will be proposing an amendment to the definition of “short position” to address these

2.4.3 We take the view that when a listed company allots shares or issues an instrument under which it agrees to allot shares, or grants an option over its own unissued shares, it is not taking a position in its own shares, short or long, it is simply issuing or agreeing to issue the shares. If the listed company does not have a short position then the controller of the listed corporation is not deemed to have a short position under s.316.

2.5 How many shares am I taken to be interested in if I hold equity derivatives ?

2.5.1 The number of shares in which you are taken to be interested, or have a short position, if you hold, write or issue financial instruments such as equity derivatives is for example :

- (i) the number of shares that may have to be delivered to you, or by you, on the exercise of rights under the derivatives;
- (ii) the number of shares by reference to which the amount payable under the derivatives is derived or determined; or
- (iii) (in the case of stock futures contracts) the contract multiplier times the number of contracts you hold.

(See further section 322(9) and 322 (11) to (13))

2.5.2 If any party to a derivative can choose whether to settle in cash or by delivery then paragraph 2.5.1 (i) should be used to work out the number of shares in which you are interested. If it is not possible to determine precisely the number of shares in which you are taken to be interested (or have a short position) at the date when you first acquire an interest in the underlying shares through an equity derivative then you should still file a notice if the number of shares in which you are interested may exceed 5% or more of the issued shares of the listed corporation concerned. For example, if the number of shares that you will receive under an equity derivative is determined by the price of the shares on a given date in the future (and there is a minimum number that you are bound to get) then if that minimum number (together with any other shares in which you are interested) exceeds 5% or more of the issued shares of the listed corporation concerned a duty of disclosure arises on entering into the derivative. If the derivative specifies only a maximum then disclose the maximum figure. If the derivative specifies both a maximum and a minimum then disclose the figure which is most appropriate.

2.5.3 Continuing the example in paragraph 2.3.3 - assume that every 10 European Style Cash Settled Call Warrants 2001-2002 give the warrant holder the right to receive the cash equivalent of the average of the closing prices of one ordinary share in XYZ Ltd on the 5 business days on which quotations are available immediately preceding the exercise date minus the exercise price. If you hold 10,000,000 warrants, you will taken to be interested in 1,000,000 shares.

comments. In the interim we hope that the revised paragraph 2.4.2 is more practical to apply and spells out more clearly the positions that are intended to be covered by the term “short position”.

2.5.4. We understand that paragraph 2.5.2 of the August 2003 version of the outline has been read to mean that a person need not file a notice if he cannot determine the precise number of shares in which he is taken to be interested (or have a short position) through an equity derivative – even though it is clear that this interest will bring the total number of shares in which he is interested to more than 5%, or cause his total interest to cross a whole percentage level above 5%. We have adjusted the text of paragraph 2.5.2 to explain the requirements of the SFO. We would also like to clarify that if an equity derivative gives a person an interest in 5% or more of the shares of a listed corporation, or causes his interest to cross a whole percentage level above 5%, he comes under a duty of disclosure under s.310 of the SFO. The question of the precise number of shares that he should state on the form, as required by s.326(1)(b) or (c), is a separate issue and does not detract from the duty of disclosure. If you are not sure of the precise number of shares to state on the form you should provide your best estimate of the number of shares in which you are interested. The same principle applies to disclosures in relation to short positions.

Variance derivatives

2.5.5 We take the view that an interest in shares is not created by the holding, writing or issuing of variance derivatives where the price or value of the derivative and any payment under the derivative is solely linked to the volatility of the underlying shares. Accordingly, the holder, writer or issuer of the variance derivatives should not disclose having acquired an interest in the underlying shares of variance derivatives, or there being a change in the nature of his interest in such shares on writing or issuing the variance derivatives, provided payment under the derivative is solely linked to the volatility of the underlying shares.

2.6 How and when do I calculate the percentage figure of my interest ?

How many shares am I interested in ?

2.6.1 Firstly, you should add up all the shares of the listed corporation concerned (of the same class) in which you are interested in or are deemed to be interested in (see paragraphs 2.1 to 2.5). If you have bought and sold several blocks of shares on the same day you cannot normally deduct the number of shares that you sold from the shares that you bought to determine the number of shares in which you are interested at the end of that day. The reason for this is that you acquire an interest in shares when you contract to buy them but you only cease to have an interest in shares when you complete the sale (by transferring the shares to the purchaser).

2.6.2 Hence a person who is interested in 6.1% of the shares of a listed corporation cannot avoid his disclosure obligations by buying 1% in the morning and selling 0.2% in the afternoon. He will end the day with an interest in 7.1% and his interest will only drop down to 6.9% when he completes the sale 2 days later (see also paragraph 4.1.4). If you have lent shares you should still include them in the total unless your right to require the return of the shares has been extinguished.

No netting-off between long and short positions

2.6.3.1 You cannot net off any short position that you have against your long position. The percentage figure of each must be calculated separately. This principle applies equally to multiple option strategies as to other transactions e.g. a straddle, which is a combination of put and call options, gives rise to both a long and a short position and is potentially discloseable as 2 separate transactions. Similarly, when parties in the derivatives market enter into squaring transactions (economically identical but opposite transactions) to close out trades these give rise to a duty of disclosure.

2.6.3.2 For a structured derivative (i.e. a single transaction) involving a combination of option positions over the same lot of shares, you can either report the long and short positions by adding individual option positions together or report the effective long and short positions of the structured derivative. For example, if you sell a call and purchase a put, both in respect of 1,000,000 of the same underlying shares you will have a short position under both options. Since both options are over the same block of 1,000,000 shares you would disclose your “effective” short interest i.e. in 1,000,000 shares – not 2,000,000 shares. However, long and short positions should be not netted off against each other. A digital option can be counted as 1 share⁹.

Time of calculation percentage figure

2.6.4 From a practical standpoint, the percentage figure of your interest in shares (and your short position) can normally be determined by reference to the shares in which you are interested at the close of trading on the Stock Exchange at the end of any trading day. However, this should not be viewed as an endorsement to window dressing practices with the intention of adjusting the end of day position to avoid disclosure.

Standard situation (long positions in shares)

2.6.5 You should use the following formula to determine the percentage figure of your interest in shares in a listed corporation –

$$\frac{\text{the total number of shares (issued or unissued) in which you are interested}}{\text{number of shares of the listed corporation of the same class in issue}} \times 100$$

2.6.6 The number of shares of the listed corporation in issue can be found on the HKEx web site <http://www.hkex.com.hk>.¹⁰ Go to the HKEx Home Page which is <http://www.hkex.com.hk/eng/index.htm> and click “For Investors”. Then click

⁹ Multiplied by the contract multiplier. This is consistent with paragraph 2.5.1(iii).

¹⁰ Effective from January 2009, listed issuers are required by Listing Rules to publish a Monthly Return to provide an update on a fixed monthly basis the movement of its issued capital, and to publish a Next Day Disclosure Return in respect of changes in issued share capital, in some cases by 8:30 a.m. the next business day and in other cases subject to a 5% de minimis threshold and certain other criteria. All Monthly Returns and Next Day Disclosure Returns submitted according to Listing Rules will be published on the HKExnews website. The public will have access to the latest number of issued shares disclosed by the listed issuers by retrieving the respective Monthly Returns and Next Day Disclosure Returns.

“Companies/Securities profile and enter the name or stock code of the listed corporation concerned. The number of issued shares at a specified date is shown together with other useful information relating to the listed corporation. To work out the *percentage level* of your interest you simply round down the percentage figure of your interest to the next whole number. The date for calculating this percentage is the date of the occurrence of the relevant event (see paragraph 2.7) and the total number of shares in which you are interested, and the number of shares of the listed corporation in issue, should be determined on that day.

2.6.7 Please note that the denominator (the number of shares below the line) is not increased simply because there are a number of financial instruments such as options, warrants, convertible bonds issued in respect of unissued shares of the same class in issue.

2.6.8 In the forms you are asked to round the percentage figure of your interest to 2 decimal places. This is because a higher level of accuracy is of little interest to investors. However, you do not need to round the percentage figure of your interest to 2 decimal places when working out whether you have to file a notice. Hence if you are interested in 4.99999% of a listed corporation you do not have to round this to 5.00% and thereby come under a disclosure obligation.

Different classes of shares and “H” shares

2.6.9 If there are more than one classes of shares issued by the listed corporation concerned, the percentage figure of the shares in which you are interested should be calculated as a proportion of the number of issued shares of the class in which you are interested taken separately from other classes. Whether shares are divided into different classes is a question of fact. However, differences in rights of shareholders will normally mean that shares are of different classes. Hence interests in “H” shares or “foreign shares” of a PRC company listed on the Stock Exchange (which have different rights to “A” or “domestic” shares) should be calculated as a proportion of the number of issued “H” shares separately from the number of issued “A” shares. For the avoidance of doubt we should add that interests in shares, and interests in the underlying shares of equity derivatives, should only be added together if the shares are of the same class.

Short positions

2.6.10 To work out whether you have a short position of 1% or more of the shares in a listed corporation you use a similar formula –

$$\frac{\text{the total number of shares (issued or unissued) in which you have a short position}}{\text{number of shares of the listed corporation of the same class in issue}} \times 100$$

Groups of corporations

2.6.11 If two corporations in a wholly owned group are both interested in the same shares the ultimate holding company should not aggregate both interests to calculate the

percentage level of its interest as this would be double counting – transactions between corporations which are both members of the same group of companies do not increase or reduce the number of shares that the ultimate holding company must report.

2.6.12 There may be a change in the nature of a corporation's interest as a result of transactions between corporations which are both members of the same group of companies. Under s.313(13)(v) there is normally no change in the nature of a holding company's interest in shares due to intra-group transfers between wholly owned corporations. However this provision does not apply to holding companies where the corporations in question are not wholly owned.

Fund managers

2.6.13 If you are a fund manager and manage more than one fund you must aggregate the shares in the different funds to determine the total number of shares in which you are interested (see also paragraphs 2.1.2(vi) and 2.12.15).

2.7 When do I have to give a notice ?

2.7.1 You only have to file a notice on the occurrence of certain events - called "relevant events" (see s. 308 of the SFO). *Relevant events* include :

- (i) When you first become interested in 5% or more of the shares of a listed corporation (i.e. when you first acquire a notifiable interest).
- (ii) When your interest drops below 5% (i.e. you cease to have a notifiable interest).
- (iii) When there is an increase or decrease in the percentage figure of your holding that results in your interest crossing over a whole percentage number which is above 5% (e.g. your interest increases from 6.8% to 7.1% - crossing over 7% or it decreases from 8.1 to 7.8% crossing over 8%).
- (iv) When you have a notifiable interest and *the nature of your interest in the shares changes* (Please see examples in paragraph 2.9.2).
- (v) When you have a notifiable interest and you come to have, or cease to have, a short position of more than 1% (e.g. you are already interested in 6.8% of the shares of a listed corporation and write, issue or become the holder of an equity derivative under which you have a short position of 1.9%).
- (vi) When you have a notifiable interest and there is an increase or decrease in the percentage figure of your short position that results in your short position crossing over a whole percentage number which is above 1%. (e.g. you are already interested in 6.8% of the shares of a listed corporation and increase your short position from 1.9% to 2.1% or decrease it from 6.2% to 5.8%).
- (vii) If you have an interest in 5% or more of the shares of a corporation that is being listed, shares of a class that is being listed, or shares of a class which are being given full voting rights.
- (viii) If the 5% threshold is reduced (and you have a notifiable interest immediately after the reduction) or the 1% threshold for short positions is reduced (and you

have a notifiable interest and a short position that is notifiable immediately after the reduction).

2.7.2 A notification of relevant events (vii) and (viii) is referred to as an “Initial Notification”. In the case of an Initial Notification the time allowed for filing a notice is 10 business days as opposed to 3 business days in the case of the other relevant events.

2.7.3 Relevant event (iv) may not always give rise to a duty to give a notification. The change in the nature of your interest is not required to be reported if the percentage level of your interest that has not changed, and the percentage level of your interest at the last notification given by you are both the same. For example, if you have an interest in 5.6% of the shares of a listed corporation and lend 0.5% the percentage level of your interest that has not changed is 5.0% (i.e. 5.6% less 0.5% equals a percentage figure of 5.1% which is then rounded down to a percentage level of 5.0%) and no notification need be made. However, if you have an interest in 5.6% of the shares of a listed corporation and lend 1.0% the percentage level of your interest that has not changed is 4.0% (i.e. a percentage figure of 4.6% rounded down to a percentage level of 4.0%) and a notification must be made.

2.7.4 However a duty of disclosure may also arise in a range of other situations - principally where aggregation provisions, or exemptions, cease to apply e.g. where a person is taken to be interested in shares in which a controlled corporation is interested and the corporation ceases to be a controlled corporation (see s.316(6)); and where subsidiary covered by the group exemption ceases to be a wholly owned subsidiary (see s.313(11)). See also paragraph 2.12.9 below.

Duties of disclosure resulting from Share Repurchases or Placements

2.7.5 A duty of disclosure may also arise due to actions taken by others. For example, if the listed corporation concerned bought back shares and as a result the number of shares in issue reduced which leads to the percentage level of your interest increasing, you would come under a duty of disclosure. On the question of the timing of the disclosure, a notice should be filed within 3 business days of the date that the shares are cancelled. They will be cancelled immediately following completion of the share repurchase. However, as will be seen below (paragraph 4.1) the time allowed for reporting the change will only run from the date that you became aware of the facts that lead to the change in the percentage level of your interest.

2.7.6 It is common in Hong Kong for there to be a “placement” and a related “top-up”. The major shareholder places a block of shares with a third party and then the listed corporation issues the same number of new shares to the major shareholder. This leads to a dilution of the interests of other shareholders in the listed corporation. If as a result of a placement and top up, the percentage level of your interest reduces you will come under a duty of disclosure. The disclosure obligation arises from the date that the shares are issued. This would normally be on the date of allotment. However, as will be seen below (paragraph 4.1) the time allowed for reporting the change will only run from the date that you became aware of the facts that lead to the change in the percentage level of your interest i.e. the date that you became aware that the number of shares in issue had increased.

2.7.7 As the disclosure obligation arising following a share repurchase, or placement, does not arise from your having bought or sold any shares (or there being a change in the nature of any shares that you hold) you need only complete column 1 of the box entitled “Details of relevant event” (e.g. Box 14 of Form 1). You need not state in this box the capacity in which you held any shares, the number “bought/sold or involved” or the consideration.

Changes in the percentage level of a short position

2.7.8 In relation to paragraphs 2.7.1 (v) and (vi) you should note that you only have to make a disclosure as a result of your short position passing through the 1% percentage level or a higher percentage level if you also have a notifiable interest (i.e. a 5% long position). You are not required to make a disclosure if there is a change in the percentage level of your short position but do not have a “notifiable interest”. Hence if your short position rises from 5% to 6% but you still only have a 3% long position you will not be required to file a DI notice.

Disclosure of short positions when a company is first listed

2.7.9 If you have a 5% long position in shares of a company when it is first listed then (1) you come under a duty of disclosure; and (2) when you fill in the form you will have to disclose details of your interest in the shares and also any short position that you have. However, if you do not have a notifiable interest, the existence of a short position will not of itself prompt a duty of disclosure on first listing of a company - even if your short position is 3% short, 4% short etc. This reflects the important distinction between (1) whether there is a notifiable event giving rise to a duty of disclosure and (2) what you have to disclose when there is a notifiable event.

Death of an individual

2.7.10 If an individual substantial shareholder dies this does not give rise to a duty of disclosure. However, an executor will acquire an interest in the shares in which the deceased was interested on the date of death and should file a notice within 3 business days giving his name and adding “as executor of the estate of [name of the deceased].” This is because an executor derives title and authority from the will, and not technically from the probate, so that the deceased’s estate vests in him immediately on death.

2.7.11 In contrast, a person seeking appointment as administrator will not acquire an interest in the shares in which the deceased was interested at the date of death as an administrator has no title or authority to act in the estate before a grant of administration has been made. Accordingly, s.10 of the Probate and Administration Ordinance (Cap. 10) provides that the estate of a person who dies intestate shall vest temporarily in the Official Administrator. The interest of the Official Administrator is exempt by virtue of s.323(1)(d)(ii) and s.346(1)(d)(ii) of the SFO. However, once an administrator is appointed the deceased’s estate will be vested in the administrator and he should file a DI notice within 3 business days of his appointment giving his name and adding “as administrator of the estate of [name of the deceased].”

2.7.12 If you are a beneficiary under a will you should file a notice (if you will acquire an interest in 5% or more of the shares of a listed corporation) when you first become aware that you are a beneficiary and are told of the number of shares that you will inherit. You should also file a notice disclosing a change in the nature of your interest after the executor/administrator transfers the interest in the shares to you (and they represent a notifiable interest).

2.7.13 When the executor/administrator transfers the interest in the shares to the person entitled to the estate of the deceased person, the executor/administrator should also file a notice that he has ceased to be interested in the shares.

Liquidation of a corporation

2.7.14 Similarly, if a winding-up order is made in respect of a corporate substantial shareholder this does not give rise to a duty of disclosure by the corporation. However, the liquidator or provisional liquidator will acquire an interest in shares in which the corporation was interested at the date of the winding-up order and should file a notice giving his name and adding “as [provisional] liquidator of [name of the corporation].”

2.7.15 When the liquidator or provisional liquidator transfers the interest in the shares to the creditors, any creditor acquiring an interest of 5% or more in the shares, and the liquidator/provisional liquidator should file a notice.

2.7.16 We take the view that you do not come under a duty of disclosure when you cease to be interested in shares of a listed corporation by virtue only of the fact that the corporation ceases to be a listed corporation (i.e. if you remain interested in the shares of the corporation). However, if you cease to be interested in the shares of the listed corporation before it ceases to be a listed corporation, or at the point that it ceases to be a listed corporation, then you will still come under a duty of disclosure. The rationale for this is that the disclosure regime is to provide transparency concerning investors in listed companies and the need for this transparency drops away when the company ceases to be listed.

2.8 [Paragraph 2.8 concerned disclosure obligations on commencement of the SFO. It has been deleted from this revision of the outline as spent.]

2.9 What is meant by “the nature of your interest in the shares changes” ?

2.9.1 If “the nature of a person’s interest is not the same” before and after the relevant time a person comes under a duty of disclosure (see s.313(1)(d)). The term “nature of a persons interest is not the same” is generally paraphrased to “change in nature of an interest”. The situations in which there is a change in the nature of an interest are very broad. For example there will be a change in the *nature of a person’s interest* in shares when there is a change in the nature of his title to shares, when any of his interests, whether legal or equitable, change and when his interest in shares which are the underlying shares of equity

derivatives change on the exercise by him, or against him, of rights under the equity derivatives (see s. 313(13)).

2.9.2 The most common situations in which there will be a change in the nature of a person's interest in shares, including shares which are the underlying shares of equity derivatives, are :

- (i) When a person grants or exercises rights under equity derivatives (whether physically or cash settled);
- (ii) When a person has rights under equity derivatives (whether physically or cash settled) exercised against him;
- (iii) where a person lending shares under a securities borrowing and lending agreement, agrees to deliver or delivers the shares to the person borrowing the shares under the agreement;
- (iv) where a person lending shares under a securities borrowing and lending agreement, takes delivery of shares which are returned by the person who borrowed the shares under the agreement;
- (v) where a person enters into a contract for the sale of shares in which he is interested;
- (vi) where a person takes delivery of shares from another person;
- (vii) where a person provides an interest in shares as security or a person returns shares held as security (releases a security interest)¹¹;
- (viii) where steps are taken to enforce a security interest against a person;
- (ix) where a person declares a trust over shares that he continues to hold;
- (x) where shares held in a (non-discretionary) trust are distributed to beneficiaries of the trust.

2.9.3 For example, if you have a right under a call option to require Mr. X to sell you 1,000,000 shares, you will have an interest in 1,000,000 shares. This interest is also a contingent interest. When you exercise your rights your contingent interest will become an immediate right to the delivery of the 1,000,000 shares – this is a change in the nature of your interest. The exercise of the rights also creates a binding obligation to deliver the shares to you causing a change in the nature of Mr. X's interest in the shares.

2.9.4 Similarly, if you have a right to require Mr. X to buy 2,000,000 shares under a put option, Mr. X will have a contingent interest in the 2,000,000 shares. When you exercise your rights to require Mr. X to take 2,000,000 shares, Mr. X no longer has a contingent interest in the shares but is under an immediate obligation to take delivery of the shares. This is a change in the nature of his interest. The exercise of the rights creates a binding obligation to deliver the shares to Mr. X thus causing a change in the nature of your interest in the shares.

