Continuous Disclosure - Guidance Note 8 Rewrite

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Oct - Nov 2012

Outline

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The reasons for this consultation

An agreed action from ASIC's 2009 assessment of ASX, recognising:

- LR 3.1 is critical to the integrity and efficiency of the ASX market and the confidence investors have in it.
- GN 8 was last updated in 2005 – since then, we have had numerous ASIC infringement notices, the *James Hardie* and *Fortescue* decisions, *Centro* and other class actions, and a number of high profile disclosure issues arising from spurious takeover approaches.
- Increased calls from listed entities and their advisers for greater clarity in relation to aspects of LR 3.1 (especially around the requirement to release information "immediately" and earnings surprises) and for more guidance generally to assist them to understand and comply with their continuous disclosure obligations.

The reasons for this consultation (cont.)

- Evidence of a lack of appreciation in some quarters of:
  - how the exceptions to immediate disclosure in LR 3.1A operate
  - how and when LR 3.1B operates
  - ASX's price query and aware letter processes
  - Corporations Act s1309.
- After an internal review, preliminary stakeholder consultation and detailed discussions with ASIC, ASX has determined that:
  - some Listing Rule changes are required
  - GN 8 needs to be re-written from the ground up and consulted on before publication.
- ASX is also consulting on an abridged guide for directors that is much shorter (12 pages) and has less of the technical content than the full version of GN 8.

Key themes

- No major changes to the Listing Rules or ASX practice – just more and better guidance.
- Restoring the focus of LR 3.1 to its original purpose – disclosure of information likely to have a material effect on price or value.
- Emphasising the interconnectedness between LR 3.1, 3.1A and 3.1B:
  - LR 3.1 and LR 3.1A operate in tandem to achieve "timely disclosure" (ie immediate disclosure of material information when it is ripe for disclosure)
  - However, LR 3.1B may require earlier disclosure of material information, as well as disclosure of non-material information, if a false market emerges or is in danger of emerging.

Proposed changes to LR 3.1 – 3.1B

Minor amendments:

- refining the examples of potentially disclosable information given in the notes to Listing Rule 3.1.
- reversing the order of the exceptions in Listing Rule 3.1A to de-emphasise the "reasonable person" test and make it clear that this is a last order, rather than a first order, requirement for information not to be immediately disclosed.
- modifying Listing Rule 3.1B to make it clear that a listed entity must give ASX the information it "asks for", rather than the information that is "necessary", to correct or prevent a false market in its securities.
- changing the underlying definitions in LR 19.12 to add a definition of "information" (modelled on s1042A) and fix the out-dated reference to "executive officer" in the definition of "aware".

Overview of revised Guidance Note

- Much more detailed guidance (69 pages) covering:
  - the basic operation of LR 3.1
  - headings and contents of announcements
  - the requirement in LR 15.7 to give information to ASX first
  - the exceptions to immediate disclosure in LR 3.1A
  - the “false market” provisions in LR 3.1B
  - earnings guidance and “earnings surprises”
  - ASX enforcement practices (inc. “price query letters” and “aware letters”)
  - 7 detailed worked examples and 8 further examples illustrating the operation of LR 3.1 – 3.1B (Annexure A)
  - the linkages between LR 3.1 and the Corporations Act (Annexure B)
  - compliance programs (Annexure C).

Issue # 1 - materiality

More guidance given on the test for materiality in s677, including:

- that high frequency traders are not "persons who commonly invest" in securities for the purposes of that test.
- a suggestion that officers ask two questions to test for materiality:
  - "Would this information influence my decision to buy or sell securities in the entity at their current market price?"
  - "Would I feel exposed to an action for insider trading if I were to buy or sell securities in the entity at their current market price, knowing this information had not been disclosed to the market?"
- that ASX uses the 5-10% accounting materiality thresholds for determining whether to refer a potential breach of LR 3.1 to ASIC (to give the market some sense of the order of magnitude of movement in price that ASX considers is "material").

