Continuous Disclosure - Guidance Note 8 Rewrite

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Outline

- The consultation process
- Core themes unchanged
- Clarifications to Guidance Note 8
- Final changes to Listing Rules 3.1 – 3.1B
- Other important changes to chapter 3 of the Listing Rules
- Other minor Listing Rule changes
- Other Guidance Note changes

The consultation process

- A 2+ year process, which included:
  - informal engagement with listed entities, directors, company secretaries, general counsel and other key stakeholders over an extended period to gain an understanding of major areas of concern or confusion
  - comprehensive internal review and critiquing (including by the ASX Limited and ASX Compliance boards and ASX senior management)
  - close dialog with ASIC over multiple drafts
  - sign-off by senior counsel

  before the consultation documents were released in October 2012

The consultation process (cont.)

- Intensive program to socialise the proposed changes via:
  - media interviews
  - national roadshow presentations
  - meetings with the 5 main state chapters of the Corporations Committee of the Law Council's Business Law Section
  - individual meetings with the AICD, CSA and each of ASX's 20 largest listed entities
  - presentations to various stakeholder groups and their members, including the ACI, AIRA and the WA division of CSA
  - presentations to various law firms and their clients (which in many cases included listed company directors, secretaries and general counsel in their audience)

The consultation process (cont.)

- 19 non-confidential and 2 confidential submissions received in response to the formal consultation
- General feedback overwhelmingly positive
- A large number of specific comments on areas where ASX's guidance could be enhanced or proposed listing rule changes could be refined
- ASX able to accommodate a good proportion of these comments but there were a number with which it did not agree, as outlined in a 90+ page detailed consultation response:

  http://www.asx.com.au/documents/about/GN8_Consultation_Response.pdf

Core themes unchanged

- LR 3.1 requires the immediate disclosure of “market sensitive” information (ie information concerning a listed entity that a reasonable person would expect to have a material effect on the price or value of its securities) unless it falls within the exceptions to immediate disclosure in LR 3.1A
- The market sensitivity of information has to be assessed in context, taking into account:
  - the circumstances affecting the entity at the time
  - any external information that is publicly available at the time
  - any previous information the entity has provided to the market (eg, in a prospectus or PDS, under its continuous or periodic disclosure obligations or by way of earnings guidance)

Core themes unchanged

- "Immediately" does not mean "instantaneously", but rather "promptly and without delay"
- The speed with which disclosure can be made will vary, depending on the circumstances eg:
  - source, forewarning, amount and complexity of information
  - need in some cases to verify the accuracy or bona fides of the information
  - need in some cases to comply with legal/technical requirements (eg JORC)
  - need in some cases for board/disclosure committee approval
- Not all continuous disclosure announcements require board approval

Core themes unchanged (cont.)

- Given the requirement for announcements to be issued immediately, a listed entity should have suitable arrangements in place to enable this to occur (eg delegations to management, disclosure committee etc)
- Where necessary/appropriate, the requirement to act “immediately” can accommodate the time needed to get board/disclosure committee approval, provided this takes place promptly and without delay
- Trading halts are a useful mechanism that listed entities can use to manage their disclosure obligations – they help to reduce regulatory risk and also stop the “taxi meter” running on potential class action litigation
- If the market is or will be trading while an announcement is pending, think carefully about whether a trading halt is appropriate

Core themes unchanged (cont.)

- The “incomplete proposal or negotiation” exception generally means that a market sensitive agreement does not need to be disclosed until it is signed or the entity is otherwise committed to proceeding with the transaction (provided confidentiality is maintained)
- It’s therefore generally OK to schedule the signing of a market sensitive agreement and announcing it before market opens or after market closes to avoid disrupting the normal course of trading on the market (provided the entity is not otherwise committed to proceeding with the transaction and confidentiality is maintained)
- Most information that falls within the prescribed categories in LR 3.1A.1 and that is confidential under LR 3.1A.2 will also satisfy the “reasonable person” test in LR 3.1A.3.

