30 November 2012

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Copy to:
Ms Belinda Gibson
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Dear Ms Tan

Reference: Review of ASX Listing Rules Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B* ("Continuous Disclosure Review")

BHP Billiton welcomes the opportunity to provide comments in relation to the Continuous Disclosure Review and supports the efforts by ASX to assist listed entities to understand and comply with their continuous disclosure obligations. BHP Billiton also supports ASX's effort to restore the focus of the continuous disclosure regime to disclosure of price sensitive information.

Set out below is a summary of some of BHP Billiton's comments in relation to the proposed amendments to the ASX Listing Rules and the revised version of Listing Rules Guidance Note 8 (**revised GN**). The comments are directed at those specific areas that concern BHP Billiton, or that BHP Billiton considers require additional clarification.

The points addressed in our summary include:

- the point at which an officer becomes aware of material information;
- the proposed new definition of 'information';
- ASX's suggested test for determining what may be material information;
- disclosure carve-outs, including ASX's enhanced enforcement role;
- the disclosure trigger point and the meaning of 'immediately';
- increased focus on trading halts;
- some of the particular disclosure issues covered by the revised GN; and
- new disclosure requirements in Chapter 3, including in relation to contracts with directors and the CEO, notices requisitioning meetings, substantial shareholder information and the declaration of dividends.

A. Awareness of material information and what constitutes "material information"

When does an officer become 'aware'?

The revised GN clarifies the definition of "officer" for awareness purposes, but does not draw a distinction between an officer becoming aware of certain facts / information, and the officer being in a position to determine if the information is material in the context of the listed entity. This distinction is critical from a practical perspective, particularly in the context of a large, diversified group, where information flows up from various parts of the group but needs to be considered in the context of the broader group (and any appropriate verification needs to

undertaken) before it can be treated as "market sensitive" information and the entity can become "aware" of material information.

What is 'information'?

ASX proposes to introduce a definition of 'information', which will include matters of supposition and other matters that are insufficiently definite to warrant disclosure to the market, and matters relating to intentions, or likely intentions, of a person. BHP Billiton submits that:

- it is potentially confusing to define information that could be material information that requires disclosure by reference to matters that are insufficiently definite to warrant disclosure;
- the expanded definition is difficult to reconcile with ASX's guidance (section 4.5), that in some instances 'information may be so uncertain or indefinite that it ought not be market sensitive'; and
- the definition of information should be revisited to ensure that it does not bring into the sphere of 'material information' information which is so uncertain that it would not be considered by a reasonable person to be material information.

B. Disclosure Carve-outs

Incomplete proposal or negotiation

ASX suggests that a known event or circumstance that can reasonably be expected to have a material effect on the price of securities does not fall within the 'incomplete proposal or negotiation' exception, even if it may take time for the entity to put a figure or estimate on the financial impact of that event or circumstance. BHP Billiton considers that:

- this guidance may be relevant in very limited circumstances where the implications of an event or circumstance are immediately evident;
- the guidance is not helpful for larger businesses because the implications of an event at group level will not be immediately apparent and it will take time to work through the internal process of determining if the event is in fact material information; and
- this guidance should be qualified to recognise its limited application.

Confidentiality, false market and ASX's enforcement role

It is BHP Billiton's view that a listed entity is still generally best placed to make a determination about whether the market in its securities is fully informed and it is for this reason appropriate that the obligation to comply with the continuous disclosure regime rests with the listed entity. The confidentiality carve-out is a vital protection as it ensures that the entity is not compelled to make premature disclosure. BHP Billiton considers:

- whilst trading may be an indication of a loss of confidentiality, it can similarly be driven by other factors;
- there should be robust controls around ASX's exercise of its discretion to form a view that the carve-out no longer applies;
- to form a view that a piece of information has ceased to be confidential, there would need to be specific evidence of that information in the market (i.e. credible, specific speculation) coupled with disorderly trading. To apply the rules in any other way would

be very problematic for larger companies that are likely to have multiple opportunities, projects or transactions under review in various stages of development; and
- market integrity will not be enhanced by disclosure of various incomplete transactions. On the contrary, such an action will result in speculative market trading on the basis of information / transactions which may not eventuate.

C. The meaning of "immediately" and the use of trading halts

Disclosure trigger point

BHP Billiton considers that, with respect to events or developments that arise due to decisions or actions taken within a company, the revised GN should recognise the overriding principle that the disclosure obligation crystallises when the person with the relevant authority has taken a decision.