2.9.5 As mentioned in paragraph 2.7.3 the change in the nature of your interest is not required to be reported if the percentage level of your interest **that has not changed**, and the

¹¹ But see paragraph 2.9.5(vi)

percentage level of your interest at the last notification given by you are both the same¹² and there is a separate exception where the interest that has not changed fluctuates within a narrow band from the percentage figure of your interest at the last notification given by you¹³. There are also five circumstances in which there is taken to be no change in the nature of a person's interest (see. s. 313(13)) and a further circumstance is set out in s.5 of the Securities and Futures (Disclosure of Interests – Exclusions) Regulation (L.N. 229 of 2002) (“the Exclusions Regulation”). There is taken to be no change in the nature of a person's interest in shares :

- (i) on delivery of shares to him (if his equitable interest in those shares is notifiable, or has previously been notified)¹⁴.
- (ii) For a vendor of shares on entering into a contract for sale if the sale is required to be completed within 4 days on which the Stock Exchange is open for business (see s.5 of the Exclusions Regulation)¹⁵.
- (iii) For a substantial shareholder on exercise of rights to subscribe for shares granted to him as part of a rights issue, and delivery of the shares to him on completion of the rights issue.
- (iv) For a holding company, if the change in nature of the interest is due to the acquisition of an interest in those shares by its wholly owned subsidiary from another wholly owned subsidiary.
- (v) For a holder of derivatives, due to a change in the terms on which rights under equity derivatives may be exercised because of a change in the number of underlying shares in issue.
- (vi) For a substantial shareholder, where a “qualified lender” (see paragraph 2.12.16) comes to have an interest in the shares by way of security¹⁶.

2.9.6 If a contract for the sale shares is not required to be completed within the period of 4 days mentioned in paragraph 2.9.5 (ii) you must file a notice within 3 business days of the date of the contract for sale (for the change in the nature of your interest – for substantial shareholders use code 117 “other”) and file a second notice within 3 business days of delivery of the shares (when you cease to be interested in those shares). We take the view that if a vendor of shares is not required to file a notice for the reasons mentioned in paragraph 2.9.5 (ii) then a person who is taken to have that interest (i.e. the vendor's holding company or spouse) is also not required to file a notice.

¹² See section 313(8)(a).

¹³ See paragraph 2.12.8 and section 313(8)(b).

¹⁴ It has been suggested that where the particular shares to be purchased under a contract, or which are the underlying shares of equity derivatives, are not specified (for example, they are held in CCASS) then the purchaser does not have an “equitable” interest in the shares and that therefore he must make a further disclosure of a change in the nature of his interest on delivery of the shares to him. We do not agree. Section 322(15) makes it clear that it is immaterial whether the shares in which a person has an interest or short position are identifiable. Furthermore, it makes no difference that the shares are unissued. If a person has notified an interest in voting shares when he enters into a contract to purchase shares, he does not need to make a further disclosure on delivery of the shares to him under the contract if the sale is required to be completed within 4 days.

¹⁵ This exemption is directed towards minimizing the disclosure obligations of persons conducting straight forward transactions on exchange. It does not extend to exempt complex transactions affecting the underlying shares of derivatives .

¹⁶ Whilst the exemption does not specifically apply when a qualified lender ceases to have a security interest in the shares we take the view that it is intended that the exemption also applies where a qualified lender ceases to have an interest in shares by way of security. It is clearly of little value to investors to be notified of the cessation of a security interest when the creation of the security interest is exempt.

2.9.7 As a result of the exemption mentioned in paragraph 2.9.5 (vi) where a qualified lender comes to have an interest in the shares “by way of security” his security interest will not need to be reported. However, if any interest other than a security interest is taken by the qualified lender, the grant of that interest would have to be reported by both the substantial shareholder and the qualified lender (see also paragraph 2.12.16). Thus, if -

- (i) you provide an interest in shares as security to a person who is recognized as a “qualified lender” giving him the right to use the securities (e.g. to re-pledge them or lend them);
- (ii) you provide an interest in shares as security to a person who is not recognized as a “qualified lender” such as a Mainland Bank;
- (iii) if any person returns shares held as security; or
- (iv) if a qualified lender takes steps to exercise voting rights in respect of shares provided as security,

then there is a change in the nature of your interest in the shares. When there is a change in the nature of a person’s interest in shares and the percentage level of that shares in which his interest has not changed is different from the percentage level of his interest in the last disclosure made by him, then a duty of disclosure arises unless an exemption applies (see further section 2.12.16).

2.9.8 If you create an equitable mortgage over shares¹⁷ or charge shares you must file a DI form using code 117 (“other”) to describe the relevant event. No details of the consideration need be given (as the shares are not being bought or sold). Your capacity would remain as “beneficial owner”. The descriptions of the various relevant events are being revised and the creation of a security interest will be more precisely described. The person taking a security interest should use code 101 or 103 to describe the relevant event and code 203 to describe the capacity in which it acquired the interest.

Miscellaneous issues

2.9.9 It has been suggested that section 322 only applies to interests in shares that are in existence at the relevant time. We do not agree. Under section 322(1) a reference to an interest in shares is construed as including a reference to an interest of any kind whatsoever in “voting shares” (formerly “shares comprised in the relevant share capital of a listed corporation”). The definition of “voting shares” (formerly shares in the “relevant share capital”) includes “unissued shares” and therefore shares that are not in existence are interests to which section 322 applies. Furthermore, section 322 refers extensively to equity derivatives and underlying shares of equity derivatives. The definition of “underlying shares” in section 308 includes the shares by reference to which the price or value of the equity derivatives is calculated “whether in any case those shares are issued or unissued” (the last line of the definition of “underlying shares”, as enacted, qualifies both paragraphs (a) and (b) in the

¹⁷ Bank of China (HK) Ltd v Kanishi (Far East) Ltd [2002] 2 HKLRD 52 per Ma J (as he then was) “Shares are choses in action and not choses in possession. It is therefore not possible to create a pledge of shares as one would pledge other choses in possession...” “The depositing of share certificates or instruments of transfer cannot therefore constitute a pledge of the underlying shares. “The true nature of the interest in the shares was an equitable mortgage”. Bank of China v Kanishi was cited with approval by Mr. Justice Lunn in SFC v Liu Su Ke HCMA 518/2009

definition). Finally, section 322(15) makes it clear that it is immaterial whether the shares in which a person has an interest or short position are unidentifiable.

2.9.10 It has also been suggested that where the particular shares to be sold under a contract, or which are the underlying shares of equity derivatives, are “unspecified” then there will be no change in the nature of a person’s interest in the shares. We do not agree. Section 322(15) makes it clear that it is immaterial whether the shares in which a person has an interest or short position are unidentifiable. See also the definition of “underlying shares” which applies whether in any case the underlying shares are issued or unissued. Accordingly, the disclosure obligations and exemptions would apply equally to interests (and short positions) in unissued shares.

2.10 What price/consideration must I disclose and how do I calculate this ?

2.10.1 In the DI forms you are asked for details of the relevant event. This is the event that triggers the Notice. The details that you must give relate to the shares bought/sold or involved at the time of the relevant event – not the shares which you already had. Where the relevant event is prompted by a transaction that forms part of a series of transactions effected on the same day, the details of the relevant event that you give should relate to all shares in which you acquired an interest, ceased to have an interest or the nature of your interest changed on that day as a result of that series of transactions.

Sales and purchases of shares

2.10.2 If an on-exchange transaction prompts disclosure the highest price per share and the average price per share must be disclosed. Similarly, in the case of an off-exchange transaction the average consideration per share and the nature of the consideration given or received must be stated. An acquisition or disposal is made “On-Exchange” when the transaction took place in the ordinary course of trading on a recognized exchange and “Off-Exchange” covers all other transactions.

2.10.3 If you have entered into a single transaction that takes you through a percentage level the highest price and average price will be the same. However, if you are an individual or a fund manager that has entered into a number of transactions during any trading day you will need to calculate the average price. The average price/the average consideration per share paid or received is determined by dividing the total amount paid/received for the shares bought or sold by the number of shares bought or sold. A table of various types of consideration and appropriate codes appears in the Notes to each form. If no price or consideration has been paid or received the price or consideration should be stated as “NIL”.

2.10.4 If you are a financial institution conducting a wide range of transactions on any day you should isolate the transaction, or series of transactions, that gave rise to the duty of disclosure. You should then disclose the highest price per share and the average price paid or received (the average consideration per share and the nature of the consideration for off-exchange trades) for that transaction(s). The term “series of transactions” means transactions of the same type e.g. a order to buy 2,000,000 shares for the “house position” that is executed in 20 trades in one day. If the trades are executed both on-exchange and off-exchange then the

average price/highest price and average consideration/nature of consideration must all be given.

Transactions where no consideration need be stated

2.10.5 If the transaction that prompts disclosure is :

- (i) a change in the nature of your interest in shares (e.g. a securities borrowing and lending transaction);
- (ii) a transaction in derivatives; or
- (iii) a change in a short position,

the highest price per share and the average price per share (average amount and nature of the consideration for off-exchange trades) need not be disclosed¹⁸.

Example

2.10.6 We have set out below an example of how to complete Box 14 of Form 1. Assume that you already own 4,500,000 shares in the listed corporation or 4.5% of the shares in issue. On 31st December 2003 you purchased (through the Stock Exchange) 400,000 shares for HK\$800,000 and 100,000 shares for HK\$210,000 (all shares to be held beneficially) increasing your total shareholding to 5%. As the two transactions are a series of transactions on the same date the details of the relevant event that you give in Box 14 should relate to the purchase of 500,000 shares (the order for 400,000 shares plus the order for 100,000 shares). You should complete Box 14 in the following manner. The Codes to be used are described in the directions and instructions for completing each form.

14. Details of relevant event

	Relevant event code describing circumstances (see Table 1)	Code describing capacity in which shares were/are held (see Table 2)		Number of shares bought/sold or involved	Currency of transaction	On Exchange		Off Exchange	
		Before relevant event	After relevant event			Highest price per share	Average price per share	Average consideration per share	Consideration Code (see Table 3)
Long position	101		201	500,000	HKD	2.10	2.02		
Short position									

2.11 What is meant by the “capacity” in which I hold shares ?

2.11.1 You will see in the last example that you are asked to state the “capacity” in which you held the interest in shares before or after the relevant event. The term “capacity” describes the type of interest that you have in shares – whether your interest is beneficial (i.e. the shares are held for your own benefit) or whether you have an interest as an investment manager managing a fund, or you have an interest because you hold the shares as a trustee for

¹⁸ See section 326(8).

someone else. In the Notes to the prescribed forms there is a table which sets out all of the common types of capacities and you are asked to choose the capacity in which you are interested in shares, and enter an appropriate code on the form.

The capacity in which you held the shares that gave rise to the relevant event

2.11.2 Firstly, in the box entitled “Details of relevant event” you are asked to state the capacity in which you were acting when you bought or sold the shares which gave rise to the duty to file a notice (or there was a change in the nature of your interest). If you sold shares, the capacity relates to the capacity in which you held the shares that were sold i.e. you should complete the column labeled “Before the relevant event”. If you purchased shares you should complete the column labeled “After the relevant event”. If there was a change in the nature of your interest you should complete both.

2.11.3 Normally, a single transaction will take your interest from, say, 5.9% to 6.1% and it is the capacity in which you acted in relation to that single transaction that must be disclosed. However, if you are a financial institution conducting a range of transactions on any day you should isolate the transaction, or series of transactions, that gave rise to the duty of disclosure and enter the capacity in which you acted in that transaction or series of transactions. Hence, if you are acting in multiple capacities on any one day you should identify the series of transactions that gave rise to the disclosure obligation. If your asset management division purchased 10,000,000 shares in one day in 10 trades, and your trading desk borrowed 5,000,000 shares the same day in 5 transactions then you would identify whether the 10,000,000 series of transactions or the 5,000,000 series of transactions prompted the disclosure obligation and then choose capacity code 202 or 201 accordingly.

The capacity in which you held all of the shares in which you were interested.

2.11.4 In a separate box on the form labeled “Capacity in which interests in Box [] are held”, you are asked to state the capacity in which you held all of the shares in which you had an interest (a short position) immediately after the relevant event. You may, for example, hold 80% of the shares beneficially and the rest on trust. In this case you would enter the code for beneficial owner on one line and the code for “trustee” on the next row and then give the number of shares held in each capacity in the next column. If you hold a single block of shares in more than one capacity you should select the code which you think best describes your circumstances.

2.12 Exemptions and interests that are disregarded

2.12.1 A number of exemptions have been created where it was felt that disclosure would be of little informational value to investors. Hence several exemptions remove the obligation to disclose small changes in interests in shares while others suspend the duty where there is duplication in reporting of interests. As the exemptions are sometimes very detailed they will not be examined at length in this outline and the following is merely a brief summary of the principal exemptions and disregards (listed in the order in which the statutory

provision appears in the SFO). You should seek legal advice if you are unsure whether one of these exemptions may apply to you. Voluntary disclosures may be made under Part XV and you will not incur any penalty if you fail to claim an exemption/disregard that you are eligible for.

2.12.2 Most exemptions do not apply to a short position that you hold because of the nature of a short position. Only the exemptions mentioned in paragraphs 2.12.3, 2.12.4, 2.12.5, 2.12.7, 2.12.8, 2.12.9 and 2.12.11 apply to short positions. The SFC has power to exempt persons from all or any of the provisions of Part XV but it can only do so after having regard to the guidelines published after consultation with the Financial Secretary (see s.309(1)). The Guidelines published under s.309(1) only contemplate an exemption being granted in 2 types of case. These are briefly outlined in paragraph 2.12.4 and 2.12.5 and the Guidelines themselves are posted on the Part XV page of our web site. The SFC will not entertain applications for exemption in other cases.

2.12.3 *Basket of shares.*

2.12.3.1 Derivatives that derive their value from a basket of shares in several companies (whose shares are listed on the Stock Exchange or a specified exchange¹⁹) may be exempt. Shares of at least 5 listed corporations must be in the basket and no one share should account for over 30% of the value of the entire basket (see s.308(5)).

2.12.3.2 It has been argued that units in unit trust fall within the definition of “equity derivatives” and that they are therefore eligible for the exemption for derivatives that derive their value from a basket of shares. We do not agree. The exemption in s.308(5) does not extend to unit trusts.

2.12.3.3 It has also been suggested that it may be possible to structure a derivative, using cross sales of index options, so that the effective position is over a single share. However, such an arrangement would not satisfy the conditions for the exemption. These require, inter alia, that no more than 30% of the price or value of the equity derivatives is derived from or determined by the prices or values of the shares in any one company. The price of a derivative, where the effective position is over a single share, will be determined by the price of that share and will therefore not satisfy this condition.

2.12.4 *Dual listings.*

2.12.4.1 A corporation may apply to the SFC for exemption of that corporation, and others in relation to the corporation, from the provisions of Part XV, if it is listed on an overseas exchange and certain criteria are satisfied. For some corporations, either already listed or seeking a listing, the principal share trading market in their securities exists or will exist on a stock exchange other than Hong Kong. In some cases either no share trading or only nominal trading will take place on the Stock Exchange. In other cases the corporate

¹⁹ A list of specified exchanges is at Part 3 of Schedule 1 to the SFO.

insiders of such corporations will be subject to statutory disclosure of interest obligations in another jurisdiction that are comparable to those of Part XV. Requiring compliance by these corporate insiders with Part XV may result in additional costs without contributing to an informed market for the shares of the relevant corporation. (See s.309(1) and the Guidelines published under s.309(1)).

2.12.5 *Issuers of structured products.*

2.12.5.1 A corporation issuing structured products may apply to the SFC for exemption of that corporation, and others in relation to the corporation, from the provisions of Part XV if certain conditions are satisfied. The principal conditions are that the corporation's shares are not listed in Hong Kong, the corporation has not raised and does not propose to raise publicly traded equity capital in Hong Kong, and that only the structured products will be listed in Hong Kong (See s.309(1) and the Guidelines published under s.309(1)). It is the substantial shareholders and directors of the corporation issuing the structured product (the "issuer") that are exempt from disclosing their interests in shares and debentures of the issuer. The issuer and holders of the equity derivatives must still count the underlying shares of the equity derivatives in determining their disclosure obligations.

2.12.6 *De minimis exemption (acquisitions and disposals).* (See s.313(7)).

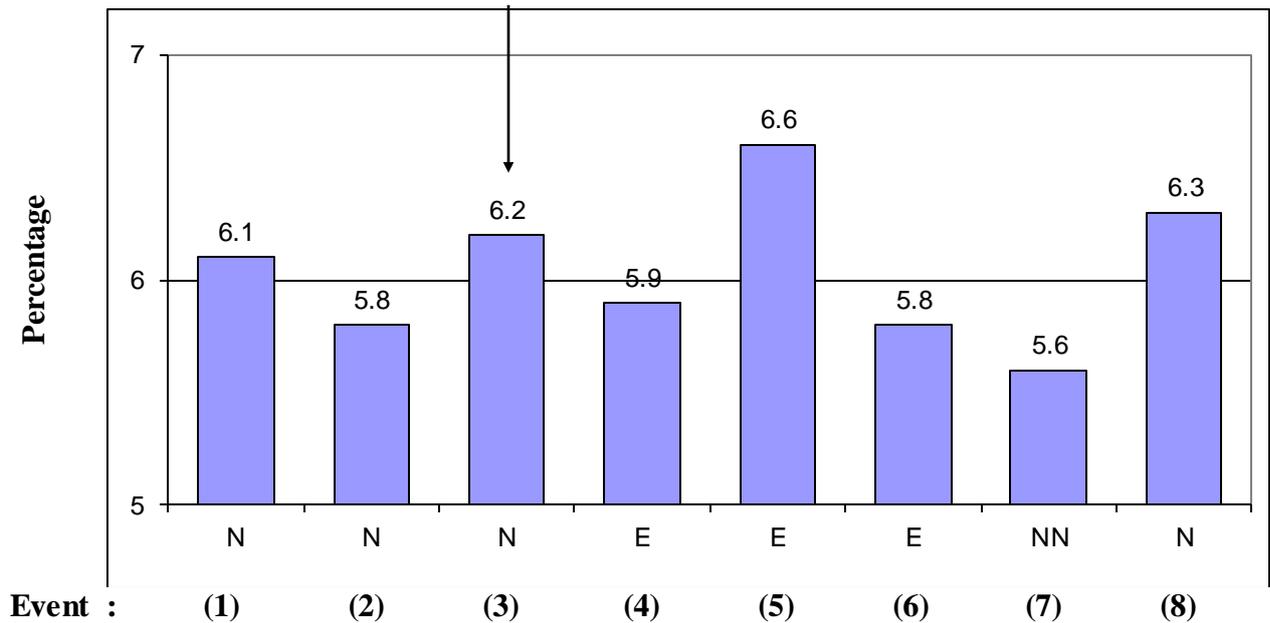
2.12.6.1 Where a person acquires an interest in shares, or ceases to be interested in shares, and as a result his interest crosses over a percentage level, the person will still not need to disclose the new interest if :

- (i) the percentage level of his interest is the same as, or less than, the percentage level of his interest in the "**last notification**" given by him; and
- (ii) the difference between the percentage figure of his interest disclosed in the "**last notification**" given by him and the percentage figure of his interest at all times thereafter, is less than 0.5% of the issued share capital (of the same class) of the listed corporation concerned.

2.12.6.2 The "last notification" must be a notification under s.313(1)(c) i.e. due to a change in the percentage level of your interest above 5%. A notification given when first crossing the 5% threshold and a notification of a change in the nature of your interest do not qualify as a "last notification".

2.12.6.3 The *de minimis* exemption is best explained with the assistance of an example. In the following bar chart each bar represents the purchase or sale of an interest in shares of a listed corporation. The figures shown represent the percentage figure of your interest. The letters below each column represent whether the transaction is notifiable or exempt. N = Notifiable; E = Exempt ; NN = Not Notifiable. The reference to a percentage level refer to e.g. the level 6% or 7%. The term "percentage figure" refers to the actual percentage that you hold e.g. 6.1%, 5.7%.

“Last notification”



- (1) You buy 6.1% of a listed corporation. This is not a “last notification” as it was not made under s.313(1)(c).
- (2) You sell 0.3% and the percentage figure of your interest passes through the 6% level. This is notifiable as the previous notice was given when first crossing the 5% threshold and does not count as a “last notification”. (Note : If the percentage level of your interest after the next transaction was the same as, or less than, the percentage level after this transaction (5.8%) then this transaction would qualify as a “last notification” meaning that the next transaction would qualify for the *de minimis* exemption. In the event the next transaction resulted in an increase in the percentage level of your interest (to 6.2%) and accordingly the elements in paragraph 2.12.6.1(i) are not satisfied and the exemption is not available.)
- (3) You buy 0.4% passing through the 6% level. This is notifiable. It does not qualify for the *de minimis* exception because the percentage level of your interest after the transaction is not “the same as or lower” than your previous interest. This is a notification under s.313(1)(c) and qualifies as being a “Last notification” if the next transaction qualifies for the *de minimis* exemption.
- (4) You sell 0.3%. This is exempt. All the conditions for the *de minimis* exemption are present.
- (5) You buy 0.7%. This is exempt. All the conditions for the *de minimis* exemption are present. Even though you purchased more than 0.5% the percentage figure

of you interest after the transaction is within 0.5% of the “Last Notification” i.e. 6.2%.

