

# Continuous disclosure requirements

## *Board performance*

A listed company has an obligation to continuously disclose information which may have an effect on its market price or value. Continuous disclosure is based on the principle that all investors should have equal and timely access to information about a company. Timely disclosure of information helps to protect the investor and the reputation of the market.

The ASX Listing Rule 3.1 Immediate notice of material information provides:

*“Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity’s securities, the entity must immediately tell ASX that information.”*

The language of the obligation under Listing Rule 3.1 is similar to s 674 of the *Corporations Act 2001* which imposes statutory liability for breaches of the listing rules where the information which could affect market prices is not generally available. This is one of the most important of the ASX Listing Rules. Directors must be very familiar with this and the ASX Guidance Note related to continuous disclosure.

There is a balance required of directors not acting too hastily, leading to possible mistakes in an announcement (*James Hardie* (2012) HCA 17), against the need to disclose information immediately.

### Why is continuous disclosure so important?

Directors can be personally liable for a company’s failure to observe continuous disclosure requirements. Class actions for breach of continuous disclosure obligations have become a common method of seeking redress from companies and directors where a company has failed or suffered substantial declines in its share price. There have been a number of very substantial class action settlements involving continuous disclosure obligations with the largest thus far being the Centro case settlement for \$200 million in June 2012.

### ASX guidance on disclosure

All directors of listed companies must pay close attention to two particular documents released by ASX:

- The new version of Attachment A - ASX Listing Rules, Guidance Note 8 (Final version), *Continuous Disclosure: Listing Rules 3.1 – 3.1B* (17 August 2015); and
- A shorter guide entitled *Continuous Disclosure: An Abridged Guide*.

There are currently no draft revisions to *Guidance Note 8 Continuous Disclosure*. The latest version, issued on 17 August 2015, consisted of only minor alterations after relatively extensive changes were incorporated into the 1 July 2015 revision. These changes were prompted by ASX’s concern that entities and their advisers were misinterpreting elements of GN 8, the Federal Court decision in *ASIC v Newcrest Mining Limited* [2014] FCA 698 and the ASIC’s release of REP 393.

Some of the more important points to take note of in Guidance Note 8 include:

### Meaning of 'immediately'

Entities are required to tell the market about information 'immediately'. The word 'immediately' should be read as meaning 'promptly and without delay' rather than 'instantaneously'. The speed with which a notice can be given will vary depending on the circumstances.

Relevant factors may include:

- Where and when the information originated
- The forewarning (if any) the entity had of the information
- The amount and complexity of the information concerned
- The need in some cases to verify the accuracy or bona fides of the information
- The need in some cases to comply with specific legal or Listing Rule requirements
- The need for an announcement to be carefully drawn so that it is accurate, complete and not misleading the need in some cases to comply with specific legal or Listing Rule requirements
- The need in some cases for an announcement to be approved by the entity's board or disclosure committee

### Earnings guidance

Where an entity has published specific earnings guidance and it expects its earnings to differ materially from that guidance, ASX recommends that the entity apply the guidance on materiality in Australian Accounting and International Financial Reporting Standards that:

- (a) an expected variation in earnings compared to its published earnings guidance equal to or greater than 10 per cent should be presumed to be material and therefore ought to be disclosed; but
- (b) an expected variation in earnings compared to its published earnings guidance equal to or less than 5 per cent should be presumed not to be material and therefore need not be disclosed, unless there is evidence or convincing argument to the contrary.

Where the variation is between 5 per cent and 10 per cent, the entity needs to form a judgement as to whether or not it is material.

### Trading Halt

An entity needs to consider a trading halt when it becomes aware of market sensitive information outside of trading hours or where it is not in a position to release the information.

If an entity tells ASX that it needs a trading halt to give it time to make an announcement about information that it considers to be market sensitive, ASX will usually err on the side of caution and grant the trading halt.

### Board Approval

There will sometimes be significant disclosure announcements which will require board approval. There should be arrangements in place to allow this to happen 'immediately' – for example, a disclosure committee that can meet quickly by telephone or on short notice. Where a board decision itself is the information to be disclosed (for example special dividend), the obligation to disclose will generally not arise until the board has made the decision.

Where information relates to a market sensitive event which has already occurred, the meeting to consider the announcement must be convened and the board must approve the announcement without delay. Consideration of the announcement cannot be delayed to a previously scheduled regular board meeting or to a meeting to be convened at a future date. If there could be a delay, consideration should be given to requesting a trading halt.

### What systems should be in place?

In a speech on 18 March 2015, Mr John Price, ASIC Commissioner, outlined some practical suggestions on what systems companies should have in place to allow them to identify and respond to events that may trigger their continuous disclosure obligations as and when they fall due, saying:

*“At a practical level, some of the steps an entity can take to minimise risk in this area include the following:*

- *Have delegations in place for who has authority to speak on behalf of the entity – whether in response to an ASX ‘price query’ or ‘aware’ letter, or when the entity becomes aware of information that needs to be released to the market.*
- *Have a written ‘rapid response’ plan and make sure all board members, their advisers and senior staff are fully apprised of its contents. This plan and the systems that fall within it need to be subject to periodic review and stress testing to ensure effectiveness.*
- *Have a plan for when an entity will consider a trading halt is appropriate and have a template ‘request for trading halt’ letter ready for use at all times.*
- *Make it a practice to prepare a draft announcement where there is prior notice of an event that is likely to require an announcement to be made.*
- *Monitor the market and the information it is trading on. The entity should monitor significant media outlets, including any relevant social media, for leaks or rumours that may require correction.”*

### When do continuous disclosure requirements not apply?

ASX Listing Rule 3.1A states that the continuous disclosure requirements in Listing Rule 3.1 do not apply to particular information while each of the following is satisfied:

- One or more of the following five situations applies:
  - It would be breach of law to disclose the information;
  - The information concerns an incomplete proposal or negotiation;
  - The information comprises matters of supposition or is insufficiently definite to warrant disclosure;
  - The information is generated for the internal management purposes of the entity; or
  - The information is a trade secret; and
- The information is confidential and ASX has not formed the view that the information has ceased to be confidential; and
- A reasonable person would not expect the information to be disclosed.