Issue # 2 – “immediately”

ASX confirms that:

- consistent with judicial authority, “immediately” does not mean “instantaneously”, but rather “promptly and without delay”.
- the standard of promptness expected by the market and regulators is justifiably high (noting that ASIC has issued infringement notices where the period of delay in disclosing information has been only 60-90 minutes and no trading halt was requested to cater for the delay).
- ASX specifically recognises that the speed with which disclosure can be made will vary, depending on:
  - where and when the information originated
  - the forewarning (if any) the entity had of the information …

Issue # 2 – “immediately” (cont.)

- the amount and complexity of the information concerned
- the need in some cases to verify the accuracy or bona fides of the information
- the need in some cases to comply with specific legal or Listing Rule requirements (eg JORC)
- the need in some cases for an announcement to be approved by the entity’s board or disclosure committee.

➢ This is tempered by guidance that if the market is, or is going to be, trading before an announcement is released, a listed entity needs to give careful consideration to requesting a trading halt to prevent trading happening on an uninformed basis.

Issue # 3 – trading halts

Detailed guidance given on how to use trading halts to manage disclosure issues and to comply with the spirit and intent of LR 3.1, including:

- ASX confirms its long standing practice that, except in the most unusual circumstances, ASX will invariably agree to a request for a trading halt so as to afford an entity the time it says its needs to prepare and issue an announcement under LR 3.1.
- ASX also confirms that if an entity approaches ASX promptly after it becomes obliged to disclose information under LR 3.1 to request a trading halt and, after the halt has been granted, then acts to issue an announcement as quickly as it can in the circumstances, ASX will regard the entity as having complied with the spirit and intent of LR 3.1.

Issue # 4 – the need for board approval

- Case law confirms that board approval is not required for all announcements but may be necessary or appropriate for more significant announcements.
- The requirement to act “immediately” can accommodate the time needed to get board approval, provided this takes place promptly and without delay.
- Guidance is given on how to approach this issue, depending on the nature of the information to be disclosed, the applicability of the exceptions in LR 3.1A and whether the circumstances warrant requesting a trading halt.
- Guidance also suggests delegating authority to senior management to release some announcements + having a disclosure committee that can meet by phone or on short notice to consider others.

Issue # 5 – emergency announcements

- Ordinarily, under LR 15.7, an entity must not release information that is required to be given to ASX under LR 3.1 to anyone else, unless and until it has been given to ASX and the entity has received an acknowledgement from ASX that the information has been released to the market.
- ASX confirms, however, that if a listed entity has a pressing commercial or legal need to make an announcement outside of the hours of operation of the Market Announcements Platform (MAP), provided it gives a copy to MAP at the same time as it makes the announcement so that it is queued for processing by MAP before licensed markets in Australia next open for trading, ASX will generally not take any action against the entity for infringing LR 15.7.

Issue # 6 – commercial sensitive info

- Commercially sensitive information that can be genuinely characterised as a trade secret is protected from disclosure under LR 3.1A.
- Where LR 3.1A does not apply, entities do not necessarily have to disclose commercially sensitive matters, provided sufficient information is disclosed to enable the market to assess the impact of a transaction on the price or value of the entity's securities (eg by disclosing the impact of a material contract on revenue or profit without disclosing contracted prices and volumes).
- However, if an announcement cannot adequately cover all the material information investors need without including commercially sensitive information, LR 3.1 will require disclosure of that information.

Issue # 7 – CAs and NDAs

- A listed entity must comply with its disclosure obligations under LR 3.1 and s674 even where it is party to a confidentiality or non-disclosure agreement that might otherwise require information to be kept confidential.
- Entities entering into CAs and NDAs should insist upon an express carve-out for disclosure required by law or under the listing rules.
- Persons trying to enforce CAs and NDAs to prevent the disclosure of information by a listed entity under LR 3.1 should note that this will involve an interference in the contractual relations between ASX and the entity and also potential liability under s674(2A), if they succeed, as a person who has procured a breach of s674(2).