- (6) You sell 0.8%. This is exempt. All the conditions for the *de minimis* exemption are present. Even though you sold more than 0.5% the percentage figure of you interest after the transaction is within 0.5% of the “Last Notification” i.e. 6.2%.
- (7) You sell 0.2%. This is not notifiable because the percentage figure of your interest has not passed through a percentage level. None of the circumstances giving rise to a duty of disclosure listed in s.313(1) apply. The *de minimis* exemption does not create a reporting obligation if you stray outside the band of less than 0.5% from the “last notification”. However, the *de minimis* exemption is no longer available thereafter until there is a further notice filed under s.313(1)(c).
- (8) You buy 0.7%, passing through the 6% level. This is notifiable because the percentage figure of your interest passes through a whole percentage level. It does not qualify for the *de minimis* exemption because the percentage figure of your interest after the previous transaction was not “at all times” within 0.5% of the percentage figure given in the “last notification”. The difference between the percentage figure of the previous transaction and the “last notification” (5.6% and 6.2%) is 0.6%.

2.12.7 *De minimis exemption (short positions)*. This exempts substantial shareholders from disclosing small changes in their short positions in shares (see s. 313(9)). The exemption operates in a similar manner to the *de minimis* exemption explained in paragraph 2.12.6 above.

2.12.8 *De minimis exemption (changes in the nature of an interest)*.

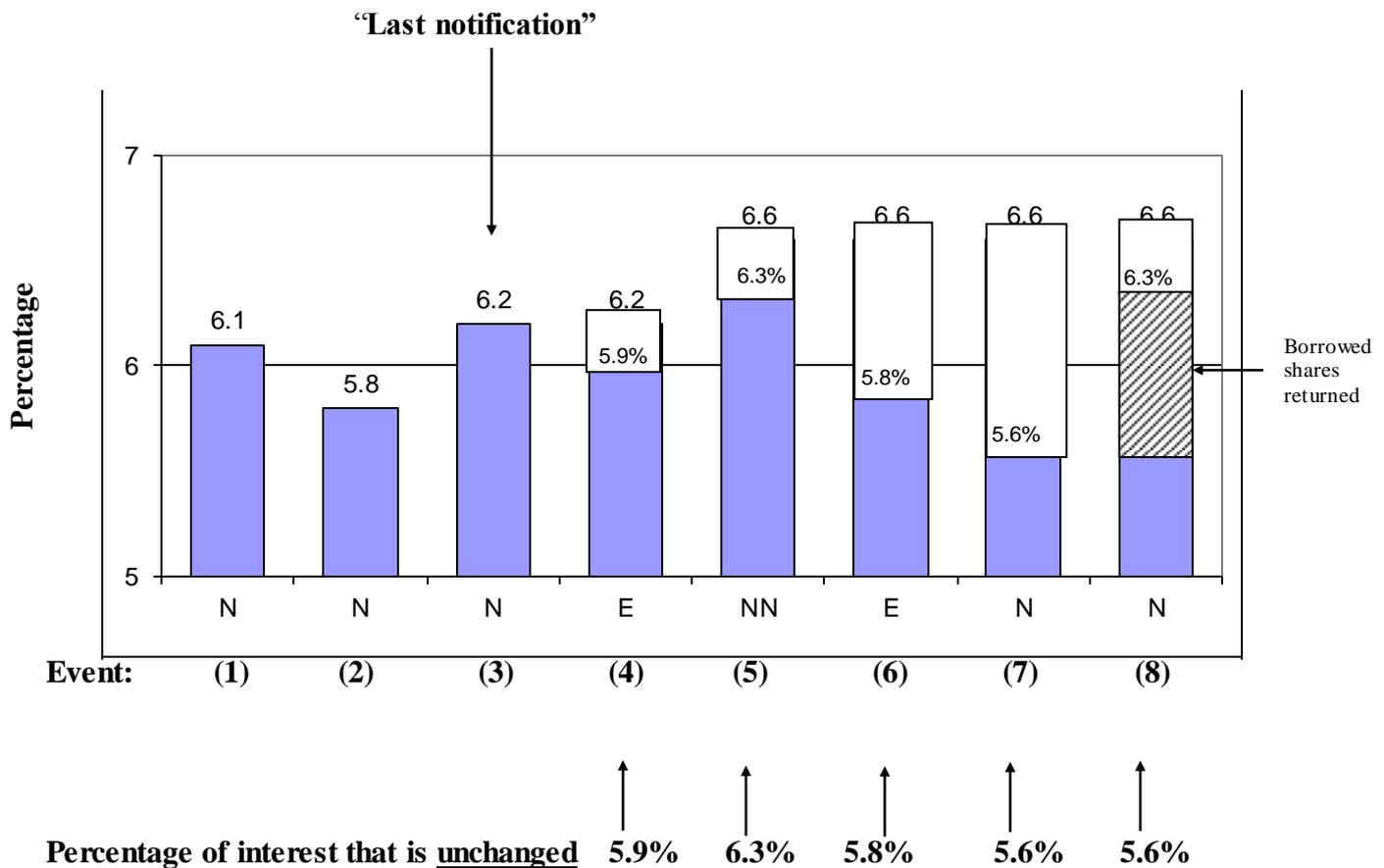
2.12.8.1 At paragraph 2.7.3 we explained that a change in the nature of your interest is not required to be reported if the percentage level of your interest that has not changed, and the percentage level of your interest at the last notification given by you are both the same (see s.313(8)(a)). For ease of reference we will call this the “*same percentage level exemption*”.

2.12.8.2 Section 313(8)(b) extends the *de minimis* exemption to situations where there is, potentially, a disclosure obligation due to a change in the nature of an interest. Here, it is necessary to look at the percentage level of the shares in which a person’s interest has not changed. Where the percentage figure of a person’s interest in shares, in which the nature of his interest has not changed, crosses over a percentage level the person need not make a disclosure if :

- (i) the percentage level of his interest (in shares in which the nature of his interest has not changed) is the same as or less than the percentage level of his interest in the last notification given by him; and

- (ii) the difference between the percentage figure disclosed in the last notification and the percentage figure of the shares in which his interest has not changed (at all times subsequent to the last notification) is less than 0.5% of the issued share capital (of the same class) of the listed corporation concerned.

2.12.8.3 The example below is similar to that in paragraph 2.12.6. However, when there is a change in the nature of your interest, the total number of shares in which you are interested remains fixed whilst the shares in which your interest is unchanged is shown as the dark part of each column.



2.12.8.4 In this example, assume that –

- (1) You buy 6.1% of a listed corporation. This purchase is notifiable as your interest has crossed the 5% threshold.
- (2) You sell 0.3% and the percentage figure of your interest passes though the 6% level. This is notifiable as the previous notice was given when first crossing the 5% threshold and does not count as a “last notification”.

- (3) You buy 0.4% passing through the 6% level. This is notifiable. It does not qualify for the *de minimis* exception because the percentage level of your interest after the transaction is not “the same as or lower” than your previous interest. This is a notification under s.313(1)(c) and qualifies as being a “Last notification” if the next transaction qualifies for the *de minimis* exemption.
- (4) You lend 0.3%. There is therefore a change in the nature of your interest in 0.3% of the shares. The percentage figure of shares in which your interest which is unchanged drops through the 6% band to 5.9%. This would normally be discloseable. However, it is exempt as all the conditions for the *de minimis* exemption are present.
- (5) You buy 0.4% taking your interest to 6.6%. This is not notifiable because the percentage figure of your interest has not passed through a percentage level.
- (6) You lend another 0.5%. There is therefore a change in the nature of your interest in 0.5% of the shares. The percentage figure of shares in which your interest is unchanged since the last notification drops through the 6% band from 6.3% to 5.8% (we use 6.3% as the starting point rather than 6.6% because there is already a change in the nature of your interest in the 0.3% which have already been lent). This loan is therefore exempt. All the conditions for the *de minimis* exemption are present. The percentage figure of the shares in which your interest is unchanged after the transaction is within 0.5% of the “Last Notification” i.e. 6.2%.
- (7) You lend a further 0.2%. This transaction is notifiable as a change in the nature of your interest under s.313(1)(d). This is because (1) the percentage level of the shares in which your interest is unchanged is a lower percentage level than your interest at the time of the last notification (i.e. 5% as opposed to 6% - so that the *same percentage level exemption* is not available s.313(8)(a)) and (2) (turning to the *de minimis* exemption in s.313(8)(b)) the percentage figure of your interest that is “at all times” unchanged is now more than 0.5% from the percentage figure of your interest at the last notification (i.e. 6.2%) and hence the *de minimis* exemption does not assist.
- (8) The borrower returns 0.7% of the shares. However the percentage figure of the shares in which your interest is unchanged remains at 5.6%. This is because the notification at step (7) does not count as a “last notification” because it is not due to a change in the percentage level of the interest (notifiable under s.313(1)(c)). Therefore, again (1) the percentage level of the shares in which your interest is unchanged is a lower percentage level than your interest at the time of the last notification (i.e. 5% as opposed to 6% - so that the *same percentage level exemption* is not available s.313(8)(a)) and (2) (turning to the *de minimis* exemption in s.313(8)(b)) the percentage figure of your interest that is “at all times” unchanged (i.e. 5.6%) remains at more than 0.5% from the percentage figure of your interest at the last notification (i.e. 6.2%) (see 2.12.8.5 below) and hence the *de minimis* exemption does not assist.

2.12.8.5 Please note that for the purposes of the *de minimis* exemption the notification of the previous transaction (the 5.6% transaction) does not qualify as a “last notification” because it was due to a change in the nature of your interest reportable under s.313(1)(d). The *de minimis* exemption is not available again until you notify the percentage figure of your interest crossing a percentage level – a notification under s.313(1)(c). Even if you remained in the 5% band instead of crossing back up to 6%, further changes in the nature of your interest which stay within the 5% band (i.e. 5% and above to just under 6%) would still have been reportable because the *same percentage level exemption* is not available (the percentage level of your interest at the time of the “last notification” was above 6% and not within the 5% band).

2.12.9 *Wholly owned group exemption.*

2.12.9.1.1 This exempts wholly owned subsidiaries from making any disclosures in certain circumstances if their ultimate holding company “complies with the duty of disclosure” (see ss. 313(10) and (11) and 316(2)). The circumstances are where the duty of disclosure arises under s.313(1) or (4) – the exemption is not available where the disclosure is an Initial Notification (i.e. a disclosure arising under s.310(2) or (3)). By “complies with the duty of disclosure” the SFO means that the holding company complies with the duty of disclosure - if there is a duty of disclosure. The section does not impose a duty of disclosure on the holding company where none would otherwise arise. For example if holding company A has a 0.2 % interest itself and its wholly owned subsidiary B has 5.9%, A will be taken to be interested in 6.1%. Assume that B acquires a further 0.2%, and its interest crosses the 6% percentage level to 6.1%. However A’s interest increases from 6.1% to 6.3% - his interest does not cross a percentage level. There is no duty of disclosure and hence A and B can both enjoy the group exemption with no disclosure needing to be made.

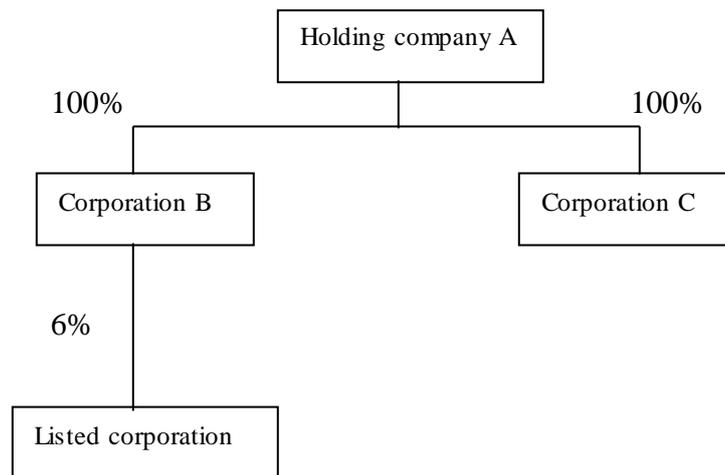
2.12.9.1.2 A corporation that is wholly owned subsidiary does not qualify for the *Wholly owned group exemption* at the time when a corporation first becomes a listed corporation or when shares of a particular class first become listed (the exemption only applies to duties arising in the circumstances set out in s.313(1) and (4) not 313(2)) and it must make a disclosure if it has an interest in shares when a corporation is first listed. Hence if you are a corporation in a group and you, or a corporation that you control, is interested in the shares of a corporation when it is first listed, or if you have a notifiable interest and a short position in such shares, you must (each) file a notice.

2.12.9.2 Similarly, transfers within the 100% owned group do not affect the number of shares in which the ultimate holding company is interested, or the nature of the interest of the ultimate holding company (see s.313(13(v))), and therefore do not give rise to a duty of disclosure. There is no “relevant event” to trigger a duty of disclosure as the percentage level of the holding company’s interest remains the same. If two corporations in a group are both interested in the same shares the ultimate holding company should not aggregate both interests for disclosure purposes as this would be double counting – transactions between corporations in a wholly owned group do not increase or reduce the number of shares that the ultimate holding company must report.

2.12.9.3 Hence, in a typical warrant issue, no disclosure is required when warrants are issued by one member of a wholly owned group to another member of the same group. Hedging activities within the same group also need not be disclosed. In each case these transactions between corporations in a wholly owned group do not increase or reduce the number of shares that the ultimate holding company is interested in, or has a short position in. Simply holding unsold derivatives warrants (where a corporation in the same wholly owned group wrote or issued the warrants) therefore gives rise to no interest/short position. However, interests or short positions that arise on transactions in the derivative warrants with third parties must be disclosed. The term “third parties” would include dealings with corporations that are controlled corporations but are not members of the same wholly owned group.

2.12.9.4 A duty of disclosure arises where the subsidiary in question ceases to be a wholly owned subsidiary (see s.313(11)). In the most extreme case this would be when it left the group altogether but it would also cease to be a wholly owned subsidiary even if only 1% of its shares were sold to a third party.

2.12.9.5 For example, assume corporation A has 2 wholly owned subsidiaries B and C. B then purchases 6% of the shares of a listed corporation. The group structure would look like this :



2.12.9.6 B need not file a notice of the purchase if A files a notice (assuming the notification is not an “Initial Notification” under s.313(2) or (3)). If B then grants a call option to C over the entire 6% interest this creates a short position for B and a long position of 6% for C. The grant and taking of the option need not be notified by B or C as the transaction is between 2 members of a wholly owned group. The transaction does not need to be disclosed by A as it is still only interested in 6% of the shares of the listed corporation.

2.12.9.7 If A then sells all its shares in B to a third party (i.e. B leaves the group) B is taken to have come to have a notifiable interests and a short position and must file a notice

and A must file 2 notices as it is (1) taken to have ceased to have an interest in the shares held by B and (2) also taken to have acquired an interest in 6% of the shares through the option held by C (see. s.313(11)).

2.12.9.8 The topic of how the group exemption affects the obligation to disclose changes in the nature of an interest is covered in paragraph 2.13.18 below – in the context of securities borrowing and lending where the issue principally arises. The principle is that transactions between corporations that are members of a group need not be disclosed whilst transactions between members of the group and third parties must be disclosed.

2.12.9.9 Both long and short positions resulting from transactions with third parties will give rise to a reporting obligation in the normal way if the result is that either crosses a percentage level. If one transaction between a third party and a member of the group results in a long position and another transaction results in a short position, the holding company A cannot net these off.

2.12.10 *Qualifying issues.*

2.12.10.1 This effectively exempts shareholders of a listed corporation who receive and take up rights under qualifying bonus and rights issues (so that the percentage level of their interest remains the same) - whilst shareholders who do not take up their rights will have to make a disclosure (see s. 314(2)).

2.12.10.2 The exemption does not extend to persons who buy rights to shares from the shareholders to whom the rights are granted. In such a case the both shareholder selling the rights and the person buying the rights must both make a disclosure (if their interests cross a percentage level).

2.12.10.3 A “rights issue” is defined in s.308(1) so as to cover offers or issues by listed corporations to all shareholders in proportion to the number of shares held by them at a given date. It covers most issues referred to as “rights issues” and “bonus issues” but not, for example, convertible bonds.

"rights issue" means an offer or issue by a listed corporation of shares in the listed corporation (whether issued or unissued) to all persons holding issued shares in the listed corporation at a certain date (other than a person whose address is in a place where such offer or issue is not permitted under the law of that place) in proportion to the number of those issued shares held by them at that date, but does not include an offer or issue of shares in the listed corporation in lieu of all or part of a cash dividend;

2.12.10.4 We take the view that if a separate prospectus is required to be filed in a jurisdiction outside Hong Kong, before the offer or issue can be extended to shareholders residing in that jurisdiction, then the offer or issue is "not permitted" under the law of that jurisdiction. Accordingly an offer or issue may still be regarded as a "rights issue" if the offer or issue is not extended to shareholders residing in such jurisdictions.

2.12.10.5 When there is a rights issue you will become interested in shares that have not yet been issued (the rights shares) whilst the number of shares in issue remains the same. If the formula in paragraph 2.6.5 was used the percentage figure of your interest would rise after the rights issue was approved and then reduce on completion of the rights issue. This effect was not intended. Accordingly s.314(2) provides that in the case of a rights issue you should calculate the percentage of shares in which you are interested using the following formula (see s.314(2)) –

$$\frac{\text{the total number of shares (issued or unissued) in which you are interested}}{\text{number of shares of the listed corporation of the same class in issue + number of shares to be issued upon completion of the rights/bonus issue}} \times 100$$

2.12.10.6 The effect of this is that if you take up a rights issue in full the percentage level of your interest remains the same throughout the period of the rights issue and no disclosure obligation arises.

2.12.10.7 The underwriter of a rights issue will acquire an interest in all rights shares that he agrees to take in the event that the shareholders do not take up their rights. In Box 4 of the disclosure notice he should state the number of shares in issue as enlarged by the rights shares proposed to be issued. Following completion of the rights issue the underwriter should file a notice stating the number of shares that he has ceased to be interested in (the number of rights shares taken up by the shareholders).

2.12.11 *The aggregation exemption.*

2.12.11.1 Section 316(5) provides an exemption for the fund management industry - persons carrying on a business of managing investments or holding investments for customers whether as a custodian or a trustee – from the requirements of s.316(2) and (3). It removes the obligation on a holding company to aggregate interests in shares of listed corporations held by controlled corporations that hold their interest in their capacity as an investment manager, custodian or trustee and manage their interests independently (see s. 316(2)(3) and (5)). The exemption does not exempt the investment manager, trustee or custodian from his duty to disclose his interests in the shares that he manages or holds. It also only applies to interests held by separate corporations. The exemption is not available to separate businesses carried on in one corporation even if there are Chinese walls between the various divisions. To qualify for the exemption the conditions to be satisfied are that :

- (i) the controlled corporation is interested in those shares by reason only of its obligation or power to invest in, manage, deal in or hold interests in those shares on behalf of its customers in the ordinary course of its business as an investment manager²⁰, custodian or trustee;²¹

²⁰ A defined term, see paragraph 2.12.11.3.

- (ii) to the extent that the controlled corporation has any right or power to vote in respect of those shares, such right or power is exercisable by the controlled corporation independently without any reference to its holding company or any company in the same group; and
- (iii) when performing its functions as an investment manager, custodian or trustee, the power of the controlled corporation to invest in, manage, deal in or hold interests in those shares is exercised by the controlled corporation independently without any reference to its holding company or any corporation in the same group.

Hence the exemption does not apply to a trustee or custodian unless its “principal” business is holding shares on behalf of customers – in practice investment managers. It does not apply to persons merely holding shares on trust. The term “independently without any reference to” the holding company or related corporation means that the exemption is not available if there is any dialogue with the holding company concerning the shares or, in the case of an investment manager, if the holding company sets the investment parameters within which the investment manager must operate.

2.12.11.2 As the conditions necessary to qualify for this exemption are set out in the SFO it is up to the holding company seeking to take advantage of the exemption to satisfy itself that it meets the conditions set out in s.316(5). It will be a question of fact in every case whether the requirements of s.316(5) are met and continue to be met. If you are a holding company that wishes to rely upon this exemption you should keep suitable records to support your claim.

