



# **Review of ASX Listing Rules Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B***

**ASX Public Consultation**

**17 October 2012**

## Introduction

1. ASX is proposing to issue a revised version of Listing Rules Guidance Note 8 to assist listed entities to understand and comply with their disclosure obligations under Listing Rules 3.1 – 3.1B. These rules are among the most important provisions in the ASX Listing Rules. Compliance with them is critical to the integrity and efficiency of the ASX market, and other markets that trade in ASX quoted securities or derivatives of those securities.
2. In conjunction with the release of the revised Guidance Note, ASX is proposing to amend Listing Rules 3.1 – 3.1B in some minor respects<sup>1</sup> so that they will read as follows:
  - 3.1 *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.*
    - 3.1A *Listing rule 3.1 does not apply to particular information while each of the following requirements is satisfied in relation to the information:*
      - 3.1A.1 *One or more of the following applies:*
        - *It would be a breach of a 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*
      - 3.1A.2 *The information is confidential and ASX has not formed the view that the information has ceased to be confidential; and*
      - 3.1A.3 *A reasonable person would not expect the information to be disclosed.*
    - 3.1B *If ASX considers that there is or is likely to be a false market in an entity's securities, and asks the entity to give it information to correct or prevent a false market, the entity must give ASX the information it asks for.*

ASX is also proposing to make some other amendments to disclosure-related provisions in the Listing Rules to improve their operation, to reflect the change in name of the Companies Announcements Platform to the Market Announcements Platform, and to correct various minor drafting errors. A number of these changes are directed to imposing specific disclosure obligations in relation to information (such as the declaration or non-declaration of dividends, actions under dividend reinvestment plans, information about employment or consultancy agreements with CEOs, directors or other related parties, and the like) that ASX believes ought to be disclosed to the market in all cases, whereas presently that information is only required to be disclosed under Listing Rule 3.1 if a reasonable person would expect it to have a material effect on the price or value of an entity's securities.

3. ASX is also proposing to issue a shorter guide entitled *Continuous Disclosure: An Abridged Guide*. This is in recognition of the fact that the revised version of Guidance Note 8 is a lengthy and detailed document. This reflects the call from many quarters for more comprehensive guidance and more worked examples to assist listed entities to understand and comply with their disclosure obligations, as well as the many varied and nuanced issues it needs to address. Some of the materials in the Guidance Note (particularly those in the footnotes) are targeted at legal and other professional advisers and are intended to assist them in understanding ASX's approaches on some of the more technical issues that can arise in this context. The Abridged Guide, on the other hand, is much shorter and targeted specifically at directors and other officers of listed entities.

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<sup>1</sup> The primary amendment proposed is one made at ASIC's suggestion – namely, to reverse the order of the exceptions in Listing Rule 3.1A, so as to de-emphasise the "reasonable person" test and convey the fact that this is a last order, rather than a first order, requirement for information not to be immediately disclosed.

## The reasons for this consultation

4. ASIC Report 222 *Market Assessment Report: ASX Group* released on 30 November 2010 recorded an agreement between ASIC and ASX that:

“ASX Group has agreed to establish an ASX–ASIC working group for the purposes of advancing joint initiatives on better disclosure for investors, with a particular focus on reviewing ASX Guidance Note 8 to ensure it remains current in light of recent market conditions and disclosure practices.”
5. This agreement reflected a number of considerations. Listing Rules Guidance Note 8 was last updated in June 2005. Since that time, equity markets around the world have been tested by the fall-out from the global financial crisis and some of the disclosure issues that emerged during that period. The courts have also ruled on various aspects of continuous disclosure laws in the *Fortescue Metals* and *James Hardie* matters, and ASIC has provided further direction on the operation of these laws through its enforcement activities, including in the various infringement notices it has issued. In addition, the day-to-day interactions between ASX and ASIC on the one hand and listed entities and their advisers on the other have highlighted some aspects of the continuous disclosure requirements that do not appear to be fully appreciated in some quarters and that merit ASX giving more detailed guidance on those requirements.
6. This public consultation is the culmination of many months work by ASX in furtherance of this agreed action. ASX has conducted a major internal review of the current Guidance Note 8 on continuous disclosure, which included preliminary discussions with a number of listed entities, their officers and legal advisers, and various professional bodies on aspects of the continuous disclosure rules that would benefit from updated guidance from ASX. There have also been extensive and ongoing discussions between ASIC and ASX on that point and generally in relation to continuous disclosure matters. As a result of the views elicited from these discussions, ASX is proposing to release a new version of Guidance Note 8 that has been completely re-written from the ground up, and to make a number of consequential changes to the ASX Listing Rules.
7. ASX and ASIC share the responsibility for regulating the continuous disclosure framework that applies to ASX listed entities and have worked together closely and co-operatively to develop the revised version of Guidance Note 8. The revised Guidance Note has benefited from detailed input from ASIC across a number of drafts. ASIC is in broad agreement with the thrust and contents of the revised Guidance Note being released for consultation. ASIC also supports consultation on the changes to the Listing Rules that ASX is proposing.
8. The purpose of this consultation is to seek feedback on the proposed new version of Guidance Note 8 and Listing Rule changes for ASX to consider and discuss with ASIC before ASX finalises the Guidance Note and Listing Rule changes.