Core themes unchanged (cont.)

- Contrary to the advice some lawyers have been giving, the “reasonable person” test does not generally require disclosure of confidential approaches to enter into a takeover or other control transaction - these usually will be protected from mandatory disclosure by LR 3.1A for so long as they involve an incomplete proposal or negotiation and remain confidential.
- LR 3.1B is an important and integral part of the continuous disclosure framework
- ASX may require a listed entity to disclose information that does not otherwise require disclosure under LR 3.1 or 3.1A if ASX considers it necessary to correct or prevent a false market
- An entity therefore may have to respond to speculation in a media or analyst report or to a market rumour if ASX considers that it has caused, or may cause, a false market

Core themes unchanged (cont.)

- A listed entity may have to make an announcement under LR 3.1 if its earnings will differ from market expectations to an extent that is market sensitive
- Former guidance that a 10–15% change is material withdrawn
- The market's expectations for earnings may be set or evidenced by:
  - an entity's earnings guidance
  - for larger entities who don't give guidance and who are covered by sell-side analysts, the earnings forecasts of those analysts
  - for smaller entities who don't give guidance and who are not covered by sell-side analysts, pcp earnings

  It may also be modified by outlook statements and market announcements

Core themes unchanged (cont.)

- A listed entity which has published earnings guidance and which is aware that its actual earnings are likely to differ materially from that guidance not only needs to consider its disclosure obligations under LR 3.1, but also its potential exposure for misleading and deceptive conduct if it fails to update that guidance
- ASX suggests using the accounting 5–10% materiality thresholds for determining whether actual earnings are materially different from guidance
- As a forward looking statement, earnings guidance must have a reasonable basis and should be carefully prepared and vetted, and generally approved by the board, before release
- BUT an entity can't delay an announcement of market sensitive information just because it wants to put out updated earnings guidance in light of that information

Clarification # 1 – “immediately”

- “Promptly and without delay” means acting as quickly as you can in the circumstances (promptly) and not deferring, postponing or putting it off to a later time (without delay)
- Preparing an announcement necessarily takes time and a mere passing of time is not a “delay” for these purposes (although, if you take too long, it will raise issues about whether you are acting “promptly”)
- A relevant factor in assessing whether an entity has acted immediately (ie promptly and without delay) is the need for an announcement to be carefully drawn so that it is accurate, complete and not misleading
- Time starts to run when an officer has, or ought reasonably to have, come into possession of sufficient information to appreciate that the matter is market sensitive
- If the market is not trading, the spirit and intent of LR 3.1 is that disclosure should be made before the market next starts trading

Clarification # 2 – when to use trading halts

- Generally speaking, a trading halt will not be required if an announcement can be put out promptly and without delay
- ASX does not expect an entity to request a trading halt before it has assessed whether particular information is in fact market sensitive and therefore needs to be disclosed under LR 3.1
- In certain cases, ASX expects an entity to act very quickly and, if it can't put out an announcement straight away, to request a trading halt:
  - if info has leaked ahead of an announcement and it is having, or is likely to have, a material effect on market price
  - if ASX has asked for info to be released to correct or prevent a false market
  - if it is "calamitous" news (eg appointment of administrator or receiver)
- A trading halt will also be necessary if an announcement is going to be "delayed" (ie deferred, postponed or put off to a later time)

Clarification # 3 – reasonable person test

- Given the general rule that information which falls within the prescribed categories in LR 3.1A.1 and which meets the confidentiality requirements in LR 3.1A.2 will also satisfy the reasonable person test in LR 3.1A.3, LR 3.1A.3 necessarily has a very narrow field of operation
- LR 3.1A.3 will only be tripped if there is something in the surrounding circumstances sufficient to displace this general rule. Two prime examples:
  - "cherry-picking" disclosures
  - information that needs to be disclosed to prevent an announcement of other information under LR 3.1 from being misleading or deceptive
- Consequently, ASX has withdrawn former example H6 (confidential approach to do a competing transaction to an existing hostile bid) as an example of when the reasonable person test would be triggered