2.12.11.3 The term “investment manager” is defined in s.316(7) to mean –

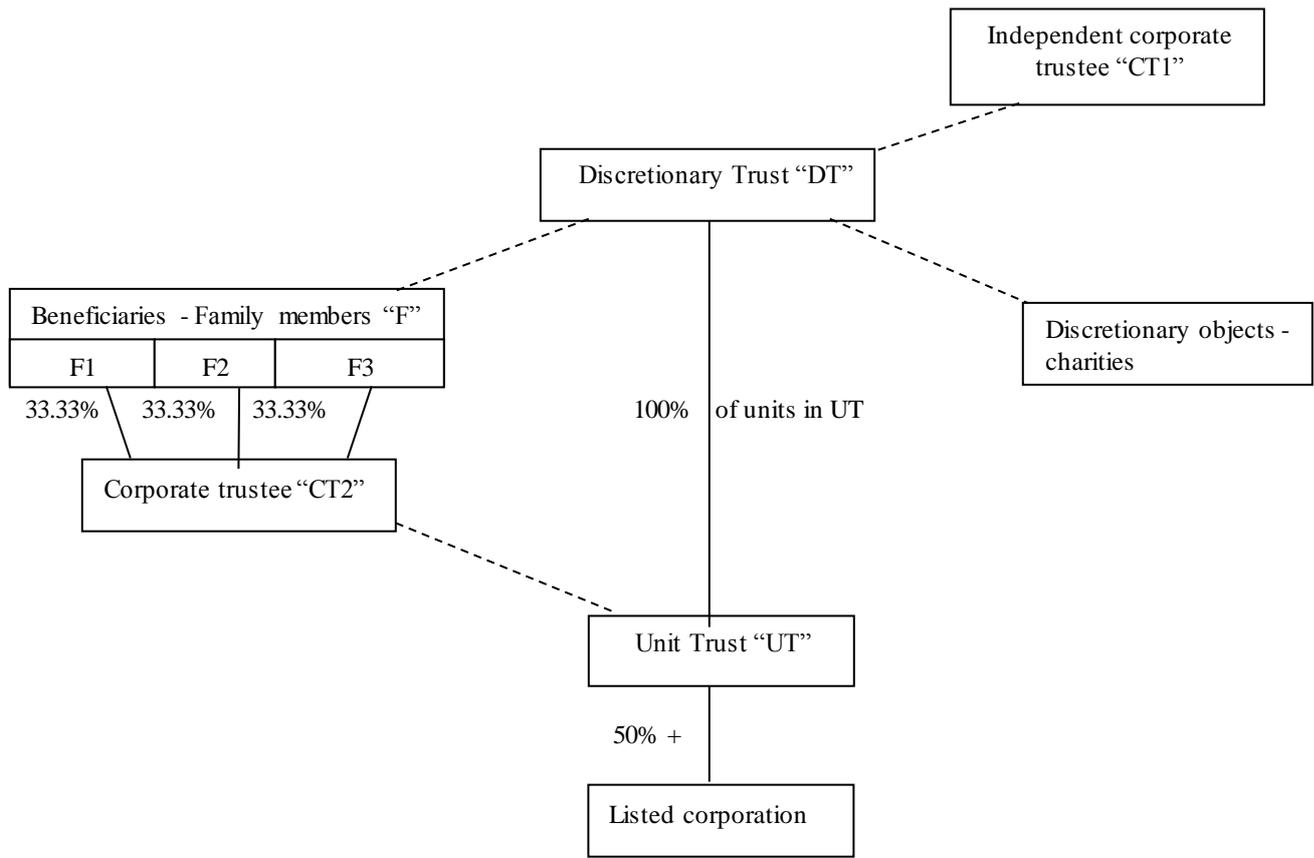
- (i) a corporation licensed or registered in Hong Kong for the regulated activity of asset management and is authorized to manage investments in securities for another person under a written agreement; or
- (ii) a corporation which is licensed registered or exempt for asset management in a place recognized for the purposes of s.316(7) by the SFC²² and is authorized to manage investments in securities for another person under a written agreement.

2.12.11.4 The term “trustee” is defined in s.316(7) to mean a corporation the “principal business” of which is to hold property belonging to another person under the provisions of a trust deed. The term “custodian” is defined in s.308 to mean a corporation the “principal business” of which is to act as a custodian of securities or other property for another person whether on trust or by contract.

2.12.11.5 A common structure for “*family controlled*” listed companies in Hong Kong is as follows :

²¹ A defined term, see paragraph 2.12.11.4.

²² 11 countries are recognized for this purpose - Australia, France, Germany, Guernsey, Ireland, Isle of Man, Jersey, Luxembourg, Switzerland, United Kingdom and United States of America



2.12.11.6 An independent corporate trustee “CT1” is appointed as trustee of a discretionary trust “DT”. A unit trust “UT” is established to hold the family’s shares in a listed corporation. The units in UT are all held by CT1 for DT. The family members (F 1, F2, and F3) are discretionary beneficiaries of DT. They also control a corporation “CT2” which is the trustee of unit trust UT. Accordingly they retain the day to day control over the affairs of the listed corporation and can also control whether income should be accumulated and when and how much income should be distributed. There are many variants on this theme but they are generally to a similar effect.

2.12.11.7 It has been suggested that F1, F2 and F3 are not interested in shares of the listed corporation because s.316(5) entitles them to disaggregate the interests of CT2. This is not correct. The trustee of the trust in the above example does not have "customers" and does not carry on a “business”. Accordingly F1, F2 and F3 will not be entitled to disaggregate the interests of CT2 under s.316(5). None of the provisions of s.323 (interests which are to be disregarded) apply in these circumstances. It may also be that the provisions of s.317 (agreements to acquire interests in shares) apply. Accordingly, F1, F2 and F3 should each disclose interests held by UT in the listed corporation.

2.12.11.8 Furthermore, if F1 (or persons with whom they had an arrangement) was previously interested in any of the shares held by UT then F1 will also be a "founder" of DT and will have an independent obligation to file disclosure notices (see the definition of "founder" in s.308).

2.12.12 *Bare trustees.*

2.12.12.1 The interest of a bare trustee is disregarded. However, to be a bare trustee the trustee must have no duties to perform in respect of the interest in the shares except to convey or transfer that interest to the persons entitled to hold it. A bare trustee into whose name an absolute owner transfers shares is sometimes called a nominee. This must be distinguished from the situation where trustees vest shares in a nominee in order to facilitate share dealings. Such a person is in effect an agent of the trustees²³ and must disclose his interest in the shares. A custodian trustee is not a bare trustee, as he is not a mere name or “dummy” for the trustees or for the beneficiaries²⁴. A custodian may be entitled to take advantage of the disregard for an exempt custodian interest. The vendor of unascertained shares still retains an interest in shares prior to completion of the sale – he is not a bare trustee for the purchaser. If the purchaser does not pay the purchase price and sale is not completed the vendor has the right to sell the shares to another person – the vendor is not required to deal with the interest solely in accordance with the instructions of the purchaser and therefore cannot be holding the shares as a bare trustee²⁵.

2.12.13 *An exempt custodian interest.*

2.12.13.1 If an interest in shares is held by a corporation which carries on a business of holding securities in custody for another person, whether on trust or by contract, and the corporation has no authority to exercise discretion in dealing in the interest in shares, or in exercising rights attached to the interest then that interest is disregarded (see s. 323(1)(b) and (3)).

2.12.13.2 If a bank retains a discretionary right to set off any other obligations/liabilities of a client against any securities held in custody for that client the bank will not satisfy the requirement in s.323(3)(b) that the corporation "has no authority to exercise discretion in dealing in the interest, or in exercising rights attached to the interest". Similarly, the exemption is not available if a bank retains the discretionary right to take up or retain unclaimed or fractional dividends (cash and/or scrip). The custodian exemption is not establishing a new wide exemption for custodians. It is intended to parallel the regime for a "bare trustee" - simply extending the bare trustee exemption to custodians by contract (before the bare trustee exemption only applied to custodians who were trustees).

2.12.14 *Discretionary trusts.*

2.12.14.1 The interest of a beneficiary of a discretionary trust in shares held by trustees of the discretionary trust is disregarded (see s. 323(1)(a)(iii)) unless he is also a director of the listed corporation concerned.

²³ Hanbury & Martin - Modern Equity 16th ed. 72. notes 67 and 69

²⁴ Snell's Equity 30th ed. 124 note 42

²⁵ Pennington, Company Law, 8th ed., 439

2.12.15 *Collective investment schemes, pension and provident fund schemes, qualified overseas schemes.*

2.12.15.1 This disregards the interests in shares of listed corporations, held by certain schemes, of a holder of a unit or a share in the scheme and a trustee or custodian of the scheme. The schemes that enable the holder, trustee or custodian to qualify for this exemption are an authorised collective investment scheme, certain pension or provident fund schemes, and a qualified overseas scheme (see s. 323(1)(c) and (5)). A qualified overseas scheme must be established in a place outside Hong Kong recognized for the purposes of s.323(5) by the SFC by notice published in the Gazette²⁶.

2.12.15.2 It should be noted that the interest of the manager of the scheme is not disregarded (even if he is also a holder, trustee or custodian, see s.323(4)) and his interest must still be disclosed.

2.12.15.3 If a person is the holder of units in a unit trust that does not satisfy s.323(1)(c) (or the trustee or custodian of such a unit trust) he will have to disclose an interest in all shares in which unit trust is interested. This is because the unit holder has an undivided share in the whole portfolio of the unit trust.

2.12.16 *Exempt security interests.*

2.12.16.1 This enlarges the previous exemption under the repealed S(DI)O that disregards an "exempt security interest". An interest in shares is an exempt security interest if it is held by a qualified lender by way of security only for the purposes of a transaction entered into in the ordinary course of business as such a qualified lender (see s. 323(1) (f) and (6)). Under s. 308 the term "qualified lender" is defined to include an authorized financial institution, an authorized insurance company, an exchange participant of a recognized exchange company and an intermediary licensed to deal in securities or securities margin financing. The term "qualified lender" does not include a person licensed just as a licensed money lender.

2.12.16.2 The term "qualified lender" also includes a person that is a corporation authorized under the law of any place outside Hong Kong to carry on business as a bank, as an insurance company, or in an activity that is in the opinion of the Commission equivalent to dealing in securities or securities margin financing and that place is recognized for the purposes of section 313(13), 317(6), 323(6) or (7) or 341(5) by the SFC²⁷. To summarize, an interest in shares held by a qualified lender is an exempt security interest if -

- (i) it is held by way of security **only** by the qualified lender;

²⁶ 11 countries are recognized for this purpose - Australia, France, Germany, Guernsey, Ireland, Isle of Man, Jersey, Luxembourg, Switzerland, United Kingdom and United States of America

²⁷ 11 countries are recognized for this purpose - Australia, France, Germany, Guernsey, Ireland, Isle of Man, Jersey, Luxembourg, Switzerland, United Kingdom and United States of America

- (ii) the qualified lender is authorized to carry on business as a bank, an insurance company etc. in Hong Kong or under the law of a recognized place; and
- (iii) the interest in shares is held for the purposes of a transaction carried out in the ordinary course of that business.

For example if the London branch of a bank which is established in a place which is not recognized, grants a loan and holds an interest in the shares of a Hong Kong listed company as security for the loan, the security interest would qualify as an "exempt security interest" as the branch would be a "qualified lender" (the United Kingdom is a "recognized place"). On the other hand if a branch of a UK bank, which carries on business in a place which is not recognized, grants a loan and holds an interest in the shares of a Hong Kong listed company as security for the loan, the security interest would not qualify as an "exempt security interest" as the branch would not be a "qualified lender".

2.12.16.3 The creation of a security interest in shares in favour of a qualified lender does not give rise to a change in the nature of the holder's interest in those shares (see s. 313(13)).

2.12.16.4 A security interest will cease to be exempt, and the qualified lender will be taken to have acquired an interest in the shares held as security in certain circumstances (see s. 323(7)). For example, if the qualified lender :

- (i) becomes entitled to exercise voting rights as a result of default and has evidenced an intention to exercise voting rights; or
- (ii) the power of sale has become exercisable and it offers the shares for sale.

2.12.16.5 It should be noted that if the qualified lender acquires another interest in shares, other than a security interest, this interest is not disregarded. Hence if the qualified lender enforces its rights as mortgagee it will acquire an interest which is not exempt. A disclosure obligation arises. The qualified lender should use code 101 or 103 (as the case may be) to describe the relevant event and a code (other than code 203) to describe the capacity in which it acquired the interest.

2.12.16.6 There have been a number of queries concerning the meaning of the words "by way of security only". These words are same as those used in s.14(4)(b) of the repealed S(DI)O. The distinction between a security interest and a transfer of title to shares is explained well by Phillip Wood in *Comparative Law of Security and Guarantees* (see p.65) –

"Under traditional rules of universal application, if a party has a right to return equivalent securities and in the meantime to deal with the securities transferred to him as if they were his own, he must inevitably acquire the property in the securities and the transferor loses his property : this is an absolute transfer, not a transfer by way of security. The mortgagor loses title.

This reasoning has been used in the development of title finance transactions as a replacement for collateral over investment securities in order to avoid the inconveniences of mortgage law. The most common examples are stock lending and

repos. The essence of the difference is that in each case the secured creditor obtains title to the securities, not a limited security interest."

2.12.16.7 A broker providing margin financing will not be required to notify interests in shares in respect of collateral that you pledge with it by way of security in the ordinary course of its broking business. This is because a "qualified lender" includes "an intermediary licensed to deal in securities or securities margin financing." However if the broker re-pledges the shares to another institution, the interest is no longer "held by the qualified lender by way of security only" and the broker will have to disclose this interest.

2.12.16.8 A qualified lender will not be taken to have acquired an interest in the shares held as security simply because the shares are held in its account with CCASS (which requires the transfer of the shares into the name of the HKSCC Nominee) or held in its account with a bank nominee company. It is the interest in the shares which has to be held by way of security only to qualify for the exemption, not the shares themselves.

2.12.17 *Transient interests of dealers in securities.*

2.12.17.1. There is no general exemption for intermediaries (e.g. dealers and brokers). However, the interest in shares of an intermediary, licensed or registered for dealing in securities, is disregarded where the interest is acquired by the intermediary for not more than 3 business days, as an agent only for the purposes of transactions entered into for principals of the intermediary who are not related corporations of the intermediary. Clearly, where the intermediary is involved in an execution only capacity this exemption will not be available and the intermediary may have an interest in the shares that must be disclosed.

2.12.18 *Interests of dealers in securities or dealers in futures contracts in exchange contracts.*

2.12.18.1 This exemption is similar in principle to the disregard in paragraph 2.12.17. The interest in shares of an intermediary, licensed or registered for dealing in securities or dealing in futures contracts, is disregarded where the interest arises under an exchange traded stock futures contract or an exchange traded stock options contract which is acquired by the intermediary in the ordinary course of its business, pursuant to the instructions of its client and the intermediary enters into a "back-to-back contract"²⁸ with its client on the same day. Transactions for a related corporation of the intermediary do not qualify for the exemption. (See s.3(1)(d) of the Securities and Futures (Disclosure of Interests – Exclusions) Regulation (L.N. 229 of 2002)).

²⁸ Defined in s.2 of the Securities and Futures (Disclosure of Interests – Exclusions) Regulation (L.N. 229 of 2002).

2.13 Securities borrowing and lending (“SBL”)

2.13.1 The regime for SBL transactions is different to the general disclosure regime. Again, the following is merely a brief summary.

The borrower

2.13.2 The borrower of shares is normally required to disclose the borrowing and return of shares if the percentage figure of his interest passes through a percentage level of 5% or higher. This is because he acquires an interest in the shares when he borrows them and ceases to have an interest in the shares when he returns them to the lender. The borrower may take advantage of the *de minimis* exemption if the elements necessary for that exemption are satisfied. However, the initial borrowing of shares also creates a “short position” (i.e. the obligation to return the shares) for the borrower and this must be disclosed separately when he gives a notification (see the definition of “short position” in s. 308). In certain circumstances the interest of the borrower of shares may be disregarded if he is a “regulated person” (see below).

The lender

2.13.3 The position of a stock lender is more complex. The lending of stock gives rise to a duty of disclosure because there is a change in the nature of an interest in shares when they are lent and returned. A loan of 1% or more of the shares of a listed corporation by a substantial shareholder will always give rise to a disclosure obligation (unless the SBL Rules apply – see further below). A loan of up to 1% will not give rise to a disclosure obligation if after the transaction the percentage level of his interest in his other shares (i.e. those which have not been lent) remains at the same level as at the time of the last notification given by him. For this purpose the last notification could be a notification under s. 313(1)(a), (c) or (d) (see s. 313(8)(a)). Note that the *de minimis* exemption discussed at paragraph 2.12.8 may also be available.

The Securities and Futures (Disclosure of Interests - Securities Borrowing and Lending) Rules (L.N. 219 of 2002) (“SBL Rules”) and Guidelines on the criteria for approval of lending agents

2.13.4 If certain conditions are satisfied, the SBL Rules provide :

- (i) an exemption for substantial shareholders (other than substantial shareholders who are directors);
- (ii) a simplified disclosure regime for approved lending agents, and their holding companies; and
- (iii) a disregard of the interests of regulated persons in shares borrowed and lent,

in place of the disclosure obligations that may arise when there is a change in the nature of an interest in shares in a listed corporation under Part XV when they lend shares or the shares are returned to them.

Substantial shareholders

2.13.5 Substantial shareholders, who lend through an ALA, on condition that the shares are held by the ALA :

- (i) as agent for the substantial shareholder,
- (ii) for lending only and for no other purpose; and
- (iii) are lent using only a specified form of agreement (i.e. a relevant agreement²⁹ as defined),

are exempt from making disclosures of changes in the nature of their interests that result from:

- (a) the transfer of the shares to the ALA³⁰ and the return of the shares by the ALA³¹; and
- (b) the lending of the shares by the ALA and the return of the shares to the ALA (section 3 of the SBL Rules).

Approved lending agents (“ALA”s)

2.13.6 A corporation approved by the Commission as an ALA will be exempted from disclosure requirements when it lends shares from its “lending pool” or when shares are returned to their lending pool. If an ALA is interested in more than 5% of the shares of a listed corporation it will be a substantial shareholder and will have to disclose changes in the percentage level of its “lending pool” of shares in that listed corporation - but the amount of information required to be included in their notification has been simplified. (See the special notes explaining the information required to be given on the last page of the Notes to Forms 1 and 2).

2.13.7 The simplified disclosure regime is achieved through the interaction of sections 5(3) and 5(4) of the SBL Rules and the disclosure forms. Section 5(3) provides that an ALA (and its holding company³²) are not under a duty of disclosure in 6 circumstances. Section 5(4)(a) provides that an ALA (and its holding company) are taken to have acquired an interest in the shares in 4 of the 6 circumstances (and under s.5(4)(b) are taken to have ceased to have an interest where the ALA ceases to have a subsisting right to the return of shares lent). The 2

²⁹ Briefly, a relevant agreement refers to a SBL agreement providing that the borrower of shares is required to provide collateral of a value exceeding the value of shares lent, the value of collateral is marked to market to avoid any shortfall and the lender of shares can require the return of shares at any time.

³⁰ See section 3(2)(a) of the SBL Rules

³¹ See section 4(b) of the SBL Rules (whether or not those shares have been on-lent by the ALA in the interim – see the definition of “qualified shares”).

³² A person referred to in section 5(2) is the holding company of the ALA.

remaining circumstances where disclosure is not required are when shares are lent from the lending pool and returned to the lending pool (see paragraphs (c) and (d) of section 5(3)).

2.13.8 The effect of these provisions is that loans from the lending pool operated by an ALA, and returns of shares to the lending pool, are not required to be disclosed. However if shares are added to the lending pool or removed from the lending pool a disclosure obligation arises under s.5(4) of the SBL Rules. The disclosure forms must be completed in accordance with the Notes to the forms and these require that disclosures arising under s.5(4) of the SBL Rules are separately identified in the disclosure forms. The size of the lending pool must be disclosed and appropriate codes must be inserted when completing the form.

2.13.9 The SFC has published Guidelines on the criteria for approval of lending agents as ALAs and the conditions that ALAs must observe. These conditions prevent the ALA from lending shares, from the lending pool, to companies that are members of the same group of companies as the ALA or placing shares that it holds for those companies in the lending pool. The conditions apply regardless of whether the group member is an investment manager managing a fund for another or is borrowing shares for a third party. The term “members of the same group” includes any person that is a controlling entity of the ALA (defined in Schedule 1 of the SFO) and any subsidiary of a controlling entity of the ALA. Equally, shares in which the ALA is interested, otherwise than as lending agent, are not eligible for the exemption. A list of corporations that have been approved as “approved lending agents” is posted on the SFC’s web site on the Part XV web page under “Rule book / Securities and Futures Ordinance Part XV – Disclosure of Interests”.

2.13.10 The term “lending pool” in this paragraph 2.13 comprises :

- (i) shares that the ALA holds as agent for a third party which he is authorized to lend under a lending agreement that meets the requirements of the SBL Rules; and
- (ii) shares that have been lent by the ALA only if the right of the ALA to require the return of the shares has not been extinguished.

2.13.11 Provided that there is a suitable agreement in place, a custodian may transfer shares from its custody pool to its lending pool (to be held as agent rather than as custodian) and those shares can become “qualified shares” within the meaning of the SBL Rules.

2.13.12 An ALA will have to keep records of the transactions in accordance with the requirements set out in section 9 of the SBL Rules.

2.13.13 The simplified disclosure regime for ALAs also extends to holding companies of ALAs that are taken to be interested in shares in which an ALA is interested under section 316(2) of the SFO. Hence the holding company of an ALA is not normally required to disclose shares lent from and returned to the lending pool. Disclosure must be made if the ALA ceases to have a subsisting right to require the return of the shares that have been lent.

Regulated persons

2.13.14 Interests in shares borrowed by regulated persons (corporations licensed to deal in securities, and overseas brokers in recognized places³³), that merely act as a conduit (i.e. regulated persons who borrow and on-lend the shares within 5 business days after the shares on which the interest in the shares is acquired) are to be disregarded. When the shares are returned to the regulated person it may either return them to the ultimate lender or it can lend those shares again to another borrower. Provided this is done within 5 business days the regulated person's interest in the shares will still be disregarded. However, if you are a regulated person, the provisions of s.7 of the SBL Rules must be read carefully to ensure that they apply to the transaction in question.

2.13.15 Regulated persons can choose their own method to match securities borrowing and lending transactions as long as :

- (i) they observe the general principle that any stocks borrowed which have not been on-lent within 5 business days after the date of the borrowing must be included for disclosure purposes;
- (ii) the methodology adopted to match SBL transactions is reduced to writing; and
- (iii) once a methodology has been adopted to match stock borrowing and lending transactions that methodology must be applied consistently to all SBL transactions for which exemption is sought as a regulated person.

