continuous disclosure roadmap

This Clayton Utz special report provides practical explanations of the key implications of the new disclosure regime for companies.

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How we got here: the background to the new Guidance Note

ASX’s release of a 78 page Guidance Note about a Listing Rule which is only two pages long might look like overkill.

The reality, however, is that, since it was extensively rewritten in 2003, LR 3.1 and its exceptions have probably caused more angst for listed companies than any other part of the Listing Rules. This is for a number of reasons:

• the comparative brevity of the listing rule means that its application to real-life situations is often far from clear;
• non-compliance with the listing rule can give rise to significant penalties for both companies and their officers;
• ASIC’s case-by-case enforcement of the listing rule through “speeding fines” has caused considerable confusion about what the requirement to make “immediate” disclosure means; and
• the listing rule takes disclosure decisions out of a company’s hands in situations in which information has leaked onto the market through no fault of the company itself.

This was compounded by the fact that the listing rule was made by ASX (and the subject of guidance by ASX), but was enforced by ASIC and the courts. As a result, the market sometimes had the impression (whether justified or not) that the rule-maker and the regulators were not always on the same page.

In October last year, ASX released a draft rewrite of its Guidance Note on continuous disclosure. The extent of the rewrite was evident in the fact that the existing Guidance Note was less than 20 pages long, while its proposed replacement was almost 70 pages long. The final version, released on 13 March, is 78 pages long.

The purpose of the rewrite – and the extensive consultation and roadshows which followed the release of the draft – was to provide listed companies with more information and, importantly, clarity, about their continuous disclosure obligations.

Another, unstated, objective may have been to ensure that ASX and ASIC presented a common front on the meaning and application of Listing Rule 3.1. That appears to have been achieved, given the comments by ASIC Commissioner John Price when the final version of the guidance note was published:

“Companies that carefully consider the updated guidance and adopt appropriate processes with the benefit of that guidance can minimise the risk that ASIC will seek to take continuous disclosure enforcement action against them.”

The final Guidance Note was released along with a number of consequential amendments to other parts of the Listing Rules. ASX has said that the Guidance Note will not come into effect until the Listing Rules commence, which is expected to happen around 1 May 2013. Despite this, listed companies will not do themselves any harm by treating the Guidance Note as being already in operation.

“Listed companies will not do themselves any harm by treating the Guidance Note as being already in operation.”
What’s different from the draft?

The final version of the Guidance Note on continuous disclosure contains some changes from the draft released last year.

Perhaps the most important of these is the revised explanation of what “immediately” means (in relation to the requirement that a company disclose market-sensitive information “immediately”). The original draft said that “immediately” means “promptly and without delay”. We pointed out to ASX that “without delay” gave the impression that compliance would still be measured against a clock.

In response, ASX has expanded its explanation of “without delay”, to make it clear that “the passing of time, of itself, does not mean that there has been a ‘delay’ in the provision of the information to ASX”.

Trading halts are another area which has received greater attention in the final Guidance Note. It is particularly noticeable that, having rejected the idea that companies are racing against a clock when putting together continuous disclosure announcement, ASX’s revised guidance on trading halts now includes a beat the clock test. If a company requires CEO or Chairman approval before requesting a trading halt, that approval process “must be able to be activated and any necessary approvals obtained within a matter of minutes” [emphasis added]. This has the potential to cause real dilemmas for companies. If they need time to evaluate whether a continuous disclosure announcement is required, they may have to rush out a request for a trading halt. However, if it turns out that no significant announcement is required, the market may start to regard them as the boy who cried wolf.

Also receiving a lot more attention are earnings guidance and surprises. The original draft of the Guidance Note appeared to suggest that companies should respond to the “consensus estimate” of analysts who covered the company. In our submission to ASX, we pointed out that this would be extremely problematic, since there is no standard “consensus estimate”.

ASX acknowledged this concern and, as a result, has modified its proposed guidance. Both the draft and the final Guidance Note indicate that companies should keep tabs on current market expectations about its upcoming earnings, and consider whether they should announce material deviations from those expectations. However, the final Guidance Note has abandoned the idea those expectations are to be measured mainly by reference to analysts’ forecasts, let alone consensus. Instead, analysts’ forecasts are “only a guide to what the market is expecting”, and consensus estimates are now just one of “a number of approaches that an entity may legitimately use” to measure market expectations.

Finally, it is worth mentioning that ASX has clarified one of the disclosure-related amendments it was proposing to the Listing Rules. Under the draft proposal, a new LR 3.17 would have required disclosure of “any information about substantial holdings” contained in a beneficial interest notice obtained by the company. In our submission to ASX, we argued that this would be overkill, and suggested that it should be limited to cases in which beneficial tracing notice revealed that there had been non-compliance with the substantial holding disclosure requirements.

The final version of the new rule reflects these observations, and only requires companies to disclose beneficial interest notices that reveal “materially different information” from the substantial holding information already held by the company.