Issue # 8 – incomplete negotiations

- ASX confirms that negotiations are incomplete unless and until they result in a legally binding agreement or the entity is otherwise committed to proceeding with the transaction being negotiated – and generally that this will be when a contract is signed.
- It is therefore perfectly acceptable for a listed entity to arrange the signing of, and make an announcement about, a market sensitive agreement at a convenient time before markets have opened or after markets have closed.
- It is not acceptable, however, for a listed entity to commit itself to an agreement (eg by “hand shake” or side letter) but to delay signing in an attempt to delay its disclosure. As soon as an agreement is legally binding on a listed entity or it is otherwise committed to proceeding with the transaction in question, the proposal/negotiations are no longer incomplete and this exception no longer applies.

Issue # 9 – matters of supposition

ASX gives guidance that information about a matter will be "insufficiently definite to warrant disclosure" if:

- the information is so vague, embryonic or imprecise
- the veracity of the information is so open to doubt
- the likelihood of the matter occurring, or its impact if it does occur, is so uncertain

that a reasonable person would not expect it to be disclosed to the market. It also confirms that, in some cases, information in this category may be so uncertain or indefinite that it is not in fact market sensitive and therefore not required to be disclosed under LR 3.1, regardless of whether it falls within the carve-outs from disclosure in LR 3.1A.

Issue # 10 – the confidentiality carve-out

- More guidance given on the confidentiality requirement in LR 3.1A.2 and how it interacts with the reasonable person test in LR 3.1A.3 and the false market provisions in LR 3.1B.
- "Whether information has the quality of being confidential is a question of fact, not one of the intention or desire of the listed entity. Accordingly, even though an entity may consider information to be confidential and its disclosure to be a breach of confidence, if it is in fact disclosed by those who know it, then it ceases to be confidential information for the purposes of this [carve-out]."
- ASX explains why (in common with other market operators and regulators) it will generally regard a significant movement in the market price and/or traded volumes of an entity's securities as signalling a loss of confidentiality and also enlivening LR 3.1A.3 and LR 3.1B.

Issue # 11 – the “reasonable person” test

- The “reasonable person” test (currently in LR 3.1A.1 but to be re-numbered LR 3.1A.3) is widely misunderstood.
- In ASX’s view, a reasonable person would NOT expect information that is of the prescribed character (LR 3.1A.1) and confidential (LR 3.1A.2) to be disclosed unless there is something unusual in the fact matrix to suggest otherwise (examples H6, H7 and H8 in Annexure A of GN 8 illustrate the point).
- The reasonable person test also reinforces the fact that information that is:
  - no longer confidential; or
  - required to be disclosed to correct or prevent a false market under LR 3.1B,

  cannot be withheld under LR 3.1A.

Issue #12 – takeover etc approaches

- ASX confirms that the “reasonable person” test does not generally require disclosure of confidential approaches to enter into a takeover or other control transaction.
- These usually will fall within the exception to disclosure in LR 3.1A for as long as they involve an incomplete proposal or negotiation and remain confidential.
- Example H6 in Annexure A gives an example where a confidential takeover approach might have to be disclosed under the “reasonable person” test (where there is a competing bid already on the table and shareholders have to decide whether or not to accept that bid).

Issue # 13 – media/analyst speculation etc

More detailed guidance on dealing with comments/speculation in media (conventional and social) and analyst reports and market rumours:

- ASX confirms existing guidance that it does not expect a listed entity to respond to every comment concerning it that appears in the media, particularly where it does not appear to be having a material effect on the market price or volumes of the entity's securities.
- Where however a report appears to contain credible market sensitive information (accurate or otherwise) and there is a material change in market price or traded volumes which appears to be referable to that report, ASX considers the listed entity has a responsibility to respond to the report in a timely manner. If a listed entity fails to do so, ASX will consider requiring it to make disclosure under LR 3.1B and suggest that a trading halt is implemented in the meantime.

Issue # 14 – earnings guidance & surprises

- More detailed guidance about the consequences that flow from providing earnings forecasts or guidance (including when commenting on analyst forecasts).
- More detailed guidance on how to deal with "earnings surprises" (ie an entity's actual earnings being materially more or less than market expectations), including:
  - what is a material difference for these purposes?
  - when does an entity become aware that its earnings for a reporting period will be materially different from market expectations?
  - what should be announced?
  - when should it be announced?