Clarification # 4 – consensus forecasts

- For an entity which does not publish earnings guidance and which is covered by sell-side analysts, those analyst forecasts collectively set or reflect market expectations for the entity's earnings
- There are a number of approaches that an entity may legitimately use to determine market expectations based on analyst forecasts, eg:
  - use consensus (from an information vendor or calculated by the entity itself) as a central measure of analyst forecasts
  - if consensus is being distorted by an obvious outlier, adjust consensus to exclude that outlier
  - not use consensus at all, but simply plot the various analyst forecasts and if all or most of them are clustered within a reasonable range, treat that range as representing the market's view of their likely earnings.

Clarification # 5 – out-dated earnings guidance

In terms of ASX's recommendation that entities use the accounting 5–10% materiality thresholds for determining whether their earnings guidance has become materially inaccurate:

- Smaller listed entities or those that have relatively variable earnings may consider that a materiality threshold of 10% or close to it is appropriate. Very large listed entities or those that normally have very stable or predictable earnings may consider that a materiality threshold that is closer to 5% than to 10% is appropriate.
- This recommendation is purely a suggestion to assist listed entities in determining if and when they should be updating their published earnings guidance. The mere fact that an entity may expect its earnings to differ from its published guidance by more (or less) than a particular percentage will not necessarily mean that its guidance is (or is not) misleading

Clarification # 6 – loss of confidentiality

- Absent a sudden and significant movement in market price that cannot be explained by other events, ASX will generally only regard confidentiality to have been lost in information about a matter that is the subject of a media or analyst report or market rumour where the report or rumour is "reasonably specific and reasonably accurate"
- ASX will have regard to the degree of specificity in the media or analyst report or market rumour in assessing the extent to which there has been a loss of confidentiality:
  - If the report/rumour simply refers to a listed entity being about to enter into a particular transaction with another party without including any of the transaction details, ASX will generally only require the entity to disclose the fact that it is in negotiations, but not the transaction details

Clarification # 6 – loss of confidentiality (cont.)

- If the report/rumour includes some specific and accurate transaction details, ASX will generally expect the entity to confirm those details
- If the report/rumour includes some inaccurate transaction details, the response will depend on the circumstances - in some cases, it may be appropriate to correct those details, while in others it may be enough to indicate that they are inaccurate or that they are still under negotiation

➢ While it is perfectly acceptable for a listed entity to have a policy of not commenting on media speculation or market rumour, that policy must give way if ASX requires the entity to comment on the matter to correct or prevent a false market

Clarification # 7 – monitoring social media

- ASX does not expect a listed entity to be monitoring social media at large for comments or rumours about it
- ASX suggests monitoring in 2 specific scenarios – when a market sensitive announcement is pending or when an entity is close to finalising a market sensitive transaction
- The expected monitoring is limited to investor blogs, chat-sites and other social media the entity *is aware of that regularly include postings about the entity*. Examples include:
  - "shareholder action" blogs
  - for larger listed entities, the investor blogs, chat-sites and other social media sites usually monitored by their investor relations function

Final changes to LR 3.1 – 3.1B

Proceeding with minor amendments consulted upon:

- 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 *immediately* 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"

Other important changes to LR Chapter 3

Proceeding with amendments consulted upon, but in most cases with significant changes to reflect consultation feedback (highlighted below in *red*). These were intended to impose specific disclosure obligations in relation to matters that ASX had previously tried to "jemmy into" LR 3.1. From 1 May 2013, these new rules will require a listed entity to disclose:

- if it deactivates or reactivates a dividend or distribution plan (LR 3.10)
- of the material terms of any employment, service or consultancy agreement it or a related entity enters into with its CEO (or equivalent) or a director or any other person or entity who is a *related party of the CEO or a director*, and of any material variation to such an agreement (LR 3.16.4)

  However, new exception makes it clear that this rule does not require disclosure of:

Other important changes to LR Chapter 3 (cont.)

