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Mavis Tan
Senior Executive Officer
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20 Bridge Street
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By email to mavis.tan@asx.com.au

Dear Mavis

Submission on Draft Guidance Note 8 – Example H6

We refer to ASX's consultation in relation to its proposed new *Guidance Note 8: Continuous Disclosure: Listing Rules 3.1-3.1B* (***Guidance Note 8***), its proposed document entitled *Continuous Disclosure: An Abridged Guide* (***Abridged Guide***) and related proposed changes to the Listing Rules. We appreciate the opportunity to provide this submission as part of the consultation.

This submission (which has been prepared in conjunction with, and is supported by, UBS Australia's corporate advisory team) is limited to our comments on Example H6 on page 60 of Guidance Note 8, which is restated on page 11 of the Abridged Guide. It is provided in addition to another submission which this firm is making on other issues as part of the consultation, and is also in addition to our participation in the submission of the Corporations Committee of the Business Law Section of the Law Council of Australia.

Background

Example H6 describes a scenario where a listed entity (S):

- is the subject of an existing, public and hostile takeover bid from another entity (T) (which may or may not be unconditional) (***prevailing takeover bid***); and
- subsequently receives a confidential, highly conditional, incomplete and potentially higher takeover proposal from a third party (U), which may be withdrawn if disclosed (***third party NBIO***).

In this scenario, ASX suggests that (for the purposes of Listing Rule 3.1A.3) a reasonable person would expect the third party NBIO to be disclosed by S to the ASX and, therefore, should be disclosed promptly and without delay after it is received.

For the reasons given below, we submit that Example H6 is not consistent with the underlying position accepted by ASX, is unduly prescriptive and unnecessary and, therefore, should be removed. We believe that Example H6 would act to the detriment of target shareholders and the market.

Reasons for submission

1. (No distinction in principle) In the absence of the prevailing takeover bid, Guidance Note 8 (for example, in section 4.9 at page 30) explicitly acknowledges that disclosure of a third party NBIO would be "premature" and "could jeopardise the transaction" and, therefore, a reasonable person would not expect the third party NBIO to be disclosed unless and until it becomes an agreed transaction. This is in the context where, during the consideration and negotiation period, market participants would be trading in the target's securities *without* knowledge of the third party NBIO. In other words, the policy basis for this important disclosure exception is that otherwise targets may be unable to negotiate transactions which are for the benefit of security holders as a whole, because that negotiation would need to be played out in the public arena.

   We submit that the position should be no different even where there is a prevailing takeover bid. In particular, conceptually and from a policy perspective, the ability to accept a prevailing takeover bid should be no different to the ability to sell securities in the target on-market. If (as a policy matter) the existence of continued on-market trading does not displace the application of the reasonable person test in the absence of a prevailing takeover bid, then neither should the ability to accept a prevailing takeover bid where one exists.

2. (Example H6 is too simplistic) The facts in Example H6 are too simplistic or incomplete, and do not necessarily reflect common practice. For example, in the case of a hostile takeover bid, the target would commonly make disclosures to shareholders during the course of the bid (either through the ASX or its target's statement) to the effect that shareholders should take no action pending target consideration, that the target is exploring any other potential alternatives, that the hostile bid is rejected and should not be accepted, or on occasion (usually late in the process) that acceptance is recommended in the absence of a higher offer and that the target will inform shareholders of any material developments prior to the close of the hostile bid. This is often a key reason why the majority of shareholders usually do not accept a hostile bid (if they do at all) until very late in the process. Further, Example H6 does not make any comment about the level of conditionality of the prevailing hostile bid at the relevant time (for example, it could still be subject to a FIRB approval condition precedent), or the amount of time left in the offer period. Nor does it acknowledge that a potential rival bidder will generally seek to maximise its prospects of success by approaching early in the likely bid timetable. There may not be any urgency in terms of the time left for a target shareholder to make a decision about acceptance.

   In view of the above, we do not agree that a reasonable person would necessarily expect the target to disclose immediately the receipt of the third party NBIO, and submit that it has not been the common practice to date.

3. (Prejudice to the receipt or negotiation of a third party NBIO) As mentioned above, an obligation to disclose promptly the receipt of a third party NBIO may prejudice the target's ability to receive a third party NBIO at all, or to negotiate and progress a third party NBIO to a point where it is certain and complete and, therefore, ready to compete genuinely with the prevailing takeover bid. This prejudice may reduce the target's ability to engender an

auction and have an adverse impact on all target shareholders. We doubt that a reasonable person would expect immediate disclosure of an approach if the target had a genuinely held view that such prejudice may result from premature disclosure.

4. (Premature disclosure does not necessarily promote an efficient market) As with premature disclosure generally, rather than promote an efficient market, disclosure of the receipt of a third party NBIO may potentially mislead, or provoke an exaggerated market response, if the target remains concerned with the credibility or deliverability of the third party NBIO, despite appropriate qualifications that may be made in the ASX disclosure. Recent experience has demonstrated this. Indeed, an initial third party NBIO provided in the context of a prevailing takeover bid will frequently be subject to more conditions and credibility concerns than a non-binding indicative offer provided in the absence of a prevailing takeover bid, given that the target may have a greater incentive to engage where there is already a prevailing takeover bid.

5. (Other sources of takeover disclosure regulation) We do not believe that the removal of the "reasonable person" limb of the exception through a simplistic scenario in Example H6 is the appropriate way to prescribe target disclosure obligations regarding receipt of a third party NBIO, where all the surrounding circumstances and previous disclosures in each case are relevant. The appropriate mechanism already exists in the target's obligations to make disclosures in a target's statement, or a supplementary target's statement as and when appropriate, under Chapter 6 of the *Corporations Act 2001* (Cth). In satisfaction of the underlying disclosure obligation, target's statements typically discuss any alternative proposals or strategies that the listed entity has considered or is considering, including the procurement of any other genuine third party proposals. Equivalent disclosure obligations apply in connection with scheme takeovers. Further, the application of the continuous disclosure obligations to takeover scenarios, as had generally been understood prior to this draft Guidance Note 8, operated consistently with these other regimes and the general policy outlined in paragraph 1 above.

Contribution and support from UBS

We would like to acknowledge the contribution of UBS Australia's corporate advisory team, who have provided valuable comments on a draft of this submission and strongly support this submission.

We would be pleased to discuss this submission with you further if you wish.

Yours sincerely

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