Guidance that is being withdrawn #1

- The guidance in para 93 of the current Guidance Note that a variation of 10-15% against earnings guidance or, if the entity has not issued earnings guidance, against consensus forecasts or the results of the prior corresponding period, ought to be disclosed under LR 3.1.
- ASIC suggested during the GFC that this should be lowered to 5-10%.
- However, there is no necessary correlation between a percentage change in earnings vis-à-vis guidance, consensus or a prior period, and the percentage impact that will have on market price:
  - market prices on forward earnings, not past or current earnings
  - each case needs to be assessed on its facts (eg an infrastructure fund vs an early stage bio-tech company).

Guidance that is being withdrawn #1 (cont.)

- ASX considers that this guidance could lead to the wrong conclusion:
  - in some cases <10% might be material and in others >15% might not be material
  - percentage guidelines don't work well with smaller base figures

  and therefore it should be withdrawn.
- However, ASX is suggesting that if a listed entity has published earnings guidance and it expects a 5-10%+ change in earnings compared to that guidance, it should disclose that fact – this is because the original guidance could be considered misleading under s1041H, independent of whether or not it needs to be disclosed under LR 3.1.

Guidance that is being withdrawn #2

- The statement in para 31 of the current Guidance Note that:

  "A reasonable person would not expect information to be disclosed if the result would be unreasonably prejudicial to the entity."

- This statement has contributed to some of the confusion as to how the "reasonable person" test operates.
- It has also been misconstrued by some as meaning that listed entities in financial difficulties do not have to disclose materially negative information, which is **NOT** correct.
- ASX is therefore withdrawing this guidance and replacing it with more detailed guidance on how the "reasonable person" test in LR 3.1A is intended to operate and a new section in the Guidance Note dealing specifically with entities in financial difficulties.

Guidance that is being withdrawn #3

- The example in the notes to LR 3.1 of the type of information that may have to disclosed under that rule:

  > "a transaction for which the consideration payable or receivable is a significant proportion of the written down value of the entity's consolidated assets. Normally, an amount of 5% or more would be significant, but a smaller amount may be significant in a particular case."

- The use of the word "significant" here is potentially confusing and the 5% benchmark is inconsistent with ASX guidance in GN 12.
- Also, there is no necessary correlation between percentage impact on assets and percentage impact on market price.

Other Listing Rule changes

- Amending LR 1.10.1 to make it clear that LR 3.1A and 3.1B also apply to debt listings.
- Adding specific disclosure requirements in Chapter 3 for a listed entity to notify ASX immediately:
  - if it deactivates or reactivates a dividend or distribution plan
  - of the material terms of any employment, service or consultancy agreement it enters into with its chief executive officer (or equivalent) or a director or any other person or entity who is a related party of the entity, and also of any variation to such an agreement
  - of notices received from security holders calling, or requesting the calling of, or proposing to move a resolution at, a general meeting

Other Listing Rule changes (cont.)

- of information about the ownership or control of substantial holdings obtained under Part 6C.2 of the Corps Act (tracing notices) or under provisions of overseas law or the entity's constitution equivalent to Part 6C.1 (substantial holder notices) or Part 6C.2 of the Corps Act
- if it is established outside Australia, of any change to the law of its home jurisdiction of which it becomes aware that materially affects the rights or obligations of security holders
- if it declares a dividend or distribution or makes a decision that a dividend or distribution will not be declared,

and to provide a copy to ASX of any document it gives to an overseas stock exchange that is to be made public.

Other Listing Rule changes (cont.)

- Correcting a drafting oversight in Listing Rule 4.5.2 to make it clear that the annual accounts of a listed company established outside Australia have to be audited.
- Linking the requirement in Listing Rule 4.10.17 for a review of operations and activities in a listed entity's annual report to sections 299 and 299A of the Corporations Act or, in the case of an entity established outside Australia, to any equivalent provisions in the law of its home jurisdiction.
- Various minor drafting corrections and improvements (inc. replacing references to the "Company Announcements Platform" with "Market Announcements Platform").

End of presentation

Questions?