The meaning of 'immediately'

ASX appears to recognise that 'promptly and without delay' has to be assessed on the circumstances of the case. However, this guidance is qualified by further guidance that if the market is, or is going to be, trading before the announcement is released, the entity needs to give careful consideration to requesting a trading halt. BHP Billiton considers that this qualification makes the guidance very difficult to navigate in practice. We believe that:

- a trading halt is not appropriate if the entity is in a position to make an announcement promptly and without delay once the disclosure obligation is triggered;
- ASX should give further clarification around the circumstances which would need to exist in order for a trading halt to be appropriate, notwithstanding that the entity is working to release an announcement promptly and without delay;
- the revised GN should be clear that mining and oil & gas companies will not require a trading halt as long as they work promptly to compile and release an announcement which meets the new chapter 5 requirements; and
- the examples (section 3.5) of two infringement notices issued by ASIC in relation to information being delayed to market by 60 and 90 minutes to illustrate the standard of promptness expected by regulators is not helpful guidance and it is better confined to the particular circumstances.

Trading Halts

BHP Billiton considers that trading halts should be used only in those limited circumstances when the disclosure obligation has crystallised and the entity is not in a position to release an announcement promptly and without delay. BHP Billiton submits that trading halts are not appropriate, commercially or from a market order perspective, where the entity is still in the process of determining whether it has market sensitive information.

ASX considers that trading halts should not be viewed negatively by listed entities. This fails to recognise that shareholders, particularly institutional holders, do not like disruption to their ability to trade their shares and are quick to criticise companies that have requested trading halts that they considered unnecessary. For larger, diversified groups, a trading halt is rarely a suitable solution to the disclosure question and we think it would be preferable for the revised GN to focus more on ways in which companies can enhance their processes and compliance without depriving investors of the market for their shares.

D. Other

Earnings guidance / expectations

ASX has clarified that if a listed entity is covered by sell-side analysts it should be monitoring those analysts' forecasts so that it has an understanding of the market's expectations of its earnings. BHP Billiton would welcome clarification from ASX that it does not expect listed entities to track the consensus figures of external information vendors and that there is no obligation on listed entities to correct any such consensus figures.

Analyst presentations

BHP Billiton agrees that any materials presented at an analyst briefing should be published on the company's website but submits that a materiality assessment should apply when determining if they should also be released to ASX. If ASX's guidance in relation to analyst briefings is to be retained, it would be helpful if the guidance is clarified to apply to briefings which have been specifically convened by the company for analysts and that it is not meant to capture conferences or other forums where analysts may be present in the audience (which is common for forums in which large listed entities participate).

E. New specific disclosure requirements in Chapter 3

Contracts with CEO and directors

Proposed new Listing Rule 3.16.4 will require disclosure of the material terms of any employment, service or consultancy agreement entered into with the CEO or a director (or any related party), and also any variation to such an agreement. BHP Billiton submits that the disclosure requirement should either be limited to executive directors or that an express exception be given for standard form contracts entered into with non-executive directors upon their appointment. We also consider that if the information is not material, listed entities should be permitted a reasonable period of time to provide the information to the market (e.g. 5 business days).

Requisitioning of meetings

Proposed new Listing Rule 3.17.2 requires a listed entity to immediately provide ASX with a copy of any notice it receives under the various specified sections of the Corporations Act or overseas equivalent, from a holder calling, or requesting the calling of, or proposing to move a resolution at, a general meeting. In circumstances where the notice is merely moving a proposed resolution, it will rarely be material information and BHP Billiton submits that such information should not require disclosure in advance of the Notice of Meeting. We also consider that the Listing Rule should allow entities sufficient time to verify the validity of the notice before it is provided to the market.

Substantial holder information

Proposed new Listing Rule 3.17.3 requires listed entities to immediately provide ASX with a copy of any information about substantial holdings of securities obtained under Part 6C.2 of the Corporations Act. BHP Billiton submits that except where disclosure is required under Listing Rule 3.1, for Australian incorporated listed companies the obligation to notify ASX of any substantial holdings (or any changes to those holdings) should remain with the relevant holder in line with the statutory requirements.

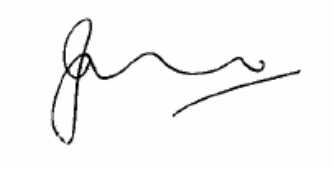
Dividends

Proposed new Listing Rule 3.21 requires an entity to tell ASX "immediately" it declares a dividend or distribution. The practice of most ASX listed companies is to disclose interim and final dividends in interim and preliminary profit announcements, respectively. BHP Billiton submits that listed entities should be able to continue with the existing practice of disclosing dividends in their half yearly and full year profit announcements provided the information is not otherwise materially price sensitive.

More detailed comments, together with our suggestions, are provided in the **Appendix**.

If you have any questions, please contact me on (03) 9609 2445 or at jane.mcaloon@bhpbilliton.com.

Yours sincerely



Jane McAloon
Group Company Secretary

APPENDIX

The comments below relate to specific areas of concern and issues which, in our view, require additional clarification or further discussion.

