AUSTRALIAN INSTITUTE
of COMPANY DIRECTORS

Level 30
20 Bond Street
Sydney NSW 2000
www.companydirectors.com.au
ABN 11 008 484 197

T: +61 2 8248 6600
F: +61 2 8248 6633
E: contact@companydirectors.com.au

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Mr Kevin Lewis
Chief Compliance Officer
ASX Compliance
Level 20 Bridge Street
Sydney NSW 2000

Email: mavis.tan@asx.com.au

Dear Kevin,

ASX Listing Rules Guidance Note 8 - Continuous Disclosure
ASX Listing Rules 3.1 – 3.1B

The Australian Institute of Company Directors welcomes the opportunity to comment on the review of the *ASX Listing Rules Guidance Note 8: Continuous Disclosure* (Draft Guidance Note) and the proposed amendments to the *ASX Listing Rules*.

The Australian Institute of Company Directors is the second largest member-based director association worldwide, with individual members from a wide range of corporations; publicly-listed companies, private companies, not-for-profit organisations, charities and government and semi-government bodies. As the principal Australian professional body representing a diverse membership of directors, we offer world class education services and provide a broad-based director perspective to current director issues in the policy debate.

Australia maintains one of the most rigorous disclosure regimes in the world and the judgments required to be made by directors pursuant to ASX Listing Rule 3.1 and section 674 of the Corporations Act 2001 (C'th) are often difficult. For this reason, understanding and ensuring that continuous disclosure requirements are complied with remains at the forefront of directors' minds for those who serve on the boards of ASX listed companies.

1. Summary

The Australian Institute of Company Directors is of the view that in general terms, the Draft Guidance Note is well written and largely consolidates an understanding of the continuous disclosure regime that was previously recognised by market participants, but not captured in writing. We are of the view that ASX Compliance should be commended on formulating a Draft Guidance Note that for the most part, is clear, commercial and which provides helpful examples of expected disclosure practices.

Although we are of the view that the Draft Guidance Note is of a high standard, we set out areas below where the Draft Guidance Note and proposed Listing Rule amendments could be further improved. In summary our comments are as follows:

(a) while "promptly and without delay" is a more pragmatic test than some other interpretations of immediately, we recommend that the ASX and ASIC give further consideration to Listing Rule 3.1 being re-framed with an "as soon as reasonably practicable" or "promptly and without unreasonable delay" standard;

(b) While the trading halt mechanism has a useful place in the continuous disclosure regime, there are occasions where the trading halt mechanism will not be helpful in assisting an entity to comply with its continuous disclosure obligations;

(c) Directors have concerns that where guidance is not issued and an entity is covered by sell-side analysts the trigger for disclosure will be a material difference between its earnings and "the consensus estimate" of sell side analysts. We are of the view that where guidance has not been issued the trigger for earnings disclosure should be a material difference from the prior corresponding period;

(d) Directors have concerns about the approach in the Draft Guidance Note as to the information a reasonable person would expect to be disclosed in a takeovers context;

(e) The proposed test in Listing Rule 3.1B relating to false markets is drafted too broadly and the previous wording of the rule should be re-instated;

(f) Listing rule 3.16 should only apply to the material terms of employment for the CEO and executive directors;

(g) Proposed Listing Rule 3.17.2 which provides that an entity must immediately give to ASX a copy of any notice it receives under section 249D, 249F, 249N, 252B, 252D or 252L of the Corporations Act or under any equivalent overseas law should be deleted given the practical issues the immediate disclosure of these notices is likely to create;

(h) Further consideration may need to be given to Listing Rule 3.21 relating to dividends and distributions; and

(i) In large part the information requiring disclosure in the proposed Listing Rule amendments will not be price sensitive, as such "immediate" disclosure does not appear to be necessary and a "as soon as reasonably practicable" test is more appropriate.

2. Draft Guidance Note

The Australian Institute of Company Directors comments on the Draft Guidance Note are set out below.

2.1 The meaning of "immediately"

Listing Rule 3.1 provides that price sensitive information must be disclosed to the ASX immediately. The Australian Institute of Company Directors has long held the view that the use of the word "immediately" creates an unrealistic expectation of the time required for company officers and the board of directors to verify information prior to an announcement being released to the ASX.

We note that the Draft Guidance provides that immediately means "promptly and without delay." While this interpretation of immediately is an improvement from suggestions that immediately could mean "instantaneously" or "straight away", we are of the view that the better standard would be for information to be disclosed "as soon as reasonably practicable" or alternatively, "promptly and without unreasonable delay" and that this should be reflected in a Listing Rule amendment rather than in just the Draft Guidance Note.

