

ASX issues draft revised guidance note on continuous disclosure

The Australian Securities Exchange (ASX) issued a draft version of revised *Guidance Note 8: Continuous Disclosure* on 17 October 2012, and is seeking market feedback by the end of November 2012.

Whilst the proposed revisions do offer additional and helpful guidance in some respects, they do not reflect a fundamental departure from the way in which ASX has historically administered the continuous disclosure regime. To this end, ASX has not proposed major drafting changes to Listing Rule 3.1.

ASX developed the draft Guidance Note in conjunction with the Australian Securities & Investments Commission (ASIC), and ASIC is in broad agreement with its themes and content.

Whilst ASX's proposals do not represent a fundamental regime-change, they do offer useful clarificatory guidance in certain **topical areas**. These areas include:

- **The meaning of "immediately":** the draft Guidance Note clarifies that "immediately" does not mean "instantaneously" but rather "promptly and without delay". It also sets out the factors that ASX will take into account when assessing if a listed entity has disclosed information promptly and without delay.

These include the origin of the information; the amount of prior notice the entity has had; the

complexity and certainty of the information; and whether there is a need for board approval of the announcement.

- **The use of trading halts to manage disclosure issues:** ASX considers trading halts to be an important tool that listed entities can use to manage their continuous disclosure obligations.

The draft Guidance Note explains how trading halts can be used in this regard and confirms ASX's existing practice that ASX will invariably grant a trading halt to an entity that tells ASX that it needs time to prepare and issue

Consultation

- ASX is seeking feedback on the proposals by 30 November 2012, with a view to issuing the guidance note in final form on or around 1 January 2013.
- If you would like further information or assistance in order to submit feedback on these proposals, please contact any of the Clifford Chance advisers listed on this briefing
- You can access the draft guidance note from the ASX website: www.asx.com.au.

a market sensitive announcement, where ASX is reasonably satisfied that the matter is of a character that is likely to be market sensitive.

- **Takeover approaches:** recently, there have been assertions in the press that a board must publicly disclose a non-binding and incomplete takeover proposal it receives.

ASX has not adopted this approach. ASX has reaffirmed its view that "incomplete" negotiations or proposals may not need to be disclosed provided they satisfy the

exemptions to disclosure (these “hurdles” will remain largely unchanged).

To this end, ASX confirms that negotiations are “incomplete” unless and until they result in a legally binding agreement or the entity is otherwise committed to proceeding with the transaction being negotiated – and generally this will be when a binding contract is signed.

- **Updating earnings guidance:** the draft Guidance Note gives substantially more guidance on how to deal with “earnings surprises”. It also briefly addresses exploration and production targets (these will be addressed in further detail in a proposed new Guidance Note 31 Reporting on Mining Activities).

ASX is also proposing to withdraw aspects of its current guidance on earnings surprises, such as its view that a variation of 10-15% against earnings guidance ought to be disclosed. Instead, ASX is proposing that if an entity has published earnings guidance and it expects its earnings to vary by 5-10% against that published guidance, that fact ought to be disclosed and revised earnings guidance given.

However, if an entity has not published any earnings guidance, the entity will need to consider the underlying continuous disclosure question as to whether a reasonable person would expect the new information to have a material effect on the price or value of the entity’s securities.

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