1. Awareness of material information and what constitutes "material information"

1.1. When does an officer become 'aware'?

The flow chart on page 5 of the revised GN recognises that the starting point in relation to the analysis of disclosure obligations is awareness of material information. BHP Billiton considers that, consistent with this principle, a distinction needs to be drawn between an officer becoming aware of certain facts / information, and the officer being in a position to determine if the information is material in the context of the listed entity. This distinction is critical from a practical perspective, particularly in the context of a large, diversified group, where information flows up from various parts of the group but needs to be considered in the context of the broader group (and any appropriate verification needs to be undertaken) before it can be treated as "market sensitive" information. The revised GN clarifies the definition of "officer" for awareness purposes, but does not draw this distinction.

BHP Billiton submits that the definition or the revised GN should recognise that, from a practical perspective, an organisation will require a reasonable amount of time to work through the internal process of collecting and considering the materiality of information from a group perspective, and it is only once that process is complete that an entity can become "aware" of material information. Parts of the revised GN (e.g. section 3.8) which suggest that in relation to a 'market sensitive event that has already occurred' the disclosure obligation arises at the point that the entity first becomes aware of the event, do not recognise that an entity will need to work through its internal process before determining whether an announcement (or a trading halt) is appropriate. From a commercial perspective (and in the interests of maintaining an orderly market), companies would be extremely reticent to seek a trading halt unless and until it becomes clear that disclosure will be required. Accordingly, the general comments in the GN about using trading halts as a tool to manage risk are not practical in these circumstances.

1.2. The test for determining what is 'material information'

What is 'information'?

ASX proposes to introduce a definition of 'information', which will include matters of supposition and other matters that are insufficiently definite to warrant disclosure to the market, and matters relating to intentions, or likely intentions, of a person. This aligns with the insider trading prohibition. However, it is potentially confusing to define information that could be material information that requires disclosure by reference to matters that are insufficiently definite to warrant disclosure. This expanded definition is also difficult to reconcile with ASX's guidance (section 4.5), with which we agree, that in some instances 'information may be so uncertain or indefinite that it ought not be market sensitive and therefore not required to be disclosed under Listing Rule 3.1, regardless of whether it falls within the carve-outs from disclosure in Listing Rule 3.1A.'

BHP Billiton submits that the definition of information should be revisited to ensure that it does not bring into the sphere of 'material information' information which is so uncertain that it would not be considered by a reasonable person to be material information.

ASX's suggested test to determine if information may be material

ASX clarifies that the reasonable person test (i.e. not reasonable investor) is an objective test and is to be judged from the perspective of an independent bystander and not from the perspective of someone whose interests are aligned with the listed entity (section 4.9).

However, ASX suggests that when determining whether information needs to be disclosed, which is tested by reference to what a reasonable person would consider to be material, an officer should ask two questions (and if the answer is "yes" and the carve-outs do not apply then the information should be disclosed):

1. Would this information influence me to buy or sell securities at their current market price?
2. Would I feel exposed for an action for insider trading if I were to buy and sell securities at their current price, knowing this information had not been disclosed to the market?

ASX's suggested subjective test is not consistent with the objective test set out in the Listing Rules or the Corporations Act 2001 (Cth) (Corporations Act). BHP Billiton considers that this guidance creates an additional test which companies will need to assess in determining whether information is material. Furthermore, the subjective test may lead to a different disclosure outcome than the objective test, recognising that an officer within the company will have a closer understanding of the group's strategy and operations than an independent bystander.

We suggest that creating an additional overlay of tests creates regulatory uncertainty as ASIC and the Courts will apply an objective test in determining compliance with the law.

Material information – qualitative factors

BHP Billiton welcomes ASX's moves to remove references to some quantitative measures from its guidance on materiality (e.g. 10-15% earnings variation) and issue guidance instead on the kinds of factors which companies may take into account in determining if information may be material. We would welcome further guidance from ASX in relation to the qualitative factors which companies may also consider. We suggest that the entity's past practice of disclosure is a relevant consideration as this will have conditioned the market to expect certain kinds of information to be disclosed, and goes to what a reasonable investor might expect.

2. Disclosure carve-outs

2.1. Listing Rule 3.1A

ASX provides further guidance in relation to the carve-outs and proposes to re-order the carve-outs to put the 'reasonable person' test carve out last to recognise the order of emphasis of the requirements in Listing Rule 3.1A.

BHP Billiton wishes to raise the following points in relation to the carve-outs.

Incomplete proposal or negotiation

ASX provides guidance in relation to incomplete negotiations and the timing of entering into agreements. BHP Billiton submits that it would be helpful if the guidance reflected the range of transaction structures which are apparent in the market. For example, an agreement which is subject to Board approval would not be disclosable as it is incomplete.