The Australian Institute of Company Directors is of the view that company officers and directors should be afforded an adequate time frame within which to ascertain and verify that there *is* price sensitive information which requires disclosure before being required to make an announcement. If the time frame within which disclosure is expected becomes too fast, companies may feel pressed to announce uncertain information early (to avoid breaching the company's continuous disclosure obligations) and put the company at risk of a misleading and deceptive conduct claim, should the information prove to be inaccurate and mislead the market. Announcements that are released to the market too quickly and without the time frame the board believes is necessary to make full and proper inquiries as to the information before it, may also create uncertainty for shareholders. We are of the view that this uncertainty could be avoided if the test in Listing Rule 3.1 did not use the term "immediately."

As stated, while "promptly and without delay" is a more pragmatic test than some other interpretations of immediately, we recommend that the ASX and ASIC give further consideration to Listing Rule 3.1 being re-framed (or at a minimum the Draft Guidance being re-considered) to insert an "as soon as reasonably practicable" or "promptly and without unreasonable delay" standard.

2.2 Trading Halts

The Draft Guidance Note appears to encourage the increased use of trading halts to assist in managing an entity's continuous disclosure obligations. The Australian Institute of Company Directors agrees that a trading halt can be a useful tool in circumstances where information has crystallized and an announcement is being prepared or when information is about to crystallize and disclosure is imminent.

The trading halt mechanism is less useful when a complex issue comes to the attention of the board but it has not yet been determined whether the issue raised is accurate or material and further inquiries are necessary. For example, if an issue is flagged that may affect a forecast or a profit upgrade or downgrade, analysis may be required across multiple business units or projects to determine whether a whole of business projection requires amendment. These types of inquiries commonly take much longer to work through than the trading halt period of two days. In the event the company is not able to receive a second trading halt, the company will be reluctant to put themselves in a position where voluntary suspension is the remaining option.

While some entities may use the trading halt mechanism frequently, many directors perceive that trading halts are viewed negatively by market participants and are therefore reluctant to use a trading halt (or a voluntary suspension) unless absolutely necessary.

In summary, while we are of the view that the trading halt mechanism has a useful place in the continuous disclosure regime, there are occasions where the trading halt mechanism will not be helpful in assisting an entity to comply with its continuous disclosure obligations. Further, we note that the Draft Guidance Note provides, "It should be noted that the Listing Rules, including Listing Rule 3.1 continue to apply while an entity's securities are in a trading halt. Hence the mere fact that an entity has requested and been granted a trading halt does not technically relieve it of the obligation to announce information under Listing Rule 3.1 promptly and without delay."[1]

For these reasons, we are of the view that rather than encouraging entities to rely on the trading halt mechanism each time a potential continuous disclosure issue is suspected, it would be preferable (as set out in paragraph 2.1 above), to move away from an "immediate" disclosure requirement in Listing Rule 3.1 to a "as soon as reasonably practicable" or "promptly and without unreasonable delay" requirement. Given that the continuous disclosure requirements are stated to apply through a trading halt we are of the view that this would give entities and directors the ability to work through complex issues before a disclosure requirement is triggered.

2.3 Consensus Estimates

The Draft Guidance Note states that "where an entity becomes aware that its earnings for a reporting period will materially differ (downwards or upwards) from:

- Earnings guidance it has given for the period;
- Where the entity is covered by the sell-side analysts, the consensus estimate of those analysts for the period; or
- Where the entity is not covered by sell-side analysts, its earnings guidance for the prior corresponding period,

it needs to consider carefully whether it has a legal obligation to notify the market of that fact."[2]

Directors have concerns that where no guidance is issued and an entity is covered by sell-side analysts the trigger for disclosure will be a material difference between its earnings and "the consensus estimate" of sell side analysts.

It is often the case that determining a consensus among analysts is difficult because the spread of analysts' views on expected earnings is quite large. In some cases, smaller listed entities may only be covered by one or two analysts and even there, the spread of views may be significant. It is also the experience of directors, that despite announcements being made by an entity which are designed to move analysts closer to the company's expectations, some analysts may still not shift their forecasts.

The mechanism for determining a "consensus" is also difficult and it is unclear from the Draft Guidance Note how this is to occur. If entities are required to determine a "consensus" from which their disclosure obligation is to be determined, how is this consensus expected to be measured? Are the outliers at

[1] Draft Guidance Note at page 13
[2] Draft Guidance Note at page 35

analysts' range to be removed and then the average calculated? Are all reports to be considered and then an average taken? Alternatively, are only the reports known for their rigorous analysis to be considered?