2.13.16 Regulated persons may choose not to take advantage of the exemption in which case they should count that interest for disclosure purposes. However, if a regulated person wishes to take advantage of the exemption, records must be kept as required by s.10 of the SBL Rules.

Regulated persons and related corporations

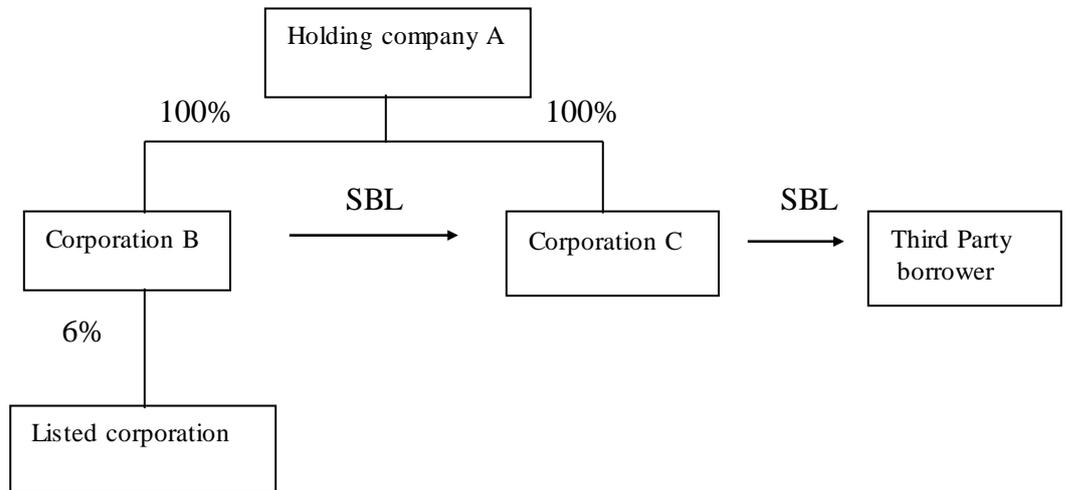
2.13.17 Regulated persons are still entitled to the benefit of the exemption if the shares are transferred to a related corporation and are used by that related corporation for lending within 5 business days after they were acquired by the regulated person. However, any holding company of the related corporation is required to aggregate the interest in the shares of the related corporation in the normal way. If the related corporation is also a regulated corporation then the interest of the related corporation may also be disregarded (see paragraph 2.13.22 below).

Interaction of the SBL Rules and the exemption for corporations in groups

2.13.18 As has been mentioned in paragraph 2.9, a holding company, is not required to file a notice if there is a change in nature of its interest in shares which is due to the acquisition of an interest in those shares by one of its wholly owned subsidiaries from another

³³ 11 countries are recognized for this purpose - Australia, France, Germany, Guernsey, Ireland, Isle of Man, Jersey, Luxembourg, Switzerland, United Kingdom and United States of America.

wholly owned subsidiary. In the following example corporation A has 2 wholly owned subsidiaries B and C. If B lends shares to C there is no disclosure obligation as the loan is between members of a wholly owned group of companies. However, if C lends the shares to a third party outside the group, the normal rules apply – there is a change in the nature of the interest of C in the shares which must be disclosed by the holding company A.

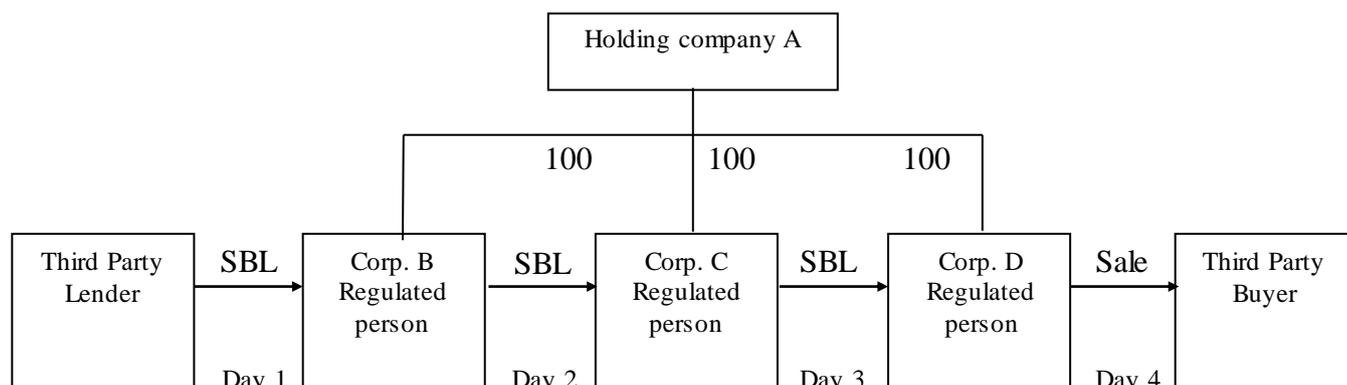


2.13.19 The conditions attaching to approval of an ALA mean that corporations that are members of a group can lend through another member of the group that is an ALA - but the shares so lend do not qualify for an exemption under the SBL Rules. In the example above, if B lends shares to C (who is an ALA) there is no disclosure obligation as the loan is between members of a wholly owned group of companies. However, when the shares are lent by C to a third party, there is a change in the nature of C’s interest in the shares which must be disclosed by the holding company A (and, if C were not a wholly owned subsidiary, C would also have to file a notice).

2.13.20 Equally, corporations that are members of a group can lend through another member of the group that is a “regulated person” within the meaning of the SBL Rules - but the group exemption is not available in respect of the transfer of shares to the related corporation (that is a regulated person). This is because the interest in shares of the regulated person is disregarded under s.7(1) of the SBL Rules. As a result the holding company of the regulated person is not taken to be interested in those shares under s.316(2) at the relevant time and therefore the conditions in s.313(10) which must be met in order to attract the group exemption for those shares are not met.

2.13.21 The position is different if both members of the group are regulated persons and each member of the group uses the shares for a prescribed purpose. Continuing from the example in paragraph 2.13.18, if B has borrowed shares from a third party and lends them to C who lends them to a third party (within 5 business days of B borrowing them) then the interests (and short positions) of both B and C are disregarded (see. S.7 of the SBL Rules).

2.13.22 However, if the shares are lent to another member of the group who uses them to settle a short sale the position is as follows :



	<i>Third Party Lender</i>	<i>Corp. B</i>	<i>Corp. C</i>	<i>Corp. D</i>	<i>Holding Company A</i>	<i>Third Party Buyer</i>
Day 0	L ³⁴	-	-	-	-	-
Day 1	L Disclose change in nature of interest	-	-	-	Interest of Corp. B is disregarded and therefore holding company A is not deemed to have an interest.	-
Day 2	L	-	-	-	Interest of Corp. C is disregarded.	-
Day 3	L	-	-	L S	Corp. D is a regulated person but the shares are not intended to be used for a prescribed purpose. Corp A must disclose Long and Short (of Corp. D)	-
Day 4	L	L S	L S	L S	Corp. D enters into a contract for sale. It is a regulated person but the shares are used for a purpose other than a prescribed purpose. B and C are taken to have acquired an interest and a short position.	L
Day 6	L	L S	L S	S	Corp D completes the sale by transferring the shares to third party. Corp A must disclose disposal of 6% and retention of 6% Short position	L

Day 1

2.13.23 In the example in paragraph 2.13.22, assume that Corporation B borrowed 6% of the shares of a listed corporation. The third party lender will have to make a disclosure because there is a change in the nature of his interest. Corporation B is not acting as an approved lending agent so s.3 of the SBL Rules does not apply to exempt the third party lender from filing a notice. Corporation B intends to on lend the shares within 5 business days and accordingly its interest is provisionally disregarded under s.7 of the SBL Rules. As Corporation B's interest is disregarded the holding company is not taken to have an interest in the 6% under s.316.

³⁴ The letter "L" stands for Long position and "S" for Short position.

Day 2

2.13.24 Corporation B lends the shares to corporation C, a related corporation that is also a regulated person. Corporation C intends to on lend the shares within 5 business days and accordingly its interest is also provisionally disregarded under s.7 of the SBL Rules. As Corporation C's interest is disregarded the holding company is again not taken to have an interest in the 6% under s.316.

Day 3

2.13.25 On day 3, the shares were borrowed by Corporation D so that it could sell short. This was not a "prescribed purpose" so that Corporation D's interest was not disregarded under s.7(1)(a) of the SBL Rules. As Corporation D's interest is not disregarded the holding company is now taken to have an interest in the 6% under s.316. Accordingly Corporation A must file a notice (within 3 business days of day 3) disclosing that it has acquired a long position of 6% and a short position of 6%. Corporation D will be shown in Box 22 of Form 2 as having a long and a short position of 6%.

Day 4

2.13.26 Under s.7(3) when the shares are used for a purpose otherwise than a prescribed purpose Corporations B and C are taken to have acquired an interest in the shares. In this case the shares are being held to settle a short sale. This is not a "prescribed purpose". As Corporations B and C are taken to have acquired an interest in the shares, the holding company is now taken to have an interest in the 6% that each of B and C had under s.316. However, as has been mentioned in paragraph 2.12.9.2, if two corporations in a group are both interested in the same shares the ultimate holding company should not count both interests as this would be double counting. Holding Company A is therefore not required to file a further notice.

Day 6

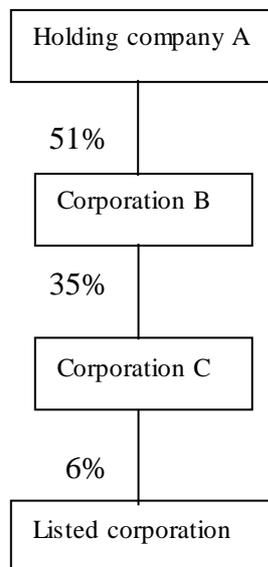
2.13.27 Corporation D completes the sale and accordingly ceases to have a long position. Corporation A must file a notice (within 3 business days of day 6) disclosing that it has ceased to have a long position of 6% but that it still has a short position of 6%. Interests of wholly owned subsidiaries under transactions with other wholly owned subsidiaries do not increase or reduce the interests (or short positions) of the group as a whole and need not be disclosed in calculating the total number of shares in which the holding company A is interested in or in completing Box 22. Accordingly the long position of B, C's long and short position and D's short position need not be disclosed in Box 22. Only B's short position (the obligation to return the shares to the third party lender) need to be disclosed in Box 22.

2.14 Controlled corporations

2.14.1 In paragraph 2.2 we explained that in calculating the total number of shares in which you are interested you must include any interests, and derivative interests, in shares of the same listed corporation that a controlled corporation has. If you have an interest in the shares because you control a chain of corporations and the corporation at the bottom of the chain has 6% of the shares of a listed corporation then each corporation in the chain is taken to be interested in 6%. The ultimate holding company is not taken to be interested in 60% because there are 10 corporations in the chain. Equally, the percentage interest is not halved if the percentage level of control is only 50%.

2.14.2 If you have an interest in the shares because you control a chain of corporations you are required to state in the prescribed forms the name of each controlled corporation in the chain in sequence starting with the top corporation and ending with the lowest corporation in the chain that has an interest in the shares of the listed corporation concerned. At each link in the chain you must state the percentage of shares that each controlled corporation controls in the corporation immediately below it (i.e. not the effective control that you have in the corporation at that level).

2.14.3 For example corporation A owns 51% of subsidiary B which in turn owns 35% of a corporation C. C then purchases 6% of the shares of a listed corporation. The group structure would look like this :



2.14.5 In this example, A and B are not wholly owned therefore each of A, B and C must file a notice. A's notice will state that the notice is being filed because a controlled corporation (C) purchased 6% of the shares of the listed corporation. It will also state that B is a controlled corporation and that it controls 51% of B, and that B controls 35% of C.

2.14.6 A, B and C are all only interested in 6% of the shares in the listed corporation and this is the percentage that they must disclose in the form. A is not required to disclose an

interest of 12% (i.e. $2 \times 6\%$) because each of B and C are interested in 6% - the number and proportion of shares in which the ultimate holding company has an interest does not enlarge as the number of companies in the chain increases. Equally A's interest is not reduced to 1.04% (i.e. $6\% \times 35\% \times 51\%$) because it controls only 51% of the shares in B and B only controls 35% of the shares in C - the number and proportion of shares in which the ultimate holding company has an interest does not reduce as the number of companies in the chain increases.

2.14.7 If B and C were wholly owned corporations, the fact that they were controlled corporations with interests in shares of the listed corporation concerned should still be stated in the forms. The fact that they need not themselves file a notice does not exempt the holding company from disclosing their interests.

2.14.7.1 If the interest of a controlled corporation in shares of a listed corporation is exempt or disregarded under paragraph 2.12.3 or paragraphs 2.12.10 to 2.12.18, its holding company is not required to aggregate that interest with its own interests in shares of the listed corporation concerned. In addition, if the interest of the controlled corporation is disregarded because it is a bare trustee, an exempt custodian interest, or the holder, trustee or custodian of a scheme (see paragraphs 2.12.12 to 2.12.15), the interest of its holding company will not be disregarded if the holding company has some other interest in the shares e.g. a discretion to deal in the shares, an interest as a manager of the scheme etc.

2.14.7.2 Note that the principle outlined in paragraph 2.14.7.1 would not exempt a holding company of an issuer of structured products from having to aggregate the interests in the underlying shares of derivatives issued by its controlled corporation (see para 2.12.5.1). Also, whilst the controlled corporation may be entitled to the benefit of one of the *de minimis* exemptions (see paragraph 2.12.6 to 2.12.8), the holding corporation will have to consider whether it meets the conditions for these exemptions based upon its own circumstances.

Limited Liability Partnership

2.14.8 We regard a limited liability partnership as a corporation for the purposes of Part XV and interests in shares held by a limited liability partnership should be disclosed by the general partner as interests in shares of a controlled corporation (rather than joint interests discloseable by each partner). The general partner of a limited liability partnership equates to the "controlling shareholder" having de facto control even though its shareholding in the limited liability partnership may be less than one third. The general partner will usually be a corporation who should make disclosure stating the name and address of the limited liability partnership in Box 22 of Form 2; its own name in column 3 of Box 22 and the percentage it holds in the limited liability partnership in column 4 (e.g. 1%).

2.14.9. To be consistent with the regime for controlled corporations set out in section 316, a limited partner who contributed more than one third of the capital to the limited liability partnership (as well as a person who exercises de facto control over a limited liability partnership - see section 316(2)(i)) should disclose the interest in shares in which the limited liability partnership is interested. Similarly, a controlling shareholder (i.e. a person exercising

de facto control or a shareholder owning one third of the shares) of a limited liability partnership should disclose an interest in shares held by the limited liability partnership.

2.15 Special features for notices filed by corporations

2.15.1 If you are a corporation that is filing a notice you must specify the name and address of any person in accordance with whose directions you, or your directors are accustomed or obliged to act. You are excepted from this requirement if you are listed in Hong Kong, the wholly owned subsidiary of a listed corporation, a corporation listed on a “specified stock exchange” or a wholly owned subsidiary of such a listed corporation. The list of specified stock exchanges is in Part 3 of Schedule 1 to the SFO.

2.15.2 The term “any person in accordance with whose directions it, or its directors are accustomed or obliged to act” would require disclosure of the name and address of the ultimate holding company, and intermediate holding companies, and its immediate controlling company/shareholder(s). Aside from its plain meaning, as a rule of thumb we take the view that this would include a person who :

- (i) is entitled to exercise or control the exercise of not less than 33 % of the voting power at general meetings of the corporation;
- (ii) controls the composition of the board of directors of the corporation³⁵; or
- (iii) has an interest in shares carrying the right to :
 - (a) veto any resolution; or
 - (b) amend, modify, limit or add conditions to any resolution, at general meetings of the corporation.

Percentage figure to be inserted in Box 26 of Form 2

2.15.3 In Box 26 of Form 2 a controlled corporation must state the name and address of the person or persons whose directions it follows. This would normally be the ultimate holding company in a group of corporations, or a series of corporations, and the controlling shareholder of the ultimate holding company. However, with a single corporation the person whose directions it follows may be a single director or a person who is not even a director. The percentage that must be stated in Box 26 is the percentage of shares in the controlled corporation that person(s) is interested.

2.15.4 Continuing the example in paragraph 2.14.3, assume that C is filing a notice disclosing that it has bought 6% of a listed corporation. If holding company A is the controller who sets the voting policy on the shares in the listed corporation then A’s name would appear in Box 26 and the percentage in the last column would be 51%. C is not required to do a calculation and state that A has an effective shareholding in C of 17.85% (i.e. 35% x 51%). If B also gives it directions C should state, in the next row of Box 26, that its immediate controlling company is B and the percentage shareholding is 35%. If A is the one that really issues directions and B just conveys them to C then only A’s name need be mentioned.

³⁵ See s.4 of Part 1 of Schedule 1 to the SFO.

3. DUTIES OF DIRECTORS AND CHIEF EXECUTIVES

3.1 What interests are directors and chief executives required to disclose ?

3.1.1 The duties of directors and chief executives (referred to hereafter simply as “directors”) are more extensive than those of substantial shareholders, reflecting their greater involvement in the management of the affairs of the listed corporation. Directors have to disclose interests in 4 main categories:

- (i) Interests and short positions in any shares of the listed corporation of which they are a director – not simply voting shares;
- (ii) Interests and short positions in shares of any “associated corporation” of the listed corporation;
- (iii) Interests in debentures of the listed corporation of which they are a director; and
- (iv) Interests in debentures of any associated corporations of the listed corporation of which they are a director.

3.1.2. In addition there is no 5% disclosure threshold similar to that set for substantial shareholders – directors have to disclose all dealings even if they have an interest, or a short position, in a small number of shares or debentures.

3.1.3 The term “director” is defined widely and includes a shadow director and any person occupying the position of director by whatever name called. The term “shadow director” means a person in accordance with whose directions or instructions the directors of a corporation are accustomed or obliged to act.

3.2 What is an “associated corporation” ?

3.2.1 An “associated corporation” is :

- (i) a holding company of the listed corporation.
- (ii) a subsidiary of the listed corporation.
- (iii) a subsidiary of the listed corporation’s holding company (e.g. a fellow subsidiary).
- (iv) a corporation in which the listed corporation is interested in more than 20% of the issued shares of any class of its share capital.

3.2.2 The term “subsidiary” is defined in Schedule 1 to the SFO in the terms that make each corporation in a chain of corporations a subsidiary of the ultimate holding company:

“(1) For the purposes of this Ordinance, a corporation shall be regarded as a subsidiary of another corporation if-

- (a) the other corporation-
 - (i) controls the composition of its board of directors;
 - (ii) controls more than half of its voting power at general meetings; or
 - (iii) holds more than half of its issued share capital (which issued share capital, for the purposes of this subparagraph, excludes any part thereof which carries no right to

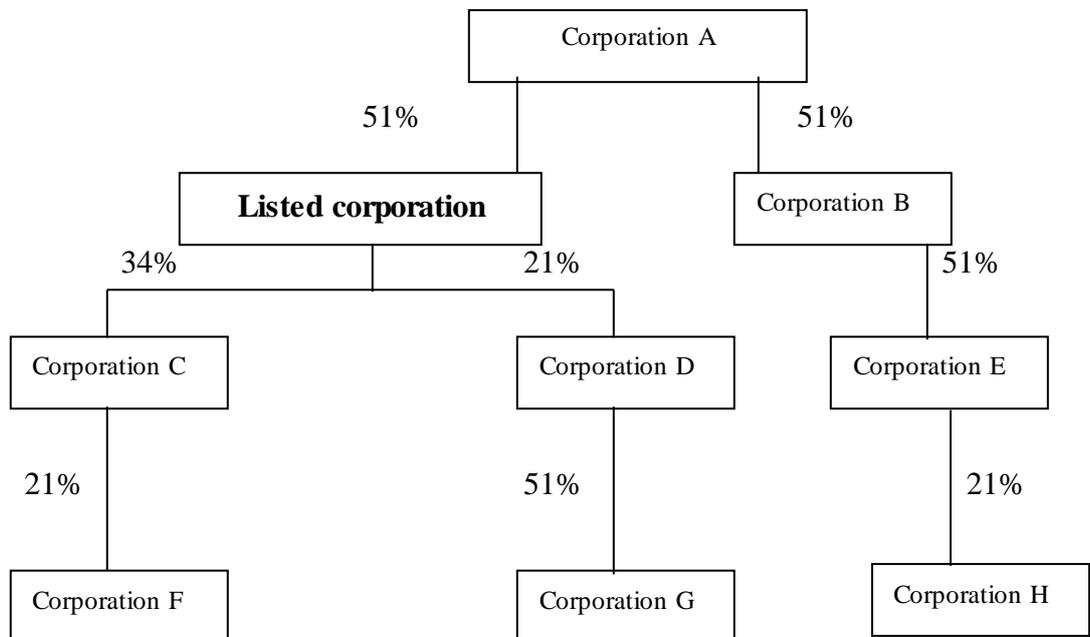
- participate beyond a specified amount on a distribution of either profits or capital);
or
(b) it is a subsidiary of a corporation which is the other corporation's subsidiary."

