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Practice Group(s):

*Energy, Infrastructure
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Continuous Disclosure – What to Say and When?

By Adam Levine and Su Sze Ting

Key Points

- Continuous disclosure is one of the key elements of ensuring market integrity. With the recent amendments to the Listing Rules and the introduction by the Australian Securities Exchange (ASX) of a new Guidance Note, continuous disclosure is once again attracting considerable attention, especially from regulators.
- The final version of ASX Listing Rules Guidance Note 8 came into effect on 1 May 2013.
- Guidance Note 8 provides listed companies with more guidance on the term "immediately", the use of trading halts, the "reasonable person" test and rumour monitoring.

ASX Guidance Note 8 on Continuous Disclosure

In our 25 October 2012 alert "*New draft ASX Listing Rule Guidance Note on continuous disclosure*", we discussed the key changes to ASX's approach to disclosure issues in the draft Guidance Note 8 released by ASX on 17 October 2012, including:

- guidance on the test for determining the materiality of information
- clarification that the meaning of "immediately" does not mean "instantaneously" but rather "promptly and without delay"
- the use of trading halts to manage disclosure issues
- practical hints to manage the need to disclose immediately
- application of the carve-outs to disclosure in Listing Rule 3.1A, including the "reasonable person" test in relation to confidential information
- guidance on what constitutes a false market.

Although the final Guidance Note 8 is not materially different from the draft version, ASX has clarified a number of important issues detailed below.

What does "immediately" mean?

ASX has clarified that "promptly and without delay" means:

- disclosing as quickly as you can in the circumstances (acting promptly)
- not postponing disclosure to a later time (acting without delay).

ASX recognises that preparing an announcement takes time. The mere passing of time does not itself amount to a "delay". However, if you take too long, you may not be acting promptly. ASX will also

take into account the need for an announcement to be carefully drawn so that it is accurate, complete and not misleading.

When to use trading halts?

A company should request a trading halt if it realises immediate disclosure is required but is unable to release an announcement promptly and without delay.

ASX expects a company to request a trading halt in any of the following circumstances:

- where the information has leaked before an announcement and it is having (or is likely to have) a material effect on share price
- if ASX asks the company to release information to correct or prevent a false market
- the information is "disastrous" (e.g. an administrator or receiver is appointed)
- where an announcement is going to be delayed and the market is trading during any part of the delay.

If a company requires a CEO or Chairperson to approve a request for a trading halt, the approval process must be able to be activated "within a matter of minutes".

A company should request a voluntary suspension where a disclosure issue cannot be resolved within two trading days.

When does the "reasonable person" test operate?

ASX makes it clear that the reasonable person test has a "very narrow field of operation". There are two examples given by ASX where a company would be expected to disclose information under the "reasonable person" test:

- to prevent an entity from "cherry-picking" disclosures (i.e. only disclosing "good" information)
- where the information needs to be disclosed to prevent an announcement of other information under Listing Rule 3.1 from being misleading or deceptive.

ASX also does not generally require disclosure of confidential approaches to enter into a takeover or other control transaction, as a reasonable person would not expect this information to be disclosed.

Earnings guidance and surprises!

If a company becomes aware that its earnings for the current reporting period will be materially different from market expectations, it must consider immediate disclosure.

There are a number of ways to determine what the market's expectations are for a company's earnings for the current reporting period, including:

- earnings guidance by the company
- if a company has no published earnings guidance, the earnings forecasts of sell-side analysts who cover the company
- if a company has no published earnings guidance and is not covered by sell-side analysts, its earnings for the prior corresponding period.

Published earnings guidance may become outdated (and may need to be updated) where a sudden and unexpected event that will have a material impact on the company's earnings occurs.

Monitoring market rumours and social media

ASX strongly encourages a company to monitor rumours in investor blogs, bulletin boards, chat-sites, Facebook, Twitter and other social media sites where:

- a market sensitive announcement is pending
- a company is close to finalising a market sensitive transaction.

ASX only expects monitoring of investor blogs, chat sites and other social media that the company knows contain regular postings about the company.

ASX will only regard the confidentiality of a matter to have been lost because it is the subject of a media report, analyst report or market rumour, where the report is "reasonably specific and reasonably accurate". The scope of an entity's response to media speculation will depend of the degree of specificity of the rumour and the extent to which confidentiality has been lost.

Practical guidance from ASIC

ASIC has given the following practical tips to assist with managing a company's continuous disclosure obligations:

- Ensure your company has adequate systems to deal with events which trigger your continuous disclosure obligations including:
 - delegations with authority to speak on behalf of the company and liaise with ASX
 - a written rapid response plan that all board members, their advisers and senior staff know
 - a plan for when to lodge a trading halt and have a template "Request for trading halt" letter ready for use
 - a draft announcement for an event which is likely to require an announcement if details of the event are "leaked"
 - written guidelines for what is "material" information for your company.
- Do not assume the reader is sophisticated and able to read between the lines. You must highlight key information and tell it as it is.
- Be careful about headings for an announcement. Try to capture the substance of the message as headings are often what will get reported in the media.
- Be consistent in applying the listing rule requirements, whether it is good or bad news.
- If an announcement is provided, the market may need to be updated to ensure that it is informed of all material information.

Further Information

If you would like more information about the changes to the continuous disclosure obligations or if you have any queries about how these changes will affect you, please contact us for more information.

Authors:

Adam Levine

adam.levine@klgates.com

+61.8.9216.0965

Su Sze Ting

susze.ting@klgates.com

+61.8.9216.0905

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