- *non-executive director fees paid out of a pool of remuneration approved by security holders;*
- *superannuation contributions in relation to such fees;*
- *an increase in director fees approved by security holders*
- *periodic remuneration reviews in accordance with the terms of an employment, service or consultancy agreement*
- *provisions entitling a chief executive officer or director to reimbursement of reasonable out of pocket expenses*
- *provisions requiring the entity to maintain directors and officers liability insurance*

Other important changes to LR Chapter 3 (cont.)

- *provisions (commonly referred to as "access arrangements") allowing a chief executive officer or director access to entity records for a period of time after they cease to be a chief executive officer or director*
- *a bona fide employment, service or consultancy agreement, or any bona fide variation to such an agreement, that it or a related entity has entered into with a relative of its chief executive officer, or a relative of any of its directors, that is on arms' length and ordinary commercial terms*
- *if it is a trust, any agreement or variation entered into by the responsible entity of the trust or a related entity where the costs associated with the agreement are borne by the responsible entity or the related entity from out of its own funds rather than from out of the trust*

Other important changes to LR Chapter 3 (cont.)

- if it is established in Australia, a copy of any document it receives about a substantial holding of securities under Part 6C.2 of the Corps Act (tracing notices) *that reveals materially different information to the most current information (if any) it has received about that substantial holding under Part 6C.1 of the Corps Act* (substantial holder notices) (LR 3.17.2)
- if it is established outside Australia, a copy of a document it receives about a substantial holdings of securities under any overseas law or provisions of its constitution equivalent to:
  - Part 6C.1 of the Corps Act (LR 3.17.3)
  - Part 6C.2 of the Corps Act *that reveals materially different information to the most current information it has received (if any) about that substantial holding under any equivalent to Part 6C.1* (LR 3.17.4)

Other important changes to LR Chapter 3 (cont.)

- *within 2 business days of receipt* of:
  - information about the material terms of any notice it receives under section 249D, 249F, 249N, 252B, 252D or 252L of the Corps Act or under any equivalent overseas law or equivalent provisions in the entity's constitution from a holder or holders of securities calling, or requesting the calling of, or proposing to move a resolution at, a general meeting (LR 3.17A.1)
  - *information that a notice previously notified to ASX under the above rule has been withdrawn by the holder or holders who gave it* (LR 3.17A.2)

noting that an entity can do this by giving either a summary or a copy of the notice and may exclude/redact any defamatory material from the summary/copy

Other important changes to LR Chapter 3 (cont.)

- if it is dual listed, of a copy of any document it gives to an overseas stock exchange *that meets the following requirements:*
  - *it is given to that overseas stock exchange in its capacity as an entity listed on that exchange;*
  - *it is, or will be, made public by the overseas stock exchange;*
  - *it includes accounts or other similar financial information; and*
  - *it is not materially the same as another document that the entity has already given to ASX* (LR 3.17B)
- 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 (LR 3.17C)
- if it decides to pay a dividend or distribution or makes a decision that a dividend or distribution will not be paid (LR 3.21)

Other minor LR changes

Proceeding with all but one (LR 15.3) of the other minor LR amendments consulted upon, *plus the following*:

- *new Appendix 1A, 1B and 1C application forms and listing agreements, supplemented by new online information forms and checklists*
- *relocating requirements for information memoranda and supplementary information memoranda currently in Appendix 1A into LR 1.4 and 1.5*
- *correcting a definitional error in the reference to "associate" in the note to LR 14.11 (voting exclusion statements)*
- *making some other minor drafting corrections or clarifications to LR 1.1 Condition 3, LR 1.11 Condition 1, LR 4.2B and LR 4.3B*
- *updating Appendix 5B quarterly report to cover oil and gas exploration entities, as well as mining exploration entities*

Other Guidance Note changes: GN 1

- Guidance Note 1 *Applying for Admission – ASX Listings* amended to:
  - conform to GN 8, particularly the commentary about the person appointed under LR 1.1 condition 12 / LR 12.6 to be responsible for communications with ASX
  - reflect the changes to the Appendix 1A application form and listing agreement and the new online information form and checklist
  - incorporate the amendments late last year to the minimum spread requirements in LR 1.1 condition 7 and the "assets" test in LR 1.3.1
  - clarify ASX's documentary requirements for satisfying the "good fame and character" requirement in LR 1.1 condition 17 …

Other Guidance Note changes: GN 1 (cont.)