ASX suggests that a known event or circumstance that can reasonably be expected to have a material effect on price of securities does not fall within the 'incomplete proposal or negotiation' exception, even if it may take time for the entity to put a figure or estimate on the financial impact of that event or circumstance. BHP Billiton considers that this guidance may be relevant in very limited circumstances where the implications of an event or circumstance are immediately evident – e.g. an explosion at a manufacturing entity's sole site or a loss of a supply contract by an entity that has one customer. However, our view is that the guidance is not helpful for larger businesses because the implications of an event at group level will not be immediately apparent and it will take time to work through the internal process of determining if the event is in fact material information. BHP Billiton considers that this guidance should be qualified to recognise its limited application.

Confidentiality, false market and ASX's enforcement role

ASX has clarified its enforcement role and its expectation that an entity must disclose to ASX all market sensitive information which has not been disclosed in reliance on the confidentiality carve-out, if contacted by ASX regarding a price movement in the entity's securities. ASX can then form the view that the entity has lost the benefit of the confidentiality carve-out and that disclosure is required in relation to the transaction(s) unless the entity can provide an alternative reason for the price movement.

It is BHP Billiton's view that a listed entity is still generally best placed to make a determination about whether the market in its securities is fully informed and it is for this reason appropriate that the obligation to comply with the continuous disclosure regime rests with the listed entity. The confidentiality carve-out is a vital protection as it ensures that the entity is not compelled to make premature disclosure. Premature disclosure of information may put transactions at risk and result in disclosure of incomplete information and transactions which may not eventuate, which could be misleading to investors and has the potential to create disorderly trading.

BHP Billiton is concerned by the suggestion in the revised GN that ASX may require disclosure of multiple incomplete transactions if there is insufficient evidence in the market to link the disorderly trading to any particular piece of information. If the possible leak cannot be identified in the media or investor blogs, then it is difficult to see how a view can be formed that the information regarding those transactions has ceased to be confidential. Whilst trading <u>may</u> be an indication of a loss of confidentiality, it can similarly be driven by other factors. BHP Billiton considers that ASX should have the 'onus of proving' that specific information is in the market and is likely to be influencing the trading. ASX's proposal to reverse the onus would result in an almost impossible task for a listed entity - to show alternative reasons for disorderly trading or face having to disclose incomplete information in the absence of any evidence of a leak.

Recognising the significance of the confidentiality carve-out, BHP Billiton considers that there should be robust controls around ASX's exercise of its discretion to form a view that the carve-out no longer applies. We consider that, to form a view that a piece of information has ceased to be confidential, there would need to be specific evidence of that information in the market (i.e. credible, specific speculation) coupled with disorderly trading. To apply the rules in any other way would be very problematic for larger companies that are likely to have multiple opportunities, projects or transactions under review in various stages of development. BHP Billiton doesn't consider that market integrity will be enhanced by disclosure of various incomplete transactions. On the contrary, such an action will result in speculative market trading on the basis of information / transactions which may not eventuate.

We further suggest that framing ASX's discretion in such wide terms may leave the market open to manipulation by third parties who believe they may benefit from forced disclosure of information.

Evidence that information is no longer confidential

The revised GN (section 4.8) suggests that rumours, media and analyst speculation and price movement are each considered by ASX as 'evidence' that information is no longer confidential. BHP Billiton's view is that uninformed speculation should not reasonably be considered as 'evidence' or as a basis on which to form a view that the confidentiality carve-out no longer applies. We suggest that this section of the guidance should be revised to the effect that ASX may take action regarding a potential loss of confidentiality if (a) there is a price movement **and** (b) a presence of a specific and credible media or analyst report.

3. The meaning of 'immediately' and the use of trading halts

3.1. Disclosure trigger point

BHP Billiton considers that, with respect to events or developments that arise due to decisions or actions taken within a company, the revised GN should recognise the overriding principle that the disclosure obligation crystallises when the person with the relevant authority has taken a decision. Until such time, there is no certainty and an obligation to disclose should not be triggered. ASX's suggestion (section 3.8) that in certain circumstances an entity may need to seek a trading halt ahead of a Board decision if the information in relation to the impending decision has leaked is not helpful guidance in the absence of any disorderly trading. Until the Board makes the decision, the disclosure obligation is not triggered and the entity is not in a position to make any disclosure in relation to the subject matter of the Board's decision. For example, there are circumstances when the market may be aware that the Board will consider a particular project or transaction by a particular point in time, and leading up to that time the market may speculate about what the Board may or may not decide. It would not be appropriate to halt trading in securities to prevent speculation of this nature at a point in time when the entity does not have a disclosure obligation and the market is fully informed. As discussed at paragraph 1.1 above, BHP Billiton considers that the trading halt mechanism is appropriate only in circumstances where the entity's disclosure obligation is triggered and it is not in a position to make an announcement promptly and without delay.