Directors are concerned that the use of "consensus estimates" to trigger disclosure obligations is fraught with uncertainty and subjectivity and that the base from which disclosure obligations are triggered may continually change. We are concerned that it will be against this subjectivity that entities and directors will be assessed to have complied with, or breached, the Listing Rules and the Corporations Act.

It is also important to note that unlike entities that are subject to rigorous reporting and disclosure obligations, sell side analysts have no similar obligations to ensure that their reports or analysis are rigorous and accurate. Despite this, the Draft Guidance Note suggests that it is these estimates, rather than the company's prior corresponding period which should trigger a disclosure obligation if formal guidance is not issued by an entity.

Directors are of the view that the Draft Guidance Note should be amended so that where formal guidance is not issued by an entity, a continuous disclosure obligation will be triggered when there is a material difference from the entity's prior corresponding period. We are of the view that the prior corresponding period is a better foundation for many entities to track against, than a changing "consensus estimate."

We note that the ASX has withdrawn its previous Guidance that a 10-15% change from earnings guidance would trigger disclosure. We agree that there is no necessary correlation between a percentage change against earnings guidance and the percentage impact it will have on the market price. However, the ASX appears to be suggesting that a 5-10% change against earnings guidance should now be disclosed. For many entities, particularly smaller entities a 5% change in earnings guidance is not a high threshold for disclosure to be triggered.

Similarly, we note that the Draft Guidance suggests that a 5-10% change in the price or value of an entity's securities will be the benchmark range from which the ASX will consider referring matters to ASIC. For many entities, a 5% change in the market price of its securities will be quite common. For this reason, we are of the view that it is critical for the ASX and ASIC to firmly consider the volatility of an entity's normal trading pattern and the trading environment when forming a view on materiality. If this does not occur in practice, then we would prefer that the 5-10% threshold guide to materiality to be re-considered.

2.4 Disclosures in a takeovers context

The Draft Guidance Note at page 60 provides examples of situations where a reasonable person would expect information to be disclosed even though it may fall within the conditions for non-disclosure under Listing Rules 3.1.A.1 and 3.1A.2.

We are of the view that the inclusion of Example H6 in the Draft Guidance Note could lead to significant commercial detriment for companies and investors in the context of a control transaction. Example H6 relates to the disclosure by the target company ("S") of an indicative non-binding confidential offer from a

friendly potential competing bidder ("U") received during the offer period of a hostile takeover bid. Under the Draft Guidance Note, the directors of company S would be expected to disclose this competing proposal as it was received during a takeover offer period, even though it would otherwise fall within the conditions for non-disclosure under one of the carve-outs in draft Listing Rule 3.1A.1, namely an incomplete proposal or negotiation, and is confidential under draft Listing Rule 3.1A.2. We see a number of issues with the inclusion of Example H6 in the Draft Guidance Note.

Market practice dictates that in hostile situations target companies (e.g. company S) may be approached by counter-bidders or go out into the market and look for white knights. If Example H6 is included in the Draft Guidance Note, it will have a chilling effect on engagement with counter-bidders and white knights, which is to the detriment of target companies and their security holders. This is because the requirement may discourage counter-bidders from approaching target companies or from submitting a detailed proposal, because of the obligation on the target companies to disclose immediately. In addition, it may also make potential white knights reticent to respond to target companies because of the requirement for target companies to make disclosure immediately.

In both cases, the consequence is likely to be that target boards will only receive very vague and uncertain proposals from counter-bidders and white knights, if any, in order to not fall within the hair trigger disclosure requirement.

Conversely, boards may receive an approach that comes from a party that is acting strategically in order to spoil the hostile bid or is ill-equipped to bid (e.g. lacks financing) and therefore in the target directors' view the competing proposal should not be dignified by disclosure. Disclosing a competing proposal of this type may give more credit to it than it otherwise should receive, which may mean that the target security holders make an ill-informed decision when deciding whether to accept the hostile offer.

Accordingly, we think that the proposed hair trigger rule set out in Example H6 is inappropriate. Rather, the rule for disclosure should be the takeovers standard, which already exists under law. Under the takeovers standard, a reasonable person would expect disclosure at the point where the proposal would be meaningful to guide a target security holder's decision as to whether or not to accept an offer.[3]

2.5 Annexure B

We note that Annexure B at page 64 of the Draft Guidance Note provides, "As a matter of general law, the directors have a duty to ensure that the entity has appropriate information reporting systems in place so that they are kept apprised of material developments affecting the entity in a timely manner." The footnote cites the decision of Delaware Court of Chancery in *Re Caremark International Inc. Derivative Litigation* (1996) 698 A.2d 959 as authority for this statement.