- give more detailed guidance on the “profit test” in LR 1.2 and the “assets test” in LR 1.3
- note that in certain cases ASX may require the disclosure of additional information under LR 1.17 about the qualifications and experience of the auditor of an entity applying for admission to the official list as an ASX listing and of the accountants and auditors who prepared, audited or reviewed financial documents provided as part of the admission process (eg to verify compliance with profit test or assets test)
- include guidance about a new fast track process ASX has implemented for pathfinder prospectuses

Other Guidance Note changes: GN 4

Guidance Note 4 *Foreign Entities Listing on ASX* amended to:

- conform to GN 8, particularly the commentary about the person appointed under LR 1.1 condition 12 / LR 12.6 to be responsible for communications with ASX
- reflect the changes to the Appendix 1A and 1C application forms and listing agreements and the related new online information forms and checklists
- incorporate the amendments late last year to the minimum spread requirements in LR 1.1 condition 7 and the reporting requirements for mining and oil & gas entities in LR Chapter 5
- incorporate other disclosure-related listing rule changes (eg LR 3.17.3, 3.17.4, 3.17A, 3.17B and 3.17C) …

Other Guidance Note changes: GN 4 (cont.)

- include guidance on certain disclosures that ASX will generally want to see in the listing prospectus or product disclosure statement of a foreign entity:
  - place of incorporation
  - a statement that:
    "As [*name of entity*] is not established in Australia, its general corporate activities (apart from any offering of securities in Australia) are not regulated by the Corporations Act 2001 of the Commonwealth of Australia or by the Australian Securities and Investments Commission but instead are regulated by [*insert name of governing legislation*] and [*insert name of corporate regulator administering that legislation*]."
  - a concise summary of the rights and obligations of security holders under the law of its home jurisdiction, including how the disclosure of substantial holdings and takeovers are regulated

Other Guidance Note changes: GN 12

Guidance Note 12 *Significant Changes to Activities* amended to:

- conform to changes to GN 1, 4, 8 and 16
- incorporate the amendments late last year to the minimum spread requirements in LR 1.1 condition 7
- include some further guidance around the "20 cent rule"

VERY IMPORTANT for all listed entities and their advisers to familiarise themselves with this Guidance Note – after LR 3.1, LR 11.1 (significant changes to nature or scale of activities) and 11.2 (disposal of main undertaking) generally cause the most issues for listed entities!

Other Guidance Note changes: GN 16

Guidance Note 16 *Trading Halts and Voluntary Suspensions* amended to:

- conform to the guidance in GN 8 on trading halts and voluntary suspensions
- repeat guidance in GN 8 for dual listed entities and the need for them to co-ordinate halts and suspensions across exchanges
- include guidance on "regulatory halts" (a new type of trading halt under the ASIC Market Integrity Rules, where there is a pause to trading and then an auction to re-set the market if the market has moved, or but for the application of anomalous order thresholds would have moved, into the "extreme trade range")

VERY IMPORTANT for all listed entities and their advisers to familiarise themselves with this Guidance Note, given the important role of trading halts and voluntary suspensions in managing continuous disclosure issues!

Other Guidance Note changes: GN 17

Guidance Note 17 *Waivers and In-Principle Advice* amended to:

- differentiate between “standard” and “non-standard” waiver requests
- implement a faster, more streamlined process for handling standard waiver requests (10 business days vs 20 business days)
- include 3 page list of standard waivers in annexure