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Mergers and Acquisitions: Required Disclosures

合併與收購時，何時需要披露內幕消息

A. Introduction (序言)

Mergers and acquisitions usually include a number of methods by which a party acquires the whole or partial ownership of the business, assets or shares in a target corporation. In Hong Kong, a number of legislations, rules and codes govern the conduct of corporations and their directors in mergers / acquisitions.

This article is going to take you through: (i) the typical steps involved in a sale and purchase of a business or a corporation in Hong Kong; and (ii) a broad overview of the principal regulatory framework governing the acquisition of shares in public companies, particularly those listed at the Stock Exchange of Hong Kong Limited (**"Stock Exchange"**).

B. Typical Steps (一般步驟)

Generally, a merger and acquisition may involve the following steps:-

- Parties undertaking to keep confidential the actual transaction or information that may be obtained during the negotiation and due diligence process;
- Financial and legal advisors conducting legal, financial and business due diligence in respect of the assets, liabilities, business, prospect and other affairs of the target company(ies);
- Parties signing definitive and legally binding Sale and Purchase Agreement(s);
- Parties may issue a notice of transfer under the Transfer of Business Ordinance in the case of a sale of business; and/or
- The required party may obtain shareholders' approval.

C. Required Disclosures for Listed Companies (對上市公司的消息披露要求)

In addition to the above said steps, a corporation listed at the Stock Exchange may be required to file and/or issue documentations (e.g. announcements; circulars and checklists) pursuant to the relevant authorities or rules[1].

[1] This includes the Listing Rules by the Stock Exchange; the Securities and Future Ordinance (Cap 571); the Codes on Takeovers and Mergers and Share Repurchase and other relevant authorities.

Chapter 14 and 14A of the Listing Rules (聯交所上市規則)

The Stock Exchange administers a non-statutory regime i.e. the Listing Rules. When a listed company or one of its group members becomes involved in the acquisition and disposal of shares/assets and/or transacts with connected persons, the listed company is required to comply with Chapter 14 and/or 14A of the Listing Rules.

Under Chapter 14 of the Listing Rules, the listed company must inform the Stock Exchange and publish announcements as soon as possible once the terms of a notifiable transaction have been finalized. Depending on the category of the transaction, which is classified in accordance to the so-called 5 percentage ratios, the listed company may have to: (i) issue notification to the Stock Exchange; (ii) publish an announcement; (iii) issue a circular to shareholders; (iv) obtain shareholders' approval; and/or (v) publish accountants' report;

As required under chapter 14A of the Listing Rules, depending on the circumstances, a connected transaction may require disclosure and shareholders' approval.

Disclosure of Inside Information under SFO (證券及期貨條例)

Part XIVA of the Securities and Futures Ordinance (**"SFO"**), which came into effect on 1 January 2013, provides a statutory regime governing disclosure of non-public material price sensitive information (referred to as "inside information" under the SFO).

Under the SFO, listed corporations are under a statutory obligation to disclose to the public inside information as soon as reasonably practicable after the inside information has come to the corporation's knowledge[2]. The Market Misconduct Tribunal may institute proceeding for non-compliance, in which the corporation, directors and/or chief executive may be subject to a number of civil sanctions, including a maximum fine[3].

Defining Inside Information (內幕消息定義)

"Inside Information", as defined in the SFO, has the same definition of 'inside information' under the insider dealing regime[4], which means specific information that:-

(a) is about:
  (i) The corporation;
  (ii) A shareholder or officer of the corporation; or
  (iii) The listed securities of the corporation of their derivatives; and

(b) is not generally known to the persons who are accustomed or would be likely to deal in the listed securities of the corporation but would if generally known to them be likely to materially affect the price of the listed securities.

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[2] S.307B(1) of SFO

[3] S.307N of SFO

[4] S.245(2) of SFO

A piece of information should be assessed objectively in considering whether it is inside information. The following are the key elements for inside information:-

(a) The information must be **specific**;
(b) The information **must not be generally known** to that segment of the market which deals or which would likely deal in the corporation's securities; and
(c) The information would, if so known, be **likely to have a material effect on the price of the corporation's securities**[5].

Timing and Manner of Disclosure (披露消息的時候和方式)

The corporation must disclose to the public such inside information as soon as practicable after such information has come to its knowledge. The disclosure must be made in a manner that can provide for equal, timely and effective access by the public to the information disclosed[6] and publications through Stock Exchange's electronic publication system should generally be sufficient.

The Safe Harbours (容許不披露內幕消息的"安全港"條文)

Notwithstanding the strict requirements for disclosure of inside information, SFO provides four exceptions to permit listed corporations not to disclose or delay in disclosing inside information. Except for Safe Harbour A below, listed corporations are not allowed to rely on the other safe harbours unless it has taken reasonable precautions/ measures to preserve the confidentiality of the information and to ensure that the information remains confidential.

A listed corporation is not required to disclose any inside information:-

Safe Harbour A: if such disclosure is prohibited by or would constitute a contravention of Hong Kong legislation or Court order;

Safe Harbour B: If the information concerns an incomplete proposal or negotiation;

Safe Harbour C: If the information is a trade secret; and

Safe Harbour D: If the information concerns the provision of liquidity support from the Government's Exchange Fund or a central bank to the corporation;

In addition to the above, the Securities and Futures Commission may, on a case by case basis, waive a listed corporation from its disclosure obligations[7].

D. Conclusion (總結)

[5] Guidelines on Disclosure of Inside Information (June 2012) by the Securities and Futures Commission

[6] S.307(C)(1) of SFO

[7] S.307E of SFO

This article is intended only to provide a general outline of the steps involved in mergers and acquisitions. It is by no means comprehensive or conclusive. In light of the Listing Rules' complex provisions relating to the disclosure of notifiable and/or connected transactions; and the stringent disclosure requirements pursuant to the SFO, listed corporations are strongly advised to seek all necessary legal and financial advice in Hong Kong when conducting mergers and acquisitions.