Subsection (2) further enlarges the definition.

3.2.3 The term "holding company" is defined in Schedule 1 to the SFO in the following terms relying heavily on the extended meaning of subsidiary:

"holding company", in relation to a corporation, means any other corporation of which it is a subsidiary;

3.2.4 An interest in more than 20% of the issued shares of any class of the share capital of a corporation is normally a direct interest in the shares of the associated corporation. However, as a listed corporation is taken to be interested in any shares that a controlled corporation has in any associated corporation (see s. 344(3) & (4)), if a listed corporation has a controlled corporation that has a direct interest in more than 20% of the shares of another corporation, that other corporation will be an associated corporation of the listed corporation. Hence in the following structure each of A to F are all associated corporations of the listed corporation. Only G and H do not qualify as an associated corporation (provided that each is not in fact controlled by the listed corporation³⁶).



ListCo has an interest of one third or more of the voting power in Corporation C and therefore ListCo is taken to be interested in any shares that Corporation C holds in Corporation F (under s.344(3) SFO). Hence ListCo is taken to have an interest of 21% in Corporation F which satisfies limb (b) of the definition of "associated corporation".

³⁶ See section 344(3).

ListCo has a direct interest of 21% in Corporation D which is therefore an “associated corporation” but ListCo does not have an interest exceeding 20% in Corporation G to satisfy limb (b) of the definition of “associated corporation” (as the calculation of its interest is : 21% x 51% = 10.71%). Corporation B is a subsidiary of the holding company of ListCo and therefore satisfies limb (a) of the definition of “associated corporation” but Corporation H is not a subsidiary of the holding company of ListCo and does not satisfy limb (a) of the definition of “associated corporation”.

3.2.5 Please also see paragraphs 3.9.6 and 3.9.7 on the disclosure obligations where a listed corporation is a controlled corporation.

3.3 What is meant by an “interest” in shares ?

3.3.1 What has been said in respect of substantial shareholders in relation to interests in shares (see paragraph 2.1) also applies to directors except that directors have to disclose an interest in any shares of the listed corporation or its associated corporation, issued or unissued, and not simply voting shares³⁷.

3.4 What is a “debenture” ?

3.4.1 A “debenture” is defined to include debenture stocks, bonds, and other debt securities of a corporation, whether constituting a charge on the assets of the corporation or not. The consequence is that directors are required to disclose any interests in any debt securities³⁸ issued by a listed corporation of which they are a director, and any associated corporation of that listed corporation.

3.5 What are deemed interests ?

3.5.1 In calculating the total number of shares in which you are interested you must include any interests, and derivative interests, in shares of the same listed corporation that certain other persons have such as your spouse, your child under 18, a corporation that you control and a trust. What has been said in respect of substantial shareholders in relation to deemed interests in shares (see paragraphs 2.2 and 2.14) also applies to directors except that directors also have to disclose an interest in any shares that they have under a discretionary trust.

3.5.2 In calculating the total number of shares in which you are interested you must normally include any interests, and derivative interests, in shares of the same listed corporation that your spouse and any child of yours under the age of 18 has. However if your

³⁷ Section 345 applies to all interests (and short positions) in shares be they direct interests (and short positions) in shares and indirect interests (and short positions) e.g. interests in shares which are the underlying shares of equity derivatives. This is clear from the reference in section 345(1) to “short positions” (which are principally positions arising under derivatives) and the many references to “equity derivatives” and “underlying shares” in section 345.

³⁸ The definition of “debenture” in the Companies Ordinance was amended to refer to “debt securities” rather than simply “securities” in 2011.

spouse is herself or himself a director or chief executive of the listed corporation concerned a director need not aggregate her or his interest (see s.344). It is important to note that s.344(1) does not relieve a substantial shareholder of the duty to aggregate the interest of his spouse and any child under the age of 18 when making a disclosure under Divisions 2, 3 and 4. Section 344(1) only applies to disclosure obligations of directors arising under Divisions 7, 8 and 9 of Part XV. If a notice is filed when acting in both capacities you should include in the notice any interest (and short position) that your spouse and any child of yours under the age of 18 has.

3.6 What are derivative interests and “underlying shares” ?

3.6.1 If you hold, write or issue financial instruments such as derivatives you will be taken to be interested in the underlying shares and these interests must be disclosed. What has been said in respect of substantial shareholders in relation to derivative interests and interests in underlying shares (see paragraph 2.3) also applies to directors.

3.7 What are meant by the terms “long position” and “short position” ?

3.7.1 What has been said in respect of substantial shareholders in relation to long positions and short positions (see paragraph 2.4) also applies to directors. In particular you must not net off long positions and short positions but must disclose these separately in the disclosure form.

3.8 How many shares am I taken to be interested in if I hold derivatives ?

3.8.1 What has been said in respect of substantial shareholders in relation to the number of shares in which you are taken to be interested under derivatives (see paragraph 2.5) also applies to directors.

3.9 When do I have to give a notice ?

3.9.1 A director has to file a notice on the occurrence of certain events, called “relevant events”. These events vary depending on whether the interest is an :

- (i) interest, or a short position, in shares of the listed corporation;
- (ii) interest, or a short position, in shares an associated corporation of the listed corporation;
- (iii) interest in debentures of the listed corporation; or
- (iv) interest in debentures of an associated corporation of the listed corporation.

Interests in shares of listed corporation

3.9.2 In the case of interests in shares of the listed corporation of which you are a director or chief executive and any “short position” (explained in paragraph 3.7 above) the relevant events include :

- (i) When you become interested in the shares of the listed corporation (e.g. on the grant to you by the listed corporation of share options).
- (ii) When you cease to be interested in such shares (e.g. on delivery of shares on settlement date).
- (iii) When you enter into a contract to sell any such shares.
- (iv) When you assign any right granted to you by the listed corporation to subscribe for such shares.
- (v) When the nature of your interest in such shares changes (e.g. on exercise of an option, on lending shares and when shares lent are returned).
- (vi) When you come to have, or cease to have, a short position in the shares of a listed corporation.
- (vii) If you have an interest, or a short position, in shares of a listed corporation at the time when it becomes a listed corporation.
- (viii) If you have an interest, or a short position, in shares of a listed corporation when you become a director or chief executive of that corporation.

3.9.3.1 A notification of relevant events (vii) to (viii) is referred to as an “Initial Notification” so that the time allowed for filing a notice is 10 business days as opposed to 3 business days in the case of the other relevant events. However, in the case of an initial notification directors are required to specify the highest price and average price per share for interests in shares acquired on-exchange within 4 months prior to the date of the relevant event and, in the case of interests acquired off-exchange, the average consideration per share and the nature of the consideration (using codes from the table of common types of consideration in the Notes to the form) (see s.349(4)).

3.9.3.2 It is important to note that on each of the relevant events that prompts an Initial Notification you must disclose all interests that you have in shares or debentures of the listed corporation and any associated corporation. For example, if you become a director of a listed corporation and hold shares in the listed corporation and 2 of its associated corporations then you must file 3 notices (one form 3A and two forms 3B).

3.9.3.3. After you have made an initial notification if you subsequently acquire or cease to have an interest in shares (or if the nature of your interest changes) you only have to file a notice detailing your interest in shares of the corporation concerned. For example, if you buy some shares in the listed corporation of which you are a director you must file a notice giving details of your interest in the listed corporation. You are not also required to file notices detailing interests in shares of associated companies simply because you have to file a notice detailing your interest in shares of the listed corporation.

Interests in shares of associated corporations –

3.9.4 In the case of interests in shares of an associated corporation of the listed corporation of which you are a director or chief executive and any “short position” (explained in paragraph 3.7 above) the relevant events include :

- (i) When you become interested in the shares of the any associated corporation of the listed corporation.
- (ii) When you cease to be interested in such shares.
- (iii) When you enter into a contract to sell any such shares.
- (iv) When an associated corporation grants you a right to subscribe for shares in the associated corporation, or such rights are exercised or assigned.
- (v) When the nature of your interest in such shares changes (e.g. on exercise of an option).
- (vi) When you come to have, or cease to have, a short position in the shares of an associated corporation.
- (vii) If you have an interest, or have a short position, in shares of an associated corporation of a listed corporation at a time when the listed corporation becomes a listed corporation.
- (viii) If you have an interest, or have a short position, in shares of an associated corporation when you become a director or chief executive of a listed corporation.
- (ix) If you have an interest, or have a short position, in shares of an associated corporation when it becomes an associated corporation.

3.9.5 A notification of relevant events (vii) to (ix) is an “Initial Notification” so that the time allowed for filing a notice is 10 business days as opposed to 3 business days in the case of the other relevant events. However, in the case of an Initial Notification directors are required to specify the highest price and average price per share for interests in shares acquired on-exchange within 4 months prior to the date of the relevant event and, in the case of interests acquired off-exchange, the average consideration per share and the nature of the consideration (using codes from the table of common types of consideration in the Notes to the form).

3.9.6 If you are a director of a listed corporation and the listed corporation or its directors are accustomed to act in accordance with your directions, then s.344(3) could be interpreted to mean that the listed corporation is a “controlled corporation” and therefore that you are interested in any shares that the listed corporation holds in its associated corporations. The same analysis would apply if you are entitled to exercise or control the exercise of one-third or more of the voting power at general meetings of the listed corporation.

3.9.7.1 We take the view that this result was not intended and consider that a director of a listed corporation is not taken to be interested in shares of an associated corporation solely because the listed corporation falls within the definition of a controlled corporation (unless the associated corporation is also a listed corporation³⁹ – when the interest in that associated corporation must be disclosed). A duty of disclosure will however arise where the director has a direct interest in shares of the associated corporation, if he is taken to have an interest in the

³⁹ It is important to note that “listed corporation” refers to a corporation that is listed in Hong Kong (see para 1.4.1).

shares of an associated corporation through a controlled corporation other than the listed corporation, or if he is taken to have such an interest because his spouse or child under the age of 18 is interested in the shares. Where a duty of disclosure arises in such circumstances the interests held through the listed corporation as well as other interests must be disclosed in the notice.

3.9.7.2 If you are interested in shares of an associated company which has no share capital (as is common with PRC companies) you must still complete a notice but where you are asked to state the number of issued shares and the percentage of shares that you hold please insert the figure “0”.

Interests in debentures of the listed corporation

3.9.8 In the case of interests in debentures of the listed corporation of which you are a director or chief executive the relevant events include :

- (i) When you become interested in the debentures of the listed corporation.
- (ii) When you cease to be interested in such debentures.
- (iii) When you enter into a contract to sell any such debentures.
- (iv) When you assign any right granted to you by the listed corporation to subscribe for such debentures.
- (v) When the nature of your interest in such debentures changes.
- (vi) If you have an interest in debentures of a listed corporation at a time when it becomes a listed corporation.
- (vii) If you have an interest in debentures of a listed corporation when you become a director or chief executive of that corporation.

3.9.9. A notification of relevant events (vi) and (vii) is an “Initial Notification” so that the time allowed for filing a notice is 10 business days as opposed to 3 business days in the case of the other relevant events. However, in the case of an Initial Notification directors are required to specify the highest price and average price per unit of the debentures for interests in debentures acquired on-exchange within 4 months prior to the date of the relevant event and, in the case of interests acquired off-exchange, the average consideration per share and the nature of the consideration (using codes from the table of common types of consideration in the Notes to the form). In the event that you are interested in convertible bonds you will have an interest in shares of the listed corporation (in addition to your interest in debentures) and must also file a notice on form 3A in addition to form 3C.

Interests in debentures of associated corporations –

3.9.10 In the case of interests in debentures of an associated corporation of the listed corporation of which you are a director or chief executive the relevant events include :

- (i) When you become interested in the debentures of the associated corporation.
- (ii) When you cease to be interested in such debentures.
- (iii) When you enter into a contract to sell any such debentures.

- (iv) When an associated corporation grants you a right to subscribe for debentures of the associated corporation, or such rights are exercised or assigned.
- (v) When the nature of your interest in such debentures changes.
- (vi) If you have an interest in debentures of an associated corporation of a listed corporation at a time when it becomes a listed corporation.
- (vii) If you have an interest in debentures of an associated corporation when you become a director or chief executive of that corporation.
- (viii) If you have an interest in debentures of an associated corporation when it becomes an associated corporation.

3.9.11 A notification of relevant events (vi) to (viii) is an “Initial Notification” so that the time allowed for filing a notice is 10 business days as opposed to 3 business days in the case of the other relevant events. However, in the case of an Initial Notification directors are required to specify the highest price and average price per unit of the debentures for interests in debentures acquired on-exchange within 4 months prior to the date of the relevant event and, in the case of interests acquired off-exchange, the average consideration per share and the nature of the consideration (using codes from the table of common types of consideration in the Notes to the form). In the event that you are interested in convertible bonds you will have an interest in shares of the associated corporation (in addition to your interest in debentures) and must also file a notice on form 3B in addition to form 3D.

[Paragraph 3.10 concerned disclosure obligations on commencement of the SFO. It has been deleted from this revision of the outline as it is spent.]

3.11 What is meant by “the nature of your interest in shares . . . changes” ?

3.11.1 There will be a change in the *nature of a person’s interest* in shares when there is a change in the nature of his title to shares, when any of his interests, whether legal or equitable, change and when his interest in shares which are the underlying shares of equity derivatives change on the exercise by him, or against him, of rights under the equity derivatives (see s. 341(5)). What has been said in respect of substantial shareholders in relation to derivative interests and interests in underlying shares (see paragraph 2.9.1 to 2.9.4 and 2.9.7 to 2.9.11) also applies to directors. Thus the most common situations in which there will be a change in the nature of a director’s interest in shares, including shares which are the underlying shares of equity derivatives, are :

- (i) When a director grants or exercises rights under equity derivatives (whether physically or cash settled);
- (ii) When a director has rights under equity derivatives (whether physically or cash settled) exercised against him;
- (iii) where a director lending shares under a securities borrowing and lending agreement, agrees to deliver or delivers the shares to the person borrowing the shares under the agreement;
- (iv) where a director lending shares under a securities borrowing and lending agreement, takes delivery of shares which are returned by the person who borrowed the shares under the agreement;

- (v) where a director enters into a contract for the sale of shares in which he is interested;
- (vi) where a director takes delivery of shares from another person;
- (vii) where a director provides an interest in shares as security or a person returns shares held as security (releases a security interest)⁴⁰;
- (viii) where steps are taken to enforce a security interest against a director;
- (ix) where a director declares a trust over shares that he continues to hold;
- (x) where shares held in a (non-discretionary) trust are distributed to a director who is a beneficiary of the trust.

3.11.2 However, in the case of directors there are only 3 circumstances in which there is not taken to be a change in the nature of a person's interest (see. S. 341(5)) :

- (i) on delivery of the shares or debentures to him, if his equitable interest in those shares or debentures is notifiable, or has previously been notified to the listed corporation concerned and the relevant exchange company, under any provisions of Part XV requiring disclosure by directors;
- (ii) due to a change in the terms on which rights under any equity derivatives may be exercised resulting from a change in the number of the underlying shares in issue; and
- (iii) where another person, being a qualified lender, comes to have an interest in his shares or debentures by way of security.

3.11.3 There is no exemption for a director on exercise of rights to subscribe for shares granted to him as part of a rights issue, and delivery of the shares to him on completion of the rights issue.

3.12 How and when do I calculate the percentage figure of my interest ?

3.12.1 Whilst the obligation on a director to disclose an interest in shares is not determined by crossing a percentage level, as is the case with substantial shareholders, directors are still required to state the percentage figure of their interests in the notices that they file.

How many shares am I interested in ?

3.12.2 Firstly, you should add up all the shares in which you are interested in or are deemed to be interested in (see paragraphs 3.5 to 3.8). If you have bought and sold several blocks of shares on the same day you cannot deduct the number of shares that you sold from the shares that you bought to determine the number of shares in which you are interested at the end of that day. The reason for this is that you acquire an interest in shares when you

⁴⁰ But see paragraph 2.9.5(vi)

contract to buy them but you only cease to have an interest in shares when you complete the sale (by transferring the shares to the purchaser).

3.12.3 Hence a person who is interested in 6.1% of the shares of a listed corporation cannot reduce the percentage level of his interest by buying 1% in the morning and selling 0.2% in the afternoon. He will end the day with an interest in 7.1% and his interest will only drop down to 6.9% when he completes the sale 2 days later. If you have lent shares you should still include them in the total unless your right to require the return of the shares has been extinguished. If you buy shares and complete the sale of shares on the same day, you cannot deduct the number of shares sold from the number of shares bought and report the net amount as a purchase (cessation of an interest). You must file 2 notices reporting the acquisition and cessation of an interest separately.

Time of calculation percentage figure

3.12.4 From a practical standpoint, the percentage figure of your interest in shares (and your short position) can normally be determined by reference to the shares in which you are interested at the close of trading on the Stock Exchange at the end of any trading day. However, this should not be viewed as an endorsement to window dressing practices, buying and selling during the course of one day, with the intention of avoiding disclosure. This does not work for the reasons mentioned in the last paragraph.

3.13 What price/consideration must I disclose and how do I calculate this ?

3.13.1 In the DI forms you are asked for details of the relevant event. This is the event that triggers the Notice. The details that you must give relate to the shares bought/sold or involved at the time of the relevant event – not the shares which you already had. Where the relevant event is prompted by a transaction that forms part of a series of transactions effected on the same day, the details of the relevant event that you give should relate to all shares in which you acquired an interest, ceased to have an interest or the nature of your interest changed on that day (as the case may be) as a result of that series of transactions.

Sales and purchases of shares

3.13.2 If an on-exchange transaction prompts disclosure the highest price per share and the average price per shares must be disclosed. Similarly, in the case of an off-exchange transaction the average consideration per share and the nature of the consideration given or received must be stated. An acquisition or disposal is made “On-Exchange” when the transaction took place in the ordinary course of trading on a recognized exchange and “Off-Exchange” covers all other transactions.

3.13.3 If you have conducted a single transaction on the day of the relevant event the highest price and average price will be the same. However, if you have conducted a number of transactions on that day you will need to calculate the average price. The average price/the average consideration per share paid or received is determined by dividing the total amount paid/received for the shares bought or sold by the number of shares bought or sold. A table of

various types of consideration and appropriate codes appears in the Notes to each form. If no price or consideration has been paid or received the price or consideration should be stated as “0”.

Transactions where no consideration need be stated

3.13.4 If the transaction that prompts disclosure is :

- (i) a change in the nature of your interest in shares (e.g. a securities borrowing and lending transaction);
- (ii) a transaction in derivatives; or
- (iii) a change in a short position,

the highest price per share and the average price per share (highest amount and nature of the consideration for off-exchange trades) need not be disclosed in the box on the form asking for “Details of the relevant event”. However in certain circumstances the price for derivatives must be stated elsewhere on the form (see below).

Example

3.13.5 We have set out below an example of how to complete Box 14 of Form 3A. Assume that you already own 4,500,000 shares in the listed corporation. On 31st December 2003 you purchased (through the Stock Exchange) 400,000 shares for HK\$800,000 and 100,000 shares for HK\$210,000 (all shares to be held beneficially). The details of the relevant event that you give in Box 14 should relate to the purchase of 500,000 shares (the order for 400,000 shares plus the order for 100,000 shares). You should complete Box 14 in the following manner. The Codes to be used are described below.

14. Details of relevant event

	Relevant event code describing circumstances (see Table 1)	Code describing capacity in which shares were/are held (see Table 2)		Number of shares bought/sold or involved	Currency of transaction	On Exchange		Off Exchange	
		Before relevant event	After relevant event			Highest price per share	Average price per share	Average consideration per share	Consideration Code (see Table 3)
Long position	121		201	500,000	HKD	2.10	2.02		
Short position									

Derivatives and debentures

3.13.6 If the disclosure is made because of the grant by the listed corporation, or any associated corporation of the listed corporation, of :

- (i) equity derivatives;
- (ii) rights under those equity derivatives;
- (iii) debentures;

- (iv) rights to subscribe for debentures; or
- (v) on the exercise or assignment of those rights so granted,

then the director must also disclose -

- (a) the price (or consideration) paid or received for the grant of those equity derivatives/debentures or those rights; or
- (b) (if the rights are being exercised or assigned) the price (or consideration) paid or received on the exercise or assignment of those right,

and, if there is no price paid or received, the figure “0” should be stated.

3.13.7 This consideration need not be disclosed in the box entitled “Details of relevant event”. In each of the forms for directors there is a separate box (e.g. Box 18 of Form 3A) for disclosure of consideration if the derivatives/debentures are granted by the listed corporation of which he is a director or an associated corporation of that listed corporation.

3.13.8 The notes to Form 3A Box 18 direct that in column 5, “Price for grant”, you should state the price per share paid or received for the grant of an option. If the price paid or received is only a nominal amount, for example, HK\$10.00 for an option to purchase 1,000,000 shares, the price should be stated as being “0” i.e. zero. If the price per share is not a nominal amount but is less than \$0.001 per share, for example \$0.00075 per share, it should be rounded up and stated as \$0.001. The same applies to Box 24 of Form 3B, Box 17 of Form 3C and Box 23 of Form 3D.