## This consultation

9. ASX is inviting comment from listed entities, their advisers and other stakeholders on:
  - the proposed new version of Guidance Note 8: *Continuous Disclosure: Listing Rules 3.1- 3.1B*;
  - the document entitled *Continuous Disclosure: An Abridged Guide*; and
  - the proposed Listing Rule changes outlined in the document entitled *Proposed Disclosure Related Amendments to the ASX Listing Rules*,issued in conjunction with this consultation paper.
10. ASX is particularly interested to hear whether there are any issues that listed entities or other stakeholders consider would merit further guidance from ASX that are not currently addressed, or not addressed in sufficient detail, in the revised version of Guidance Note 8.
11. ASX is also particularly interested to hear whether listed entities or other stakeholders believe that the Abridged Guide is helpful and whether there are any other issues it should address or address in greater detail (bearing in mind that the purpose of the Abridged Guide is to summarise the key issues relevant to directors and other officers and not to replicate the more detailed guidance in Guidance Note 8).

12. If you wish to provide comments, please do so by Friday 30 November 2012 to the following email address: [mavis.tan@asx.com.au](mailto:mavis.tan@asx.com.au).
13. ASX is proposing to make the submissions it receives in response to this consultation paper publicly available on its website unless a respondent clearly indicates that they wish their submission to remain confidential.
14. ASX will be reviewing the feedback received from this consultation internally and with ASIC to determine whether it is appropriate to amend the proposed new version of Guidance Note 8, the Abridged Guide and the proposed Listing Rule changes, before they are published in final form.
15. Subject to receiving the necessary Ministerial approval for the proposed Listing Rule changes under section 793E of the Corporations Act, on current timings, ASX hopes to introduce those Listing Rule changes and to release the final version of Guidance Note 8 and the Abridged Guide in the first quarter of 2013.

## Main Guidance Note changes

16. The revised Guidance Note provides substantially more detailed guidance in a number of areas. These include:
  - **The test for determining the materiality of information:** the revised Guidance Note explains how ASX interprets and applies the test in section 677 of the Corporations Act when determining whether or not information is “market sensitive”<sup>2</sup> for the purposes of the Listing Rules.
  - **The meaning of “immediately”:** the revised 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.
  - **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 revised 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 which tells ASX that it needs time to prepare and issue a market sensitive announcement, where ASX is reasonably satisfied that the matter is of a character that is likely to be market sensitive.
  - **Practical hints to manage the need to disclose immediately:** the revised Guidance Note includes a section with a list of steps that listed entities can take to help manage their disclosure obligations under Listing Rule 3.1.
  - **Headings and contents of announcements:** the revised Guidance Note has more guidance on what should be included in announcements under Listing Rule 3.1.
  - **Application of the carve-outs to disclosure in LR 3.1A:** the revised Guidance Note gives substantially more guidance on the requirements that need to be satisfied to attract the exception from immediate disclosure in Listing Rule 3.1A. This includes, in particular, more detailed guidance on incomplete proposals and negotiations, the requirement for confidentiality, and the “reasonable person” test currently in Listing Rule 3.1A.1 but proposed to be moved to Listing Rule 3.1A.3.
  - **False markets:** the revised Guidance Note clarifies what constitutes a false market for the purposes of Listing Rule 3.1B and outlines how ASX deals with specific situations where that rule is commonly invoked (eg where there is comment or speculation in a media or analyst report or a market rumour about a material matter involving a listed entity).
  - **Specific disclosure issues:** the revised 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 enforcement practices:** a new section has been added to the revised Guidance Note to explain how ASX monitors and enforces compliance with Listing Rule 3.1. This includes an explanation of the role of “price query letters” and “aware letters”.

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<sup>2</sup> “Market sensitive” is the short hand description ASX uses in the revised Guidance Note to refer to information that a reasonable person would expect to have a material effect on the price or value of a listed entity’s securities.

- **Annexure A:** this has been expanded to include more, and more detailed, examples illustrating the application of the principles in the Guidance Note.
- **Annexure B:** this is a new annexure intended to give greater guidance around the linkages between Listing Rule 3.1 and the Corporations Act. This includes not only the continuous disclosure provisions in section 674, but also the statutory prohibitions against false or misleading disclosures (sections 1041E, 1041F, 1041H and 1309) and the statutory duty to exercise reasonable care and diligence (sections 180(1) and 601FD(1)(b)).
- **Annexure C:** this is a new annexure intended to give greater guidance around the compliance policies and procedures that listed entities should be implementing to comply with their obligations under Listing Rule 3.1 and section 674.

17. There are 3 material pieces of guidance in the current Guidance Note and in the notes to Listing Rule 3.1 that are proposed to be withdrawn by ASX. These are:

- the statement in paragraph 31 of the current Guidance Note that:

“A reasonable person would not expect information to be disclosed if the result would be unreasonably prejudicial to the entity.”