### What policies need to be formulated by a company?

The ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations 3e* (2014) states in Recommendation 5.1 that "a listed entity should have a written policy for complying with its continuous disclosure obligations under the Listing Rules".

*“The disclosure policy should address:*

- *The roles and responsibilities of directors, officers and employees in complying with the entity’s disclosure obligations;*
- *Safeguarding confidentiality of corporate information to avoid premature disclosure;*
- *Media contact and comment;*
- *External communications such as analyst briefings and responses to security holder questions; and*
- *Measures for responding to or avoiding the emergence of a false market in the entity’s securities.”*

A summary of the company's disclosure policy should be publicly available.

### What information should be disclosed?

ASX Listing Rule 3.1 states that information such as the following (not exhaustive) could be market sensitive and therefore would require disclosure if material:

1. A transaction that will lead to a significant change in the nature or scale of the entity's activities;
2. A material acquisition or disposal;
3. The granting or withdrawal of a material licence;
4. The entry into, variation or termination of a material agreement;
5. A change in the entity's financial forecast or expectation, or the fact that the entity's earnings will be markedly different from market expectations;
6. A change in the control of the responsible entity of a trust;
7. A proposed change in the general character or nature of a trust;
8. An agreement between the entity (or a related party or subsidiary) and a director (or a related party of the director);
9. A change in accounting policy adopted by the entity;
10. Becoming a plaintiff or defendant in a material law suit;
11. The commission of an event of default under, or other event entitling a financier to terminate, a material financing facility;
12. The appointment of a receiver, manager, liquidator or administrator in respect of any loan, trade credit, trade debt, borrowing or securities held by it or any of its child entities;
13. A transaction for which the consideration payable or receivable is a significant proportion of the written down value of the entity's consolidated assets – normally an amount of 5 per cent or more would be significant but a smaller amount may be significant in a particular case;
14. A recommendation or declaration of a dividend or distribution;
15. A recommendation or decision that a dividend or distribution will not be declared;
16. Under subscriptions or over subscriptions to an issue;
17. A copy of a document containing market sensitive information that the entity lodges with an overseas stock exchange or other regulator which is available to the public;
18. Information about the beneficial ownership of securities obtained under Part 6C.2 of the *Corporations Act 2001*;
19. Giving or receiving a notice of intention to make a takeover;
20. Any rating applied by a rating agency to an entity, or securities of an entity, and any change to such a rating;
21. A proposal to change the entity's auditor.

The ASX may also ask a company for clarification if the market seems to be moving as a result of media speculation, to prevent or correct a false market.

Information is sent to the ASX Company Announcement Platform by the company. It cannot be submitted by a director, shareholder or other party.

Note that in addition to the continuous disclosure requirements, companies also have obligations to report annual and half yearly financial statements under periodic disclosure obligations (Chapter 4 of the *ASX Listing Rules*).

### What is the situation for unlisted disclosing entities?

Unlisted disclosing entities are entities which have ED securities but none of them are quoted on a stock exchange. This means that the entity is not bound by Listing Rules. However, unlisted disclosing entities must similarly disclose to ASIC (not the ASX) information not generally available that a reasonable person would expect to have a material effect on the price or value of its securities (*Corporations Act 2001* s 675).

### What are the consequences of failing to comply?

Failure to comply with the continuous disclosure requirements is an offence under s 674 of the *Corporations Act 2001* and can create a civil or criminal liability. Directors may also contravene their duty of care and diligence under s 180(1) of that Act by not complying with continuous disclosure obligations.

*“Failure to comply with the continuous disclosure requirements is an offence ... and can create a civil or criminal liability.”*

### What are the consequences of false or misleading disclosures?

Not only must the disclosure of information be timely, it must also be accurate and not misleading. For example, a director who gives, or authorises or permits the giving of, materially false or misleading information to the ASX without taking reasonable steps to ensure that the information was not false or misleading breaches s 1309(2) of the *Corporations Act 2001* with a possible penalty of imprisonment for two years. Section 1041H provides that a person must not engage in conduct, in relation to a financial product or financial service, that is misleading or deceptive or is likely to mislead or deceive. Where an entity breaches these kinds of provisions, the directors may be liable for a breach of their duty of care and diligence under s 180(1) of the *Corporations Act 2001* (High Court decisions in the James Hardie case *ASIC v Hellicar* (2012) HCA 17 and *Forrest v ASIC* (2012) HCA 39).

In *Forrest v ASIC* (2012) HCA 39, it was argued that the directors breached s 1041H in making certain announcements about a 'binding' agreement to the market. The High Court held that there had been no breach, indicating that it will consider how the intended audience will understand the announcement. In this case, the intended audience of the commercial and business community would have understood that the announcement concerned a statement of the parties' intention of agreements being binding rather than a statement as to whether a court would consider the agreements binding.

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