3.2. The meaning of ‘immediately’

Once the disclosure obligation crystallises an entity must make immediate disclosure. The revised GN clarifies that ‘immediate’ means promptly and without delay. The revised GN also lists various factors which ASX recognises will impact on the timing of the announcement.

ASX appears to recognise that ‘promptly and without delay’ has to be assessed on the circumstances of the case. BHP Billiton considers that this clarification of ASX’s approach is helpful guidance. However, this guidance is qualified by further guidance that if the market is, or is going to be, trading before the announcement is released, the entity needs to give careful consideration to requesting a trading halt. BHP Billiton considers that this qualification makes the guidance very difficult to navigate in practice because it logically suggests that a trading halt will often, if not usually, be appropriate unless the entity can make an almost immediate announcement (immediate here is given the meaning of ‘instantaneous’), notwithstanding ASX’s clarification that immediately is taken to mean promptly and without delay for the purposes of the ASX Listing Rules. On the one hand, ASX appears to recognise that the timing of the disclosure may be impacted by various factors and it is acceptable for entities to work through those factors as long as they do this promptly and without delay and, on the other hand, the guidance appears to suggest that if the entity does need the time to promptly work through these factors, it should consider doing so whilst its shares are in a trading halt.

BHP Billiton considers that a trading halt is not appropriate if the entity is in a position to make an announcement promptly and without delay once the disclosure obligation is triggered. The revised GN is not clear on why ASX considers a trading halt to be appropriate in these circumstances given the disadvantages of trading halts from the perspective of shareholders and the entity itself. BHP Billiton considers that ASX should give further clarification around the circumstances which would need to exist in order for a trading halt to be appropriate, notwithstanding that the entity is working to release an announcement promptly and without delay.

In addition, BHP Billiton is particularly keen to understand ASX’s position on this in light of the introduction of the amended chapter 5 of the Listing Rules, which will impose considerable additional reporting requirements on mining and oil & gas companies from a process and content perspective. We submit that the revised GN should be clear that mining and oil & gas companies will not require a trading halt as long as they work promptly to compile and release an announcement which meets the new chapter 5 requirements.

BHP Billiton further notes that ASX uses the examples (section 3.5) of two infringement notices issued by ASIC in relation to information being delayed to market by 60 and 90 minutes to illustrate the standard of promptness expected by regulators. We consider that this is not helpful guidance and it is better confined to the particular circumstances. If these examples are retained, it would be helpful if ASX could explain why such short delays to market may have been considered by the regulator to be too long in these circumstances (e.g. confidentiality issues) and why in other circumstances these kinds of timeframes would not be a concern.

3.3 Trading Halts

BHP Billiton considers that trading halts should be used only in those limited circumstances when the disclosure obligation has crystallised and the entity is not in a position to release an announcement promptly and without delay. It is only in such circumstances, where the market is not fully informed and the trading halt is necessary to prevent trading on an uninformed basis, that depriving investors of the market for their shares would be appropriate. BHP Billiton submits that trading halts are not appropriate, commercially or from a market order perspective, where the entity is still in the process of determining whether it has market sensitive information.

It is not clear whether the increased focus on trading halts in the revised GN signals a change of approach for ASX. However, participants could interpret the guidance to mean:

- that a trading halt is appropriate in all circumstances and not only as a tool to use for that very defined period between the disclosure obligation being triggered and the release of the announcement (where the announcement cannot be released promptly and without delay);
- that a trading halt is appropriate to give the entity time to determine whether the information it has is in fact material;
- that ASX views trading halts an appropriate tool for companies to 'manage' their legal exposure in most situations where they are working through a complex disclosure scenario.

We suggest that a potential consequence of extending the scope for when trading halts may be used is that it could lead to more relaxed disclosure practices as entities rely more on trading halts as a way to manage the process and less on refining their disclosure processes to ensure the right information reaches the market in a timely manner. Another potential consequence is that trading halts may be used for purposes other than to manage continuous disclosure obligations (e.g. as a mechanism to prevent price discovery).

ASX considers that trading halts should not be viewed negatively by listed entities. This fails to recognise that shareholders, particularly institutional holders, do not like disruption to their ability to trade their shares and are quick to criticise companies that have requested trading halts that they considered unnecessary. It is our view that a trading halt is not a complete disclosure solution (recognising that it does not eliminate the underlying disclosure obligation) and it may in fact have adverse implications from a market order perspective. We suggest that ASX should consider the disruption to shareholders of a trading halt and the risk that it over-emphasises the importance of the ultimate announcement. For larger, diversified groups, a trading halt is rarely a suitable solution to the disclosure question and we think it would be preferable for the revised GN to focus more on ways in which companies can enhance their processes and compliance without depriving investors of the market for their shares.