ASX considers that this statement no longer reflects the expectations of regulators or the market. It has also been misconstrued by some as meaning that listed entities in financial difficulties do not have to disclose materially negative information. That construction is not correct. ASX is therefore withdrawing this guidance and replacing it with more detailed guidance on how the “reasonable person” test is intended to operate and a new section dealing specifically with entities in financial difficulties.

- the following example in the notes to Listing Rule 3.1 of the type of information that may have to be disclosed under that rule:

“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% or more would be significant, but a smaller amount may be significant in a particular case.”

This guidance will not necessarily be correct in all cases. An acquisition involving expenditure of 5% or more of the written down value of the entity’s consolidated assets may or may not be market sensitive, depending on the market’s assessment of the impact of the acquisition on the entity’s forward earnings.

- the guidance in paragraph 93 of the current Guidance Note that a variation of 10-15% against earnings guidance or, if the entity has not issued earnings guidance, against consensus forecasts or the results of the prior corresponding period, ought to be disclosed under Listing Rule 3.1.

Again, this guidance will not necessarily be correct in all cases. A variation in earnings of 10-15% for the current period may or may not be market sensitive, depending on the market’s assessment of the impact of the variation on the entity’s forward earnings.

ASX is proposing instead to suggest 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. This is primarily because the initial guidance will have become misleading by a material amount and therefore should be corrected.

However, if an entity has not published any earnings guidance, ASX is not proposing to suggest any percentage threshold for the disclosure of an expected earnings variation against consensus forecasts or the results of the prior corresponding period. This is because these matters need to be considered on a case by case basis and any percentage figure ASX suggests inevitably will not be correct for all cases.<sup>3</sup>

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<sup>3</sup> Using a percentage benchmark is particularly inappropriate when applied to a consensus estimate or the result for a prior corresponding period that is a low amount, meaning that the percentage variation is also a correspondingly low amount in absolute terms.

## Proposed Listing Rule changes

18. To accompany the new Guidance Note, a number of minor Listing Rule changes are proposed, including:
- Amending Listing Rule 1.10.1 to make it clear that Listing Rules 3.1A and 3.1B also apply to Debt Listings.
  - 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 so as to de-emphasise the “reasonable person” test and convey the fact 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 give ASX the information it “asks for”, rather than the information that is “necessary”, to correct or prevent a false market in its securities.
  - Adding specific disclosure requirements in Chapter 3 for a listed entity to notify ASX:
    - if it deactivates or reactivates a dividend or distribution plan;
    - of the material terms of any employment, service or consultancy agreement it enters into with its chief executive officer (or equivalent) or a director or any other person or entity who is a related party of the entity, and also of any variation to such an agreement;
    - of notices received from security holders calling, or requesting the calling of, or proposing to move a resolution at, a general meeting;
    - of information about the ownership or control of securities obtained under Part 6C.2 of the Corporations Act or under any equivalent overseas law or equivalent provisions in the entity’s constitution;
    - 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; or
    - if it declares a dividend or distribution or makes a decision that a dividend or distribution will not be declared,

and to provide a copy to ASX of any document it gives to an overseas stock exchange that is to be made public. This will apply in each case regardless of any impact that the information may have on the price or value of the entity’s securities (currently this information is only disclosable under Listing Rule 3.1 where it has a material effect on the price or value of an entity’s securities).
  - Correcting a drafting oversight in Listing Rule 4.5.2 to make it clear that the annual accounts of a listed company established outside Australia have to be audited.
  - Linking the requirement in Listing Rule 4.10.17 for a review of operations and activities in a listed entity’s annual report to sections 299 and 299A of the Corporations Act or, in the case of an entity established outside Australia, to any equivalent provisions in the law of its home jurisdiction.
  - Amending the definition of “aware” in Listing Rule 19.12 to change the out-dated references to “executive officer” to “officer”.
  - Adding a definition of “information” into Listing Rule 19.12 that mirrors the definition in s1042A of the Corporations Act (which defines the term for the purposes of the insider trading provisions in that Act).

Some minor Listing Rule changes are also proposed to replace the references to the *Companies Announcements Platform* with its new name of the *Market Announcements Platform* and to correct some drafting errors in other disclosure-related rules.

Further details about the rule changes are provided in the attached document headed “*Proposed Disclosure Related Amendments to the ASX Listing Rules*”.

19. ASX is particularly interested to hear whether there might be any unforeseen consequences involved with any of the proposed Listing Rule changes.
20. In commenting on the proposed Listing Rule changes, ASX would ask respondents to note that any changes to its Listing Rules are required to go through a consultation process with ASIC and ultimately are subject to Ministerial disallowance under section 793E of the Corporations Act. ASX understands that ASIC and the Minister are unlikely to support any fundamental change to Listing Rule 3.1 that would weaken or undermine the policy settings currently reflected in that rule and in section 674 of the Corporations Act, the statutory provision that reinforces it. Accordingly, while ASX welcomes any and all feedback it may receive on changes that ought to be made to Listing Rule 3.1, realistically it will only be able to pursue changes that are consistent with the underlying policy of the rule and section 674.

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