While the board has an obligation to monitor the affairs of the company and an information reporting system will assist directors to do this, we are of the view that the monitoring obligations of directors stem from the statutory duty of care and diligence under section 180(1) of the Corporations Act which is not the duty

[3] Section 644(1), Corporations Act 2001 (C'th).

enunciated or examined in *Re Caremark*. We note that Australian companies also have an obligation to embrace a culture of compliance under the Commonwealth Criminal Code. As such, we recommend that the Draft Guidance Note be amended to refer to authorities that reflect directors' duties in Australia.

3 Listing Rule Amendments

Our comments on the proposed changes to the Listing Rules are set out below.

3.1 Listing Rule 3.1B - False Markets

Proposed Listing Rule 3.1B provides: "If ASX considers that there is or is likely to be a false market in an entity's securities and asks the entity to give it information to correct or prevent a false market, the entity must give ASX the information it *asks for*."

Previously, an entity was required to provide to the ASX information "needed to correct or prevent the false market". The proposed amendments therefore give the ASX a wide ranging ability to request any information from an entity in circumstances where the ASX considers there to be a false market in the entity's securities. However, as drafted, the proposed amendments mean that the information asked for need not relate to preventing or correcting a false market at all.

To ensure that the Listing Rule is consistently applied in the future, we are of the view that there must be a strong nexus between the information asked for and the false market which is sought to be corrected or prevented. Otherwise, there is a risk that under a less professional ASX compliance team than the one currently in place, Listing Rule 3.1B could be applied improperly or capriciously.

We also note that the rule assumes that the ASX will always be in the best position to determine the type of information which is necessary to correct or prevent the false market. There are often scenarios, when the entity will be in a better position to determine the information necessary to correct or prevent a false market than the ASX.

In summary, we are of the view that the proposed test in Listing Rule 3.1B relating to false markets is drafted too broadly and that the previous test should be re-instated.

3.2 Listing Rule 3.16 - Chairperson, directors, responsible entity

Listing Rule 3.16 provides, that an entity must immediately tell ASX the following information:

> "The material terms of any employment, service or consultancy agreement it or a related entity 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 any variation to such an agreement."

The Australian Institute of Company Directors understands that disclosing the material terms of a CEO's or an executive director's employment agreement may be of interest to shareholders even though the disclosure may not be price sensitive. We are however, of the view that the material terms of non-executive directors' fee agreements need not be disclosed pursuant to proposed Listing Rule 3.16 because the relevant information is already set out in the Remuneration Report. For this reason, we recommend that proposed Listing Rule 3.16 be amended so that it refers to the chief executive officer and the executive directors only.

Further, the notes setting out the purpose of the Listing Rule amendment suggest that the intention of the Listing Rule is in part for entities to disclose any agreement between the entity with a "director (or a related party of *a director*)." The notes state that "ASX considers that most investors would expect the material terms of any employment, service or consultancy agreement a listed entity enters into with a director or an associate of a director to be disclosed to the market."

Despite the notes, proposed Listing Rule 3.16.4 provides that disclosure is required of an agreement between the entity and "a director or any other person or entity who is a related party of the *entity*". If the term "related party of the entity" is intended to refer to the Corporations Act definition of "related party of a public company" set out in section 228, it may be helpful to insert a note or a cross reference to that provision underneath the proposed Listing Rule. However, further consideration may need to be given to the use of this definition if the Listing Rule is to be confined to "executive directors" as we suggest.

We are also of the view that the disclosure of "any variation" of these arrangements (regardless of materiality) is too wide a requirement and that the information set out in the proposed rule should not need to be disclosed immediately. We are of the view that a "as soon as reasonably practicable" standard would be a more appropriate time frame for disclosure.

3.3 Listing Rule 3.17 - Communications with security holders

Proposed Listing Rule 3.17.2 provides that an entity must immediately give to ASX a copy of any notice it receives under section 249D, 249F, 249N, 252B, 252D or 252L of the Corporations Act or under any equivalent overseas law.

Section 249D, as an example, allows 100 members eligible to vote at a general meeting, or members with at least 5% of the votes that may be cast at the general meeting, to request a general meeting. Often notices received by companies from shareholders seeking to rely on section 249D do not meet the requirements of the provision in which case the company will not be required to requisition the meeting at the members request. (For example, a search of the register may show that not all 100 members on the notice are shareholders or that the shareholders responsible for the notice do not hold 5% of the votes that may be cast at the general meeting.) If this occurs the company does not have an obligation to call the meeting.