3.14 What is meant by the “capacity” in which I hold shares ?

3.14.1 You will see in the last example that you are asked to state the “capacity” in which you held the interest in shares before or after the relevant event. The term “capacity” describes the type of interest that you have in shares – whether your interest is beneficial (i.e. the shares are held for your own benefit) or whether you have an interest as because you hold the shares as a trustee for someone else. In the Notes to the prescribed forms there is a table which sets out all of the common types of capacities and you are asked to choose the capacity in which you are interested in shares, and enter an appropriate code on the form.

The capacity in which you held the shares that gave rise to the relevant event

3.14.2 Firstly, in the box entitled “Details of relevant event” you are asked to state the capacity in which you were acting when you bought or sold the shares which gave rise to the duty to file a notice (or there was a change in the nature of your interest). If you sold shares, the capacity relates to the capacity in which you held the shares that were sold i.e. you should complete the column labeled “before the relevant event”. If you purchased shares you should complete the column labeled “after the relevant event”. If there was a change in the nature of your interest you should complete both.

The capacity in which you held all of the shares in which you were interested.

3.14.3 In a separate box on the form labeled “Capacity in which interests disclosed in Box [] are held” you are asked, on an Initial Notification, to state the capacity in which you held all of the shares in which you had an interest immediately after the relevant event. You may, for example, hold 80% of the shares beneficially and the rest on trust. In this case you would enter the code for beneficial owner on one line and the code for “trustee” on the next row and then give the number of shares held in each capacity in the next column.

3.15 Exemptions and interests that are disregarded

3.15.1 A number of exemptions have been created where it was felt that disclosure would be of little value to investors. As the exemptions are sometimes very detailed they will not be examined at length in this outline and the following is merely a brief summary of the principal exemptions and disregards (listed in the order in which the statutory provision appears in the SFO). You should seek legal advice if you are unsure whether one of these exemptions may apply to you. The exemptions and interests of directors that are disregarded are more limited than for substantial shareholders partly because many of the exemptions available to substantial shareholders turn on the percentage level of their interest in shares. Voluntary disclosures may be made under Part XV and you will not incur any penalty if you do not claim an exemption.

3.15.2 Most exemptions do not apply to a short position that you hold because the exemptions are given in respect of “interests in shares” – and short positions are not “interests in shares”.

3.15.3 *Basket of shares.* Derivatives that derive their value from a basket of shares in several listed companies may be exempt. Shares of at least 5 listed corporations must be in the basket and no one share should account for over 30% of the value of the entire basket (see s. 308(5)).

3.15.4 *Bare trustees.* The interest of a bare trustee is disregarded. However, to be a bare trustee the trustee must have no duties to perform in respect of the interest in the shares except to convey or transfer that interest to the persons entitled to hold it. A bare trustee into whose name an absolute owner transfers shares is sometimes called a nominee. This must be distinguished from the situation where trustees vest shares in a nominee in order to facilitate share dealings. Such a person is in effect an agent of the trustees and must disclose his interest in the shares. A custodian trustee is not a bare trustee, as he is not a mere name or “dummy” for the trustees or for the beneficiaries. Please also see paragraph 2.12.13.

3.15.5 *Collective investment schemes.* This disregards the interests in shares of listed corporations held by certain schemes of a holder of a unit or a share in the scheme, and a trustee or custodian of the scheme. The schemes that enable the holder, trustee or custodian to qualify for this exemption are an authorised collective investment scheme, certain pension or provident fund schemes, and a qualified overseas scheme (see s. 346(1)(c) and (4)). A qualified overseas scheme must be established in a place outside Hong Kong recognized for

the purposes of s.346(4) by the SFC by notice published in the Gazette⁴¹. It should be noted that the interest of the manager of the scheme is not disregarded (even if he is also a holder, trustee or custodian see s.346(3)) and his interest must still be disclosed.

3.15.6 It will be noted that the provisions that effectively exempt substantial shareholders from disclosure when they are granted interests in shares in connection with a rights issue do not apply to directors.

3.16 Securities borrowing and lending

3.16.1 The exemption from disclosure available under the SBL Rules to substantial shareholders who lend shares does not extend to directors of listed corporations. What has been said in respect of substantial shareholders in relation to the SBL Rules does not apply to persons who are directors as well as substantial shareholders.

4. THE TIME ALLOWED FOR FILING NOTICES AND THE FORMS THAT MUST BE USED

4.1 Timing of notification

4.1.1 In the case of most relevant events you must give the notification within 3 business days of the day you know of the relevant event. In the case of events that are referred to an Initial Notification, you must give the notification within 10 business days after you became aware of the relevant event.

4.1.2 The period allowed for filing a notice runs from the time you know of the facts that constitute the event (e.g. the purchase of the shares, the delivery of the shares, the buy back of shares by the listed corporation), not the day that you realize that the event gave rise to a duty of disclosure under Part XV.

4.1.3 The term “business day” means a day other than a Saturday, a public holiday and a day on which a black rainstorm warning, or a gale warning, is in force i.e. it would exclude Saturdays and Sundays. The period (of 3 or 10 business days) allowed for filing a disclosure notice is calculated excluding the day that the relevant event occurred.

4.1.4 When you buy shares you will normally have to file a notice within 3 business days after you contracted to buy the shares. When you sell shares you will normally have to file a notice within 3 business days after settlement day i.e. the day when you deliver the shares to the buyer. If in fact you cease to be interested in shares on the date of the contract for their sale e.g. due to the operation of the clearing system, you should file a notice within 3

⁴¹ 11 countries are recognized for this purpose - Australia, France, Germany, Guernsey, Ireland, Isle of Man, Jersey, Luxembourg, Switzerland, United Kingdom and United States of America

business days of that earlier date. If you contract to sell shares with a settlement date that is 5 or more trading days after the date of the contract then you should file one notice within 3 business days after the date of the contract and file a second notice within 3 business days after settlement day. In the case of a transaction that gives rise to your having a short position, disclosure should normally be made within 3 business days of the date that you enter into the transaction.

4.1.5 The notification should be filed with the Stock Exchange and the listed corporation concerned at the same time or one immediately after the other.

4.1.6 If you authorize another person (e.g. an agent or a broker) to acquire or dispose of shares on your behalf, or to come to have or cease to have short positions on your behalf, you must ensure that the agent notifies you immediately of any acquisition or disposal or other dealing (see s. 321). However, a broker does not have a responsibility to file a notice under Part XV on behalf of its client. Responsibility for filing remains with the substantial shareholder.

4.1.7 You should bear in mind that the legislation makes a failure to comply with the requirements of Part XV an offence and you should put in place adequate procedures to enable you to comply with the reporting requirements.

Transaction occurring in a different time zone

4.1.8 Section 67(1) of Cap. 1 provides "Whenever any expression of time occurs in any Ordinance the time referred to is Hong Kong Time." If you acquire an interest, or cease to have an interest, in shares as a result of a transaction that takes place in a different time zone, you should calculate the period allowed for filing a notification by reference to the day that the transaction occurred using Hong Kong time. For example, if you purchased listed shares at 3 pm New York time on 31 October 2005 (i.e. 4 am on 1 November 2005 Hong Kong time), the date of the relevant event will be 1 November 2005. The deadline for filing the notification would therefore be 3 business days later i.e. at or before 23:59 in Hong Kong on 4th November 2005

4.2 Forms to be used

4.2.1 You are required to make a disclosure using one of the 6 prescribed forms. You must complete each form in accordance with the directions and instructions in the Notes to the form and then file the notice with the Stock Exchange and the listed corporation concerned at the same time or one immediately after the other.

4.2.2 You can download the forms and the Notes, in Chinese and in English, from the HKEx web site which can be found at <https://sdinotice.hkex.com.hk> or the SFC web site at <http://www.sfc.hk/web/EN/rule-book/sfo-part-xv-disclosure-of-interests/di-notices.html>. Forms are available in pdf format for printing out and completion in manuscript or in Microsoft Excel format for completion offline using the Excel program. You must click "Enable" when opening the Excel forms - otherwise the macros will not work. Once a form has

been completed using the Excel program it can be saved and subsequent notices can be given with minimal changes to the document.

4.2.3 You must use :

Substantial shareholders

- Form 1 if you are an individual with an interest of 5% or more of the voting shares of a Hong Kong listed corporation (and are not a director or chief executive of the listed corporation).
- Form 2 if you are a corporation with an interest of 5% or more of the voting shares of a Hong Kong listed corporation making a disclosure.

Directors and chief executives

- Form 3A if you are notifying interests in shares of the listed corporation of which you are a director or chief executive.
- Form 3B if you are notifying interests in shares of any associated corporation of the listed corporation of which you are a director or chief executive.
- Form 3C if you are notifying interests in debentures of the listed corporation of which you are a director or chief executive.
- Form 3D if you are notifying interests in debentures of any associated corporation of the listed corporation of which you are a director or chief executive.

4.2.4 Please use separate forms if you are interested in different classes of shares or debentures of the listed corporation, or different associated corporations of the listed corporation of which you are a director or chief executive.

4.3 Modification or adaptation of the forms – footnotes and use of different forms

4.3.1 The forms are prescribed forms – this means that they must be used for filing a notice under Part XV. The forms must not be modified or adapted. The whole point of disclosure on interests is that certain information regarding your shareholding can be made available to the public. If you modify or adapt the forms, use annotations or footnotes outside the boxes or do not use the forms, the DI system cannot process the information and it will not be available to investors. Accordingly the legislation provides that a notice otherwise than in the prescribed form is not treated as a notification i.e. you will have committed an offence and will be liable for prosecution if you do not use the prescribed forms - unmodified. Please read the directions and instructions for completing the forms as these must be complied with.

4.3.2 Names of individuals and corporations should not be abbreviated when completing the forms. The full name should be given each time.

4.4 Codes used in the forms

4.4.1 A key objective of the new disclosure regime is to provide investors in listed corporations with more complete and better quality information to enable them to make informed investment decisions. Part XV therefore requires more information to be disclosed in the forms than was required under the S(DI)O. A system of codes has been developed so that you can describe the nature of the event that gave rise to the reporting obligation, the capacity in which you acted, the type of consideration paid etc. by simply inserting a code number in the relevant box on the form. These codes enable the information to be entered concisely and in a standard format so that the information can be processed by computer and made available to investors.

Codes to be used when completing the box entitled “Details of relevant event”

4.4.2 It is important to note that you should only use one code to describe the relevant event. You must choose from Table 1 in the directions and instructions for completing the form the code which you think best describes the relevant event. You should not use 2 or 3 codes even if more than one code may apply to the circumstances.

4.4.3 You should also only use one code to describe the capacity in which you held the shares that gave rise to the relevant event. You must choose from Table 2 in the directions and instructions for completing the form the code which you think best describes the capacity in which you held the shares that gave rise to the relevant event. You should not use 2 or 3 codes even if more than one code may apply.

4.4.4 You should also only use one code to describe the nature of the consideration (you only need to complete a code if you bought or sold the shares the shares off-exchange).

4.5 Substantial shareholders who are directors must use form 3A.

4.5.1 If you are a person who is both a substantial shareholder and a director of the listed corporation concerned, you may have separate duties to file notices (one in each capacity) as a result of a single event. For example, a person who is interested in 5.9% of the shares of a listed corporation and buys a further 0.2% will have to file a notice because he is a director (and therefore has to disclose all transactions) and will also have to file a notice as a substantial shareholder because his interest has crossed the 6% level.

4.5.2 If you are substantial shareholder and also a director then you must use Form 3A (Director’s/Chief executive’s Notice) to discharge your duty to disclose your interests, or short position, in your capacity as both a substantial shareholder and as a director. This avoids the need to file both Form 1 and Form 3A.

4.5.3 If you are both a director and a substantial shareholder please always complete Boxes 17 to 22 giving details requested in respect of all the shares in which you are interested, or have a short position, whether you are completing the form in a dual capacity or in your capacity simply as a director.

4.6 Means of filing notices

Forms completed manually

4.6.1 You must file a copy of the relevant form (without the directions and instructions on completing the form) with the listed corporation at its registered office or principal place of business in Hong Kong

4.6.2.1 You must file a separate copy of the Form (without the directions and instructions on completing the form) with the Stock Exchange using one of the following methods :

By Post -

Primary Market Information
E-Business & Information Services
Hong Kong Exchanges and Clearing Ltd.
G.P.O. Box 10023
Hong Kong
Ref: DI forms

By Hand -

Primary Market Information
E-Business & Information Services
Hong Kong Exchanges and Clearing Ltd.
Tower I & II, Exchange Square
Central, Hong Kong
Ref: DI forms

By Fax -

Fax No.
2845 6328

Printing instructions for forms filed by fax

4.6.2.2 If you have completed the Form using the Excel program please print the form in landscape on 4 pages before faxing it (i.e. half of page 1 should be printed on one sheet of paper with the second half of page 1 being printed on a separate sheet – similarly page 2 of the form). If the Excel spreadsheet is printed on just 2 pages and then sent by fax the information in the boxes often cannot be read.

4.6.3 The G.P.O. Box set out above is a dedicated P.O. Box for use of DI forms submission only. Please do not use the general the Stock Exchange P.O. Box. No other the Stock Exchange fax number should be used. Telephone confirmations of fax notification can be obtained from 2523 3799. Please restrict use of this service to significant or price sensitive notifications.

Electronic filing of notices with the Stock Exchange

4.6.4 Instead of sending the Form to the Stock Exchange in the manner set out above you can file the Form electronically with the Stock Exchange. To file electronically please download a soft copy of the form in Excel format from the HKEx web-site <https://sdinotice.hkex.com.hk> and complete the form off-line. Then file the form with the Stock Exchange following the instructions regarding electronic filing which are posted on the web-site. You do not need to have a password to file a notice a notice electronically through

the HKEx web-site <https://sdinotice.hkex.com.hk>. Directors of listed corporations can download and file the forms by using the e-Submission System from the following web site <https://www.esubmission.hkex.com.hk>. This last web site is not open to the public.

4.6.5 You must file a separate copy of the form with the listed corporation concerned by printing out the Excel form and sending it to the listed corporation by hand, by post or by fax. It is open to individual listed companies to provide electronic facilities similar to those established by the Stock Exchange for filing. Clearly, the provision of such facilities will ease the burdens imposed on their directors, chief executives and substantial shareholders under Part XV.

4.7 Common queries on completion of prescribed forms

Can I ask a representative to complete the form for me ?

4.7.1 You can ask a representative to complete the form for you. However, it is your responsibility to file the form within the time allowed and to ensure the information on the form is correct. It is not a reasonable excuse for you to say that you are not responsible for any failures or mistakes. Please also see paragraph 5.2.

Can I correct a mistake in a form after it has been filed ?

4.7.2 If you make a mistake in completing the form you cannot rectify the mistake by amending the form after it has been filed. Instead, you should file another notice with the information set out correctly. The date of the relevant event will remain the same enabling persons inspecting the DI database to see that the later filing has corrected the earlier filing.

Do I have to fill in a separate form for each listed corporation ?

4.7.3 If you are a substantial shareholder or director of more than one listed corporation, you must file a separate notice disclosing your interests (short positions) in the shares of each listed corporation. Similarly, if you are interested in shares of more than one class, you must file a separate notice disclosing your interests (short positions) in the shares of each listed corporation.

Do I always have to give particulars of my short position in the prescribed forms ?

4.7.4.1 People sometimes confuse the events that give rise to a duty of disclosure and the particulars that have to be provided in the prescribed forms. In essence, whenever you have a duty to disclose your interests in shares of a listed corporation (or associated corporation) that duty extends to all of your interests and short positions. The one exception to this is the Box entitled “Details of relevant event” - where the details you should give depend upon whether a change in your long position, or a change in your short position prompted the duty of disclosure. In the case of all subsequent boxes, whether the event which triggers disclosure is a

change in your long position, or a change in your short position, you always have to give details of both your long and your short position.

Should interests in shares that are created by different aspects of one transaction be treated as separate interests in shares?

4.7.4.2 It is possible for several persons to be interested in the same shares at the same time. Each person must disclose each of these interests in the ordinary course. However if one person has more than one interest in the same shares (e.g. as trustee of shares held for his child under 18 and also by attribution as the father of the minor child) then he should only disclose the number of shares once. Thus if he held 1,000,000 shares as trustee, and the same 1,000,000 shares are attributed to him as the father of a minor child, he should notify an interest in 1,000,000 shares and not an interest in 2,000,000 shares.

When multiple notifiable sales and purchases are executed within the same day, how should I calculate the highest price and the average price per share?

4.7.4.3 When multiple notifiable sales and purchases are executed within the same day, the purchases will have to be reported within 3 business days of the date of the **contracts** but the sale will have to be reported within 3 business days of the date of **completion** of the contracts. Hence the prices of shares sold and shares purchased are always distinct and can be calculated separately.

The highest price will be the highest price paid by you for a board lot during the day. That is a question of fact. The average price per share is the total price paid by you for shares during the day divided by the total number of shares purchased during the day.

How should the percentage of my interest in shares before and after the relevant event be calculated where the change in percentage figure of the interests was triggered by an increase in the total issued shares of the listed corporation?

4.7.4.4 Please see paragraph 2.12.10 *Qualifying issues*. Often, the change in the percentage figure of your interest will have been triggered by an increase in the total issued shares of the listed corporation as a result of a rights issue or a bonus issue. Paragraph 2.12.10 explains that an exemption may apply if the percentage level of your interest returns to the same level after the rights issue/bonus issue is completed. If it does not then you will have to file a notice. Paragraph 2.12.10.5 explains how the calculation should be done.

Does a supervisor of a PRC-incorporated listed corporation have duty of disclosure under Part XV?

4.7.4.5 If you are a supervisor and are also a substantial shareholder or a director you will have a duty of disclosure in the usual way. If you are a supervisor but do not hold the office as a director you may still be treated as a director if you are a “shadow director”. A shadow director is:

“a person in accordance with whose directions or instructions the directors of a corporation are accustomed or obliged to act”

This will be a question of fact.

I am a resident of the PRC but I do not have a HKID card or a passport, should I provide my PRC Resident Card number in the disclosure form?

4.7.4.6 A PRC resident, who does not have a HKID card or a passport, should provide his PRC Resident Card number in the disclosure form.

I am a director of a listed corporation. Do I have to fill in a notice when I change my name ?

4.7.4.7 We take the view that a change of name is not a relevant event prompting disclosure. Accordingly no notice needs to be filed on change of name. However, when there is subsequently a relevant event prompting you to file a notice e.g. the sale or purchase of shares in the listed company, you should file a notice on Form 3A stating “formerly known as [give previous name]”. For example, if you change your name from “Wong Ging Teng” to “Wong Gong Teng” you should insert above “(other names)” in Box 5 “Gong Teng (formerly known as Ging Teng)”. Box 8 should be completed in a similar fashion.” The same principles apply to substantial shareholders.

I am a director of a listed corporation. Must I file a DI notice if my spouse sells her interests in a listed corporation to our child who is under 18 years of age?

4.7.4.8 A director of a listed corporation is taken to be interested in any shares in which his spouse is interested. A director of a listed corporation is also taken to be interested in any shares in which his minor child is interested. However, the nature of his interest is different. A director is required to report any event in consequence of which the nature of his interest changes. You must therefore file a DI notice if your spouse sells her interests in a listed corporation to her child who is under 18 years of age.

I am a director of a listed corporation and wonder what codes I should use in the following transactions ?

4.7.5 What Codes should I use in the following situations :

- (i) When I am granted an option to acquire shares of the listed corporation - use code 121.
- (ii) When I exercise rights under an option in respect of shares of the listed corporation - use code 124.
- (iii) When I assign to a third party a right granted to me by the listed corporation to subscribe for shares – use code 127.

- (iv) When I enter into a contract for sale for some of my shares - use code 123.
- (v) When I complete the sale (i.e. I transfer the shares on settlement day) - use code 122.

What details do I have to give in relation to a trust ?

4.7.6 The forms ask you to specify the name and address of a trust that you have an interest in, either as trustee or beneficiary of the trust or as a founder in relation to a discretionary trust (see Box 22 of Forms 1 and 3A, Box 24 of Form 2, Box 28 of Form 3B, Box 21 of Form 3C and Box 27 of Form 3D). If you consider that this information is private you need not state the name and address of a trust in these Boxes, however, you must still complete certain information in respect of each such trust. You must state the code which best describes your status in relation to the trust (whether you are a trustee, beneficiary or founder) and the number of shares in which the trust is interested (has a short position). Please note that the directions and instructions to other Boxes contain no similar instruction. For example, it is not permissible to put "a trust" or "a discretionary trust" as the name of the controlling shareholder of a controlled corporation in column 3 of Box 20 of Form 1 (Box 22 of Form 2). You are required to insert the name of the controlling shareholder. If the controlling shareholder is a person (individual or corporation) who is a trustee of a trust or a discretionary trust then you should state his or its name rather than the name of the trust. The same applies to persons completing Box 26 of Form 2.

Interests that may be derivative interests but would not normally be classified as such

4.7.7 If you hold an interest in shares under an instrument which could be viewed as an equity derivative (because of the wide definition of equity derivative) but would not normally be regarded as such, you need not also complete the "Further information in respect of derivative interests" box provided the interest is disclosed as part of your long or short position.