Trading Halt – worked examples

Annexure A provides some worked examples of the operation of Listing Rule 3.1. At paragraph 5 of Example A, ASX suggests that in circumstances where the fact that a listed entity is negotiating an acquisition has leaked the entity would be required to make an announcement to the market in relation to the discussions and to request a trading halt

(there is a similar suggestion in Worked Example H2, Annexure A). BHP Billiton considers that requiring an entity to seek a trading halt in these circumstances is not commercially practicable as transactions are often delayed at the last hurdle and there is never a guarantee that signing will occur on schedule. A delay in signing would result in the entity's shares being suspended for a prolonged period of time. We do not consider that from a market perspective there is any reason to seek a trading halt in such circumstances because a holding statement issued to the market should result in the market being fully informed about the possible transaction.

4. Other

4.1. Earnings guidance / expectations

ASX has helpfully suggested some factors companies may consider in determining whether a variation in earnings guidance, or actual/expected earnings versus market expectations, may require disclosure under Listing Rule 3.1.

It would be helpful if ASX could clarify whether it is suggesting that, in certain circumstances, non-cash items and one-off items (which do not affect underlying earnings) may legitimately be considered by companies to not be price sensitive even if the item may result in the company reporting an accounting result which varies materially on paper?

ASX has clarified that if a listed entity is covered by sell-side analysts it should be monitoring those analysts' forecasts so that it has an understanding of the market's expectations of its earnings. There are information providers in the market who also monitor analyst forecasts and who provide their own consensus estimates for various listed entities. Such consensus estimates will often vary from the listed entity's own consensus figure due to the methodology used to calculate the figure. BHP Billiton would welcome clarification from ASX that it does not expect listed entities to track the consensus figures of external information vendors and that there is no obligation on listed entities to correct any such consensus figures. BHP Billiton considers that consensus figures maintained by the listed entity itself, applying a reasonable methodology, should be accepted as an appropriate reflection of the market's expectations of the entity's earnings.

4.2. Forward looking statements

The revised GN suggests that where an entity is making an announcement that includes forward looking statements, such as exploration or production targets, any material assumptions or qualifications underpinning those statements should also be stated in the announcement.

To ensure consistency with draft Guidance Note 31 and the proposed changes to Chapter 5 of the Listing Rules, BHP Billiton submits that there should be an express carve-out from the requirement to disclose material assumptions or qualifications where they are commercially sensitive. We further submit that it would assist companies if a non-exhaustive list of examples of information that could potentially be commercially sensitive was included (e.g. capital and operating expenditure, price assumptions, contractual penalties, emerging technology assumptions and sovereign risk discussion).

BHP Billiton notes that commercially sensitive information is specifically addressed in paragraph 3.20 of the revised GN. However, it would be helpful if the exception was included with the discussion on forward looking statements.

4.3. Analyst presentations

The revised GN suggests that any materials presented at an analyst briefing should be released to ASX and published on the entity's website (sections 6.4 and paragraph 8 Annexure C).

BHP Billiton agrees that any materials presented at an analyst briefing should be published on the company's website but submits that a materiality assessment should apply when determining if they should also be released to ASX. If the materials do not contain any information that would require disclosure under Listing Rule 3.1, BHP Billiton submits that they should not require release to ASX.

BHP Billiton also seeks clarification that the guidance is intended only to apply to briefings which have been specifically convened by the company for analysts and that it is not meant to capture conferences or other forums where analysts may be present in the audience (which is common for forums in which large listed entities participate). BHP Billiton recognises that these briefings would still be subject to the requirements in Listing Rule 3.1 and therefore any presentation that contains information that may be material would first need to be released to the exchanges.

4.4 Documents given to overseas stock exchanges

Proposed new Listing Rule 3.17A introduces a requirement for a listed entity to lodge with ASX any document given to an overseas stock exchange that will be made public.

For dual listed companies like BHP Billiton it would be helpful if there was either an exception in the Listing Rule, or clarification in the revised GN, that this rule is not intended to apply to the arm of the dual listed company that is not listed on ASX (iie. in BHP Billiton's case, BHP Billiton Plc). BHP Billiton submits that requiring documents lodged by BHP Billiton Plc with foreign exchanges to also be filed with ASX even where not material could potentially be confusing for investors in BHP Billiton Limited and would also result in unnecessary information being provided to the market. By way of example, following the declaration of a dividend (which is declared in US dollars), BHP Billiton Plc issues a notification to the London Stock Exchange and Johannesburg Stock Exchange regarding the currency conversion into South African rand.