We are of the view that requiring companies to immediately give ASX copies of these notices even when they are not valid, does not enhance the disclosure regime and has the potential to confuse shareholders. For example, the disclosure may create an expectation amongst shareholders that a meeting will be held when this is not the case.

Similar issues arise with the other provisions listed in proposed Listing Rule 3.17.2. For example, section 249N of the Corporations Act allows 100 members eligible to vote at a general meeting or members with at least 5% of the votes to propose a resolution at a general meeting. The proposed Listing Rule requires notices received under section 249N to be disclosed to ASX immediately. Again, the notice and/or

the resolution may not meet the threshold requirements of section 249N in which case it will not need to be considered at a general meeting. A resolution will also not need to be included in a notice of meeting if the resolution is too long, defamatory or the objects of the resolution cannot be lawfully achieved. We are particularly concerned that pursuant to the proposed Listing Rule, copies of defamatory resolutions would still need to be sent to the ASX and would be made available on a public website.

If, however, the notice under section 249N is valid and the resolution one which the shareholders can properly consider, section 249O of the Corporations Act requires the company to "give all its members notice of the resolution at the same time, or as soon as practicable afterwards, and in the same way as it gives notice of meeting." This provision ensures that shareholders will be properly informed of the resolution but through the notice of meeting mechanism.

Whether a meeting is to be held or a member resolution to be considered at a general meeting, the appropriate time for informing shareholders of these issues is when the notice of meeting is circulated to members. By that stage, the company will have determined whether the notice is valid, whether the meeting will be called, whether the resolution is too long or defamatory, whether the resolution will be put forward and the wording of the resolution will be finalized. It is often the case that shareholders will amend the wording of the resolution initially proposed so that the resolution is able to be properly considered at a general meeting.

We are of the view that proposed Listing Rule 3.17.2 should be deleted due to the range of practical issues immediate disclosure is likely to create and because such disclosure is likely to hinder clear and effective communication with shareholders regarding meetings. We are also concerned that mandatory disclosure by the company of *any* notice it receives purporting to comply with the relevant Corporations Act provisions (whether valid or not) will create a range of unintended consequences and may be open to abuse. The Corporations Act adequately deals with the mechanism for calling meetings and including resolutions pursuant to these provisions and this procedure should not be complicated by an additional Listing Rule requirement.

3.4 Listing Rule 3.21 - Dividends or distributions

Proposed Listing Rule 3.21 provides that: "An entity must tell ASX immediately it declares a dividend or distribution or makes a decision that a dividend or distribution will not be declared."

We note that companies generally announce dividends as part of their annual disclosures which includes the Appendix 4E - Preliminary Final Report. The Appendix 4E disclosures currently state that in relation to dividends an entity must disclose:

- The amount per security and franked amount per security of final and interim dividends or a statement that it is not proposed to pay dividends; and
- The record date for determining entitlements to the dividends (if any).

Companies often "determine" and then pay a dividend, rather than "declaring" a dividend as set out in proposed Listing Rule 3.21. We note that the use of the term "declare" in amendments made to section 254T of the Corporations Act created difficulties and the provision is currently under review by Federal Treasury. It is also not clear whether the use of the term "distribution" is confined to dividends or extends to other types of distributions that may be made to shareholders.

If the purpose of the amendment is to ensure that the ASX is notified of dividends which occur during the year but outside of the Appendix 4E disclosures it may be worthwhile trying to adapt the wording in Appendix 4E in proposed Listing Rule 3.21 if the rule is to be retained.

3.5 Timing of additional disclosures

We note that many of the proposed Listing Rule amendments relate to information the ASX would like to see disclosed even though the information is not necessarily price sensitive. By creating separate disclosure obligations for these categories of information, it is intended that Listing Rule 3.1A can return to addressing the disclosure of price sensitive information only.

Given that most of the information requiring disclosure pursuant to the disclosures set out in the Listing Rule amendments will not be price sensitive, it is unclear why "immediate" disclosure is required for a large part of this information. For the majority of these disclosures we are of the view that providing the information to the ASX "as soon as reasonably practicable" is appropriate.

We hope that these comments will be of assistance to you. If you would like to discuss any of our views please contact me or Leah Watterson on (02) 8248 6600.

Yours sincerely

Rob Elliott

General Manager of Policy &
General Counsel