Boxes that do not apply to you

4.7.8 If there are some boxes in the Form that do not apply to you these should be either left blank or you should insert "NIL" for text boxes and "0" for numeric Boxes. If you complete the box in any other manner this will either be treated as part of your notification or it will generate an exception report.

Warning in the Excel Form not to complete the relevant event box with both long and short positions

4.7.9 The normal position is that only long or short position will give rise to a duty of disclosure and a warning is generated automatically by the Excel form if you try to complete both rows in the box entitled "Details of relevant event". However if you are sure that the

transaction creates both a long and a short position simultaneously (such as borrowing shares which gives rise to both a long and a short position) then you can ignore the warning and complete both rows.

Signing the form

4.7.10 Forms filed by post, by hand or by fax need not be signed. If you are filing electronically you may sign the Form with a digital signature (as defined in section 2(1) of the Electronic Transactions Ordinance Cap. 553) but this is also not required.

Attachments

4.7.11 Do not send copies of share purchase agreements and other documents to the Stock Exchange or the listed corporation concerned when filing the forms (except in relation to concert party arrangements where the Notes to the forms tell you what to do). Attaching a document that explains the transaction in question does not discharge the duty to complete the prescribed form. The information required to be provided by Part XV and the notes to each form must be stated on the form (with the exception only of certain documents required to be provided by persons acting in concert).

4.7.12 Copies of any documents that are sent to the Stock Exchange or the listed corporation will be available for inspection by the public during normal office hours.

5. MISCELLANEOUS

5.1 Extraterritorial effect

5.1.1 You are required to file notices and comply with the other provisions of Part XV if you hold shares in listed corporations :

- (i) whether or not you are resident in Hong Kong;
- (ii) in the case of corporations, whether or not you were incorporated in Hong Kong, or have an office in Hong Kong; and
- (iii) whether or not the listed corporation was incorporated in Hong Kong.

5.2 Offences

5.2.1 It is a criminal offence (ss. 328 and 351) if a person :

- (i) without reasonable excuse, fails to make a disclosure in accordance with the provisions of Part XV that apply to that disclosure; or

- (ii) when making a disclosure, makes a statement that he knows is false or misleading in a material particular.

5.2.2 If a person commits an offence, he is liable-

- (i) on conviction on indictment to a fine of \$100,000 and to imprisonment for 2 years; or
- (ii) on summary conviction to a fine of \$10,000 and to imprisonment for 6 months,

for each offence of which he is convicted.

5.2.3 Members of a corporation and its officers can be personally liable for offences of a corporation (see ss.373, 390).

5.2.4 If you are convicted of an offence the Financial Secretary may impose restrictions on the transfer of your shares.

5.3 Concert party agreements

5.3.1 Part XV requires disclosure of interests acquired by persons pursuant to certain agreements (see s.317). For example, when two or more persons enter into an agreement to acquire interests in shares in a particular listed corporation, and :

- (i) the agreement also includes provisions imposing restrictions on either of the parties on the manner in which they can :
 - a. exercise rights attaching to the shares they acquire (e.g. voting rights), or
 - b. dispose of those shares; and
- (ii) interests in shares are actually acquired pursuant to the agreement,

then the provisions of s.317 apply.

5.3.2 They also apply where a controlling person (defined in s.317(7)) or a director of a listed corporation makes a loan to a person on the understanding that the money would be used to acquire interests in shares in the listed corporation, and shares are actually acquired in pursuance of the agreement.

5.3.3 If you have any interests in shares as a result of being a party to a section 317 agreement you have to add any shares in which any other party to the agreement is interested to your own interests in working out whether (together) you hold 5% or more of the shares in a listed corporation and must file a notice. If (together) you are interested in more than 5% you will be a substantial shareholder with disclosure obligations arising accordingly. Details of the interests of any other party to the agreement must also be taken into account in completing the prescribed form. Directors and chief executives are treated no differently to any other party to such an agreement and must aggregate the interests of the other parties to the agreement if, together, their interests reach 5% or more.

5.3.4 You must state the name of each of the other parties to the agreement, his/her address and the number of shares in which he/she is interested “apart from the agreement” in the Box specified for the purpose in the form⁴². You must state the number of shares in which you are interested under sections 317 and 318. This will be the total of firstly all shares which have been purchased pursuant to the agreement by any of the parties to the agreement and secondly all shares in which the other parties to the agreement are interested “apart from the agreement” (defined in s.318(2)).

Meaning of the phrase “apart from the agreement” in section 318

5.3.4.1 The words in brackets at the end of section 318(1) deem the parties to the agreement to be interested in the other interests in shares of each of the members of the concert party agreement “apart from the agreement” -

“whether or not the interest of the other party in question was acquired, or includes any interest which was acquired, in pursuance of the agreement”.

5.3.4.3 There has been some confusion as to the meaning of the words “apart from the agreement” in section 318. These words mean that the interests that each concert party is taken to be interested in are the interests of each of the other members of the concert party group namely their interests in shares of the relevant listed corporation concerned that the concert party member -

- (i) is interested in quite separately from the concert party (e.g. existing interests in shares, interests by attribution etc);
- (ii) interests he acquired pursuant to the concert party agreement; and
- (iii) interests he acquired pursuant to other concert party agreements,

but not including interests of other concert parties that the concert party member is taken to have by virtue of the section 317 agreement. The interests in sub-paragraphs (i), (ii) and (iii) are the interests referred to as interests “apart from the agreement”. The interests of other concert parties that the concert party member is taken to have by virtue of the section 317 agreement could be viewed as “interests under the agreement”.

5.3.4.4 Interests which arise “apart from the agreement” must be excluded to avoid double counting of interests. For example if Mr. A was interested in 500,000 shares and Mr. B was interested in 2 million shares, Mr. A would be treated as being interested in Mr. B’s 2,000,000 shares and Mr. B would be treated as interested in Mr. A’s 500,000 shares. Mr. A would not be treated as interested in the further 500,000 shares that Mr. B was treated as being interested in under section 318(1) (as this would be double counting Mr. A’s own shares). Thus section 318 requires that Mr. A was taken as interested in 2,500,000 shares in total – not 3,000,000 shares.

⁴² Required by section 326(6)(b). An interest is an interest “apart from an agreement” if a person is interested in those shares otherwise than by the application of section 318 and section 317 (see section 318(2)). They are the shares that a person is already interested in as opposed to the shares purchased pursuant to the concert party agreement.

Example of how to complete Box 23 of Form 1

5.3.5 For example, assume that Mr. Wong Ging Teng and 2 other persons agree to buy shares in XYZ Ltd. (a listed corporation). They are each already interested in a number of shares of XYZ Ltd. which they purchased before they entered into the s.317 agreement. Under the s.317 agreement Mr Wong Ging Teng purchased 25,000,000 shares, Mr. A purchased 20,000,000 shares and Mr. B purchased 15,000,000 shares in XYZ Ltd. Their shareholdings are as follows :

Concert parties	Shares not connected to the s.317 agreement	Shares purchased pursuant to the s.317 agreement	Total
Mr. Wong Ging Teng	50,000,000	25,000,000	75,000,000
Mr. A	4,000,000	20,000,000	24,000,000
Mr. B	2,000,000	15,000,000	17,000,000
Totals	56,000,000	60,000,000	116,000,000

Assume also that Mr. Wong is completing the notice. He will already have stated in Box 16 that he is interested in **116,000,000** shares⁴³. He has to state the number of shares in which the other parties are interested “apart from the agreement” and the total shares in which he (Mr. Wong) is interested by the application of s.317 and 318 (the 60,000,000 shares bought pursuant to the agreement and the further shares that the other parties are interested in “apart from the agreement”). Accordingly, Mr. Wong will then complete Box 23 as follows :

23. Further information from a party to an agreement under section 317 (Please see Notes for further information required)

Names of other parties	Address	Number of shares
Mr. A	Unit 1, 25/F Wong Industrial Bldg, Chai Wan, HK	24,000,000 ⁴⁴
Mr. B	Unit 1, 24/F Wong Industrial Bldg, Chai Wan, HK	17,000,000
Total number of shares in which substantial shareholder is interested under section 317 and 318 ⁴⁵		66,000,000 ⁴⁶

⁴³ To identify all of the shares that he is interested in Mr. Wong has to aggregate all of the shares that he is interested in or purchased pursuant to the concert party agreement plus all of the shares that the other concert parties are interested in or purchased pursuant to the concert party agreement.

⁴⁴ Required by section 326(6)(b)

⁴⁵ Required by section 326(6)(c)

⁴⁶ The figure of 66,000,000 shares is derived by taking all of the shares that Mr. Wong is interested in by the application of s.317 and 318 (i.e. 25,000,000 + 24,000,000 + 17,000,000 shares).

5.3.6 You must also :

- (i) attach a separate sheet to the notification stating that you are a party to an agreement to which s. 317 (1)(a) or (b) applies;
- (ii) include a copy of any written agreement, contract or other document which records any terms or details of the agreement; and
- (iii) if there are no such papers as are mentioned in paragraph (ii), or if such papers do not record the material terms of the agreement, include a written memorandum setting out the material terms of the agreement.

5.3.7 The memorandum required under paragraph (iii) should include details of any cash or consideration involved and the identity of all persons between whom such cash or other consideration is passed or is intended to pass. If the parties are interested in any derivatives, the exercise or conversion price, expiration date and exercise period should be disclosed. The memorandum must be signed by the substantial shareholder or his duly authorized agent.

5.3.8 A notification that a person has ceased to be a party to an agreement to which s. 317 (1)(a) or (b) applies shall also state that he or the other party (as the case may be) has ceased to be a party to the agreement and, in the latter case, include the name and address of the other party.

5.3.9 Persons who are parties to a s.317 agreement are advised to consult their legal advisers concerning the making of notifications under Part XV.

5.3.10 In the UK case of **Re Ricardo Group plc** [1989] BCLC 566 the court considered the meaning of the equivalent provision to section 317. It was decided that an interest in shares sold by one concert party to another arises “by virtue of” the agreement rather than “in pursuance of” the agreement and therefore that an agreement to purchase shares was not caught by the concert party provision. However, the court found that the shares that were delivered pursuant to the agreement were caught. This distinction appears to be of academic interest as section 318 treats the concert parties to be interested in any shares in which any concert party is interested apart from the agreement.

5.4 Investigations of shareholders by corporations

5.4.1 Section 329 allows a listed corporation to make enquiries to establish who owns its shares. The powers are not limited to establishing the identities of the substantial shareholders (i.e. persons holding 5% or more of the shares) but extend to any person that has, or had, an interest or a short position in its shares. The listed corporation may also investigate the ownership of equity derivatives where the underlying shares of the equity derivatives are shares in the listed corporation concerned. A listed corporation may be required to exercise its powers under s.329 on the requisition of members (see. S.331).

5.4.2 There is a duty to inform the Stock Exchange, the SFC and, for authorized financial institutions, the Hong Kong Monetary Authority of any information received as a

result of such enquiries (see s.330). Information received by a corporation pursuant to such an enquiry must also be recorded in the registers of interests and short positions. In addition the listed corporation must prepare a report of the information received in pursuance of the investigation and make the report available at its registered office within 10 business days of the conclusion of the investigation. A copy of the report must be delivered to the Stock Exchange and the SFC.

5.4.3 The copy of the information or report must be sent by the listed corporation to the SFC at the following address:

**Enforcement Division,
Securities and Futures Commission,
30/F Cheung Kong Center,
2 Queen's Road Central
Hong Kong**

Attention : Director of Surveillance

5.4.4 It is an offence for a person, without reasonable excuse, to fail to comply with a notice given by a listed corporation investigating the ownership of its shares under s.329 or to make a false or misleading statement in response to such a notice. It is also an offence for the listed corporation and every officer who is in default, to fail to prepare a report and deliver it to the Stock Exchange and the SFC within the periods specified. The requirements of ss. 332 and 333 should be read with care.

What information must be given in response to an investigation

5.4.5 If you are a licensed person a common query is "what information am I required to provide to a listed corporation in respect of my clients in an investigation under s.329 of the SFO"? Section 329 of the SFO requires you to give "particulars of the identity of the person" having an interest in shares of the listed corporation conducting the investigation or equity derivatives or short positions in respect of those shares. In investigations you are commonly required to give the listed corporation concerned the "full name, ID number, address and contact details of the beneficial owners (ie. your clients) of the listed shares."

5.4.6 The first question is whether the provisions of the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO") operate to restrict the information that you are required to provide to the listed corporation. We consider that there are no data privacy concerns as the disclosure obligations in Part XV are founded on the basis that the listed corporation, its shareholders and the public are entitled to know the identity of persons who are interested in shares of a listed corporation. The SFO post-dates the PDPO and its provisions were drafted having regard to the data protection principles and after consultation with the Office of the Privacy Commissioner.

5.4.7 When filing a notice under Part XV substantial shareholders must state their full name and address, ID number/passport number and contact details. These notices are filed with

the listed company concerned which is required under s.336 of the SFO to record the information in a register. The public are entitled to inspect the register with this information at the offices of the listed corporation and can view the full details. The purpose for which information in the registers is published is spelt out in s.336(10)(b) for consistency with the provisions of the PDPO. In an investigation under s.329, the position is no different. The same information may be required to be given by listed corporation itself in respect of persons who have interests in its own shares and that information is required to be published in the register maintained under s.336.

5.4.8 Accordingly we are of the view that a requirement phrased in the manner set out in paragraph 5.4.5, is within the powers of the listed corporation and does not offend the provisions of the PDPO. All of the information requested should be provided.

5.5 Registers of substantial shareholders' interests and short positions

5.5.1 Every listed corporation is required to keep a register of the interests and short positions disclosed to them (s.336). This register will be the same register as is required to be maintained under that maintained under the S(DI)O adapted to accommodate the additional information required to be provided under Part XV.

5.5.2 Whenever a listed corporation receives information from a person given in performance of a duty imposed on him by any provisions of Divisions 2 to 5 the listed corporation is under a duty to record, against the name of the person interested in the shares, or having a short position the information received and the date of the entry.

5.5.3 Hence when a listed corporation receives a notice in the prescribed form by a substantial shareholder, it must enter the information on the prescribed form (and any attachments) in a register against the name of the person giving the notice. Similarly, when it receives a reply to a requisition raised by the listed corporation carrying out an investigation under s.329, it must enter on the register :

- (i) the fact that the requirement to provide certain information was imposed;
- (ii) the date that it was imposed; and
- (iii) any information received in pursuance of the requirement.

5.5.4 The register must be completed so that the entries against the names appear in chronological order. In addition details of any party that holds shares as a result of entering into a section 317 agreement have to be disclosed in the register. An index has to be compiled by the corporation of the names contained in the register. Entries must be made in the *register* within 3 business days next following the day upon which the corporation receives the information. The *index* to the register has to be updated within 10 business days of a name being entered in the register.

5.5.5 Form 3A has been specified by the Commission under section 324(3) of the SFO for use by a person who is a director and also a substantial shareholder to disclose his interests in shares of the listed corporation of which he are a director. This is to avoid persons who are both substantial shareholders and directors or chief executives having to complete

both Form 1 and Form 3A when disclosing many transactions. Accordingly, the information that appears on notices on Form 3A by persons who are both substantial shareholders and directors should must be recorded on both the register of interests and short positions of substantial shareholders and the register of the interests and short positions of directors and chief executives.

5.5.6 There is no standard form of register prescribed by Part XV and, under s.375, the register may be in any form so long as it is capable of being reproduced in legible form. Hence a register could be maintained by filing the notifications received, in chronological order, under the name of the substantial shareholder concerned. The index would have to be updated as each notice was filed. Alternatively the data on each form could be entered into a computer database provided it was suitably indexed.

5.5.7 Listed corporations have to inform the Registrar of Companies of the place where the register of interests and short positions of substantial shareholders is kept if it is not kept at the registered office. A form of notice has been prescribed under s.336(12) of Part XV. A copy of this notice is available on the SFC web site. A listed corporation is not required to file a notice if they have already filed a notice of the location of the register under the provisions of the S(DI)O and the location of the register has not changed since the date of such notice.

5.5.8 If a listed corporation does not have a registered office in Hong Kong, the register of interests and short positions of substantial shareholders (as well as the register of the interests and short positions of directors and chief executives – see below) must be kept at the corporation's principal place of business in Hong Kong (s.336(10)(a)(iii)).

5.6 Registers of interests and short positions of directors and chief executives

5.6.1 A listed corporation is required to keep a register of the interests and short positions of directors and chief executives (s.352). This register will be the same register as is required to be maintained under that maintained under the S(DI)O adapted to accommodate the additional information required to be provided under Part XV.

5.6.2 Information received by the listed corporation must be recorded in the register in a similar manner, and within a similar timeframe, to the register of interests and short positions of substantial shareholders.

5.6.3 Under s.352(3) a listed corporation is under a duty, whenever it grants to a director or chief executive a right to subscribe for shares or debentures of the corporation, to enter against that person's name the date on which the right is granted, the period during which or the time at which it is exercisable, the consideration paid for the grant of the rights of subscription for the shares or debentures involved (or, if there is no consideration paid, that fact), the description of the shares or debentures involved, the number of those shares or the amount of those debentures, the price to be paid for them (or the consideration, if otherwise than in money).

5.6.4 Whenever a right referred to in s.352(3) is exercised by a director, the listed corporation is under a duty to record that fact and details of the shares or debentures concerned.

5.6.5 The duty on a listed corporation to record details of rights granted to and exercised by directors arises independently of the duty on directors to file notices of the grant and exercise of rights.

5.6.6. Notices of interests and short positions in listed corporations filed by substantial shareholders who are also directors will be filed using Form 3A. The information on these notices must be recorded on both the register of interests and short positions of substantial shareholders and the register of the interests and short positions of directors and chief executives.

5.6.7 Listed corporations have to inform the Registrar of Companies of the place where the register of directors' interests is kept if it is not kept at the registered office. A form of notice has been prescribed under s.352(12) of Part XV. A copy of this notice is available on the SFC web site. A listed corporation is not required to file a notice if they have already filed a notice of the location of the register under the provisions of the S(DI)O and the location of the register has not changed since the date of such notice.

5.6.8 The register of the interests and short positions of directors and chief executives must be kept at the same place as the register of interests and short positions of substantial shareholders (s.352(11)(a)).

5.7 Publication of Disclosures

5.7.1 The Stock Exchange will publish the disclosure information it receives by making the database containing the information filed with it accessible through the HKEx web site. The public can search the database and inspect all information filed with the exception of certain private data (such as HKID number, contact telephone number etc.) and attachments to notices that are filed by hand, by post or by fax. The address of the HKEx web site is (<http://www.hkex.com.hk>) and the database can be found under "Exchange Listings and Listed Companies". The Exchange may, from time to time, consult the corporation concerned after it has received a disclosure, either to verify the information contained therein or to discuss the effect that disclosure will have on the share price of the underlying securities to which it relates.

5.7.2 In cases where a listed corporation is an authorized financial institution disclosures received by the listed corporation must be forwarded by it to the Hong Kong Monetary Authority.

5.8 Investigations and orders imposing restrictions on shares etc.

5.8.1 Division 11 of Part XV grants powers to the Financial Secretary to investigate ownership of shares in or debentures of publicly listed companies. These powers provide for the appointment of an inspector to make these inquiries.

5.8.2 Division 12 of Part XV allows orders to be made by the courts and the Financial Secretary imposing restrictions on the transfer of shares and equity derivatives.

5.9 Treasury Shares

5.9.1 The Stock Exchange may grant an overseas incorporated listed corporation a waiver from Rule 10.06(5) of the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited, or Rule 13.14 of the Rules Governing the Listing of Securities on the Growth Enterprise Market of The Stock Exchange of Hong Kong Limited. This waiver would allow the overseas incorporated listed corporation, following any repurchase of its own shares, to elect to hold the shares in treasury rather than cancel those shares.

5.9.2 However, from the perspective of Part XV, shares held by the listed corporation in treasury must be included in the number of shares of the listed corporation of the same class in issue for the purposes of calculating the percentage figure of your interest in shares (see paragraph 2.6.5 above). In technical terms, treasury shares remain part of a listed corporation's issued voting shares for the purpose of s.314 of the SFO. Accordingly, the percentage figures of interests of substantial shareholders are not affected by the number of treasury shares held by the listed corporation.

5.9.3 There are two further consequences to holding shares in treasury. Firstly, the listed corporation would become a substantial shareholder if it acquired an interest in 5% or more of its own shares by purchasing and holding those shares in treasury and would have to file a notification under Part XV of the SFO on first acquiring that interest and on any subsequent changes in the percentage level of its interest. Secondly, any shareholder that controls one-third or more of the voting power at general meetings of the listed corporation concerned would also be taken to have an interest in those treasury shares which must be added to his other interests in shares of the listed corporation to determine his reporting obligations under Part XV.

5.10 If in doubt seek legal advice

5.10.1 Finally, if shareholders are unsure about their obligations or the meaning of any terms of Part XV they should consult with their professional advisers.

Table of Paragraphs added or revised in this Outline dated 22.5.2014

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2.1.1	2.12.3.1	3.9.7.2
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2.1.3	2.12.6.2	3.9.9
2.2.1(ii)	2.12.6.3(2)	3.9.10
2.2.3	2.12.8.4(1)-(2) & (7)	3.9.11
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2.7.9 – 16	3.2.4.1	5.10