BHP Billiton notes that this exception would not in any way detract from the need to disclose to ASX any information regarding BHP Billiton Plc that requires disclosure to BHP Billiton Limited shareholders under Listing Rule 3.1.

BHP Billiton submits that it would also be helpful to clarify in the revised GN that the requirements in Listing Rule 3.17A only apply to the listed entity and not, for example, to any subsidiaries that may have foreign listings.

4.5 Price query letters

BHP Billiton notes that the language in the price query letters section in the revised GN varies from the current price query letter which ASX sends to listed entities. It would be helpful if ASX could clarify how its approach or expectations in relation to price query letters will change going forward.

4.6 Content of announcements

The revised GN contains guidelines on the content of announcements made under Listing Rule 3.1. BHP Billiton agrees with the overarching principle that material announcements should contain sufficient information to enable the market to understand the ramifications of the announced event and welcomes ASX providing guidance in relation to the kinds of information which listed entities may wish to consider including in their announcements. We suggest that the appropriateness of the content will need to be assessed in context and it will depend on the entity, the nature of the transaction as well as other relevant factors. For this reason, we consider that the guidance in section 3.15 and paragraph 6 of Worked Example A (Annexure A) should be couched as a suggested list for consideration rather than as a mandated checklist for announcements. Our concern is that the guidance should remain flexible.

4.7. Monitoring investor blogs, chat sites and other social media

The revised GN mentions in several places that entities are encouraged to monitor investor blogs, chat-sites and other social media in certain circumstances (e.g. leading up to an announcement). BHP Billiton submits that this requirement is not practical, especially for larger companies which may attract a lot of commentary in the social media and chat sites around the world. We would suggest that the requirement should be limited to monitoring credible media and analyst coverage.

5. New specific disclosure requirements in Chapter 3

5.1 Contracts with CEO and directors

Proposed new Listing Rule 3.16.4 will require disclosure of the material terms of any employment, service or consultancy agreement entered into with the CEO or a director (or any related party), and also any variation to such an agreement.

Application to non-executive directors

As currently drafted, the new Listing Rule will require disclosure of standard service agreements entered into with non-executive directors upon their appointment. BHP Billiton submits that these agreements are usually standard form in line with the ASX Corporate Governance Council's Recommendations. BHP Billiton suggests that the disclosure requirement should either be limited to executive directors or that an express exception be given for standard form contracts entered into with non-executive directors upon their appointment, in particular where the standards form is available on the entity's website.

Related parties

BHP Billiton seeks clarification in relation to the proposed requirement to disclose the material terms of any employment service or consultancy agreement a listed entity or a

related entity enters into with a "related party of the entity". As drafted, this would capture, for example, service agreements entered into by a related entity with another related entity. Given the intended purpose of this section, BHP Billiton queries whether this is intended to capture persons and entities that are a related party of the director rather than the entity.

Variations

BHP Billiton submits that Listing Rule 3.16.4 should be confined to material variations to the material terms of such agreements to avoid the market being provided with unnecessary information. This approach would be consistent with the initial disclosure, which is focused on the material terms of the agreement, and would prevent the market receiving unnecessary information.

Immediately

If the information regarding the contract is not price sensitive, and therefore does not require disclosure under Listing Rule 3.1, BHP Billiton submits that entities should have to notify ASX within a reasonable period of the contract being entered into or the change being made, for example, 5 business days. Where it is not price sensitive, it is difficult to understand the rationale for requiring "immediate" disclosure.

5.2 Requisitioning of meetings / Proposal of resolutions

Proposed new Listing Rule 3.17.2 requires a listed entity to immediately provide ASX with a copy of any notice it receives under the various specified sections of the Corporations Act or overseas equivalent, from a holder calling, or requesting the calling of, or proposing to move a resolution at, a general meeting.

BHP Billiton recognises that a valid meeting requisition notice can be information which is material information. In such circumstances, Listing Rule 3.1 would apply to require the entity to release details to the market. However, in circumstances where it is merely a proposed resolution, it will rarely be material information. It seems illogical that a proposed resolution would require disclosure in advance of the Notice of Meeting if it is not material.

It is important to recognise that following receipt of a requisition notice, there are a number of steps which an entity would be required to take to ensure that the notice is valid. This may take some time and involve various parties (e.g. legal advisers, share registry). BHP Billiton's view is that the requirement to immediately disclose to the market any notice received may lead to un-vetted information being released and could potentially be misleading. For these reasons, we suggest that the rules should allow entities sufficient time to verify the information and the requirement should be amended to recognise that only valid notices should require disclosure to the market.

5.3 Substantial holder information

Proposed new Listing Rule 3.17.3 requires listed entities to immediately provide ASX with a copy of any information about substantial holdings of securities obtained under Part 6C.2 of the Corporations Act.

Scope of new rule

BHP Billiton recognises the desire to ensure that substantial holding information in relation to listed entities not regulated by the Corporations Act is provided to ASX. However, BHP Billiton submits that the proposed Listing Rule goes further than is required to achieve this objective. BHP Billiton submits that, except where disclosure is required under Listing Rule 3.1, for Australian incorporated listed companies the obligation to notify ASX of any substantial holdings (or any changes to those holdings) should remain with the relevant holder in line with the statutory requirements in section 671B of the Corporations Act.

Quality of information

In circumstances where a listed entity issues a beneficial ownership tracing notice, the entity is entirely reliant on the quality of the information that is provided in the response to the notice. BHP Billiton's experience is that this tends to vary between respondents and, in some instances, this has been found to be unreliable with the company needing to make further inquiries to try and resolve anomalies (for example, some respondents will not disclose ownership if shares have been lent out pursuant to stock lending arrangements). BHP Billiton submits that the proposed new Listing Rules could result in incomplete, inaccurate and potentially misleading information being inadvertently provided by a listed entity regarding substantial holdings.

To verify the information received in response to the beneficial ownership tracing notice, a listed entity would be required to make direct contact with the potential beneficial owner and make enquiries in relation to the actual beneficial holdings, including any potential associated holdings which may form part of that holding. This process can take a considerable amount of time and we do not consider that it is appropriate to place this regulatory burden on the listed entity when the statutory obligation sits with the holder of the securities. This is especially so, considering that in the ordinary course of business, a company would not take these steps unless there is a commercial driver to take the enquiry through to the very end.

Multiple notifications and thresholds for notification

If ASX determines that the proposed rule should be retained, BHP Billiton submits that, as currently drafted, the rule may result in multiple notifications to ASX in respect of the same holding (by the listed entity, as a result of the issuance of tracing notices, and by the person holding the relevant interest, pursuant to section 671B of the Corporations Act), which creates an unnecessary burden for listed entities and is potentially confusing for investors.

In addition, it is unclear whether the new rule is only intended to operate in the circumstances where a person would be required to submit a notice under section 671B or whether the listed entity would be required to give ASX a copy of information about substantial holdings even where they have not changed or have moved by less than one per cent. BHP Billiton suggests that the latter is information that would be confusing rather than helpful for investors and would not serve the policy objectives that underpin Chapter 3 of the Listing Rules.

If ASX determines that the proposed rule should be retained, BHP Billiton submits that the new rule should only operate where:

- the person holding the relevant interest has not already provided a notification in accordance with section 671B; and
- the results of the tracing notice indicate that either:
    - a person has begun to have, or ceased to have, a substantial holding in the listed entity; or
    - the person has a substantial holding in the listed entity and there is a movement of at least one per cent in their holding,

and that the entity should be permitted to take sufficient time to verify the information, recognising that this may take some time and will be driven largely by the capacity of parties other than the listed entity to provide the information required for the listed entity to make a disclosure which is not inaccurate, incomplete and potentially misleading.

5.4 Dividends and periodic disclosures

Dividends

Proposed new Listing Rule 3.21 requires an entity to tell ASX "immediately" it declares a dividend or distribution. The practice of most ASX listed companies is to disclose interim and final dividends in interim and preliminary profit announcements, respectively.

ASX has helpfully clarified that listed entities are not expected to release information in a periodic disclosure document ahead of the release date for that document (save for any information that it becomes aware of in preparing that document that should be released under Listing Rule 3.1).

ASX recognises that, in practice, there may be a short gap between the interim or preliminary profit announcements being signed off by the Board and release to ASX. The reason for this is that certain matters often need to be finalised after Board approval before the documents are ready for lodgement.

BHP Billiton requests clarification as to whether Listing Rule 3.21 would require listed entities to disclose dividend information ahead of their results announcement in these circumstances. BHP Billiton submits that listed entities should be able to continue with the existing practice of disclosing dividends in their half yearly and full year profit announcements provided the information is not otherwise materially price sensitive. In addition, we would suggest that the references in proposed Listing Rule 3.21 to dividends being "declared" should be changed to reflect companies' current practice of resolving to pay dividends rather than declaring them.

Periodic disclosures

In light of the clarification provided by ASX that:

- when a periodic document is released, the information contained in the document is regarded as "generally available" and does not require a separate disclosure under Listing Rule 3.1; and
- as noted above, unless a continuous disclosure obligation arises during the preparation of a periodic disclosure document, an entity is not expected to release the information in that document ahead of the scheduled release date.

BHP Billiton suggests that consideration be given to removing the reference in Listing Rules 4.2B and 4.3B to the information required by Listing Rules 4.2A and 4.3A, respectively, needing to be given to ASX immediately it becomes available.