“We pointed out to ASX that ‘without delay’ gave the impression that compliance would be measured against a clock.”
“Immediately”: it’s not (just) about time

There has been general confusion in the marketplace about what “immediately” means in the context of the requirement to disclose price-sensitive information immediately.

This was compounded by a series of ASIC “speeding tickets”, some of which appeared to give the impression that “immediately” meant within a few hours. ASX’s new Guidance Note goes a long way towards dispelling that view.

According to ASX, “immediately” means “promptly and without delay”. That, in turn means “doing it as quickly as it can be done in the circumstances and not deferring, postponing or putting it off to a later time”.

This makes it clear that compliance with the rule is measured more by reference to the processes by which the company deals with the information than by how much time has elapsed. The issue for ASX will not be the length of that period of time, but what happened during it. To that end, it would look at factors such as:

• where and when the information originated;
• whether the company had any forewarning of the information;
• the amount and complexity of the information;
• whether there was a need to verify the accuracy of the information;
• the need to draft an announcement that is accurate, complete and not misleading;
• the need for the announcement to comply with any relevant Listing Rules;
• the need, in some circumstances for the announcement to be approved by the company’s board or disclosure committee;
• whether the market is currently trading (in which case, it appears, ASX would expect the company to ask for a trading halt while processing the information);
• whether the information is particularly damaging and likely to cause a significant fall in the company’s share price (again, ASX will expect the company to ask for a trading halt pending an announcement).

Despite emphasising that immediate disclosure isn’t a race against the clock, ASX does encourage companies to consider the use of trading halts and voluntary suspensions while they are processing potentially price-sensitive information.

“Compliance is measured more by reference to the processes by which the company deals with the information than by how much time has elapsed.”
Is this “market sensitive” information?

What constitutes market sensitive information?

According to the Corporations Act, it’s information that “would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of those securities.

ASX says that this does not cover traders who seek to take advantage of very short term (usually intraday) price fluctuations and who trade without reference to the inherent value of securities and without any intention of holding them for any “meaningful period of time”. The reason such traders are excluded is that they “often make trading decisions on the basis of very small movements in market price” – in contrast to investors whose trading decisions are determined by their assessment of the information available about securities.

The Guidance Note suggests a couple of rules of thumb that company officers might use when determining whether information is market sensitive.

The first is the What Would I Do? test. The officers should ask themselves:

• Would this information influence my decision to buy or sell securities in the company at their current market price?
• Would I feel exposed to an action for insider trading if I were to buy or sell securities in the company at their current price, knowing that this information had not been disclosed to the market?

A positive answer to either question, says ASX, would be a cautionary indication that the information may be market-sensitive.

ASX also suggests that, when assessing the potential material price effect of information, companies should take note of the fact that, in cases of suspected breaches of LR 3.1, ASX looks at share price movements after information has been released:

• movements of 10% or more indicate that the information was market sensitive;
• movements of 5% or less indicate that the information was not market sensitive.

Neither of these threshold tests can provide a definitive answer to whether information is price sensitive. Company officers are not common-or-garden investors: ordinary investors do not live and work in the constant presence of inside information and compliance officers. And any company officer who could correctly forecast future movements in share prices would probably find more profitable employment in a hedge fund.

At the end of the day, any determination about whether information is market-sensitive is a judgment call that needs to be made in the context of the particular circumstances at that time, with appropriate inputs from professional advisers.

“Any company officer who could correctly forecast future movements in share prices would probably find more profitable employment in a hedge fund.”
When does information stop being confidential?

Confidentiality – and the loss of confidentiality – has been one of the biggest bugbears for listed companies since the continuous disclosure listing rules were rewritten in 2003.

Listing Rule 3.1A says that market-sensitive information does not need to be disclosed if, among other things, it is confidential and ASX has not formed the view that it has ceased to be confidential.

ASX's notes to the listing rule make it clear that:
• confidentiality can be lost through no fault of the company;
• a mere rumour that a deal is in the offing can be evidence that the deal is no longer confidential.

Thus, if there is a market rumour about a deal, the company may have to disclose details of the deal even if the rumour originated outside the company. This is something that companies can find difficult to grasp, but ASX makes it clear that whether information is confidential “is a question of fact, not one of the intention or desire of” the company.

More importantly, while a company may argue about whether a market rumour or a media story proves that information is no longer confidential, ASX effectively has the last say: the carve-out only applies if the information is confidential and ASX has not formed the view that confidentiality has been lost.

The new Guidance Note says that ASX may decide the information about a matter is no longer confidential if there is:
• a reasonably specific and reasonably accurate media or analyst report about the matter;
• a reasonably specific and reasonably accurate rumour in the market.

The amount of information that the company may be required to disclose is related to the accuracy and specificity of the leak. If the leak is simply that the company is about to enter into a deal with another party and doesn’t provide any details of the deal itself, the company would have to disclose that it was in negotiations with the other party, but not the details under negotiation. On the other hand, if the leak includes specific and accurate details, the company would be required to confirm those details.

Importantly, the carve-out can also fall away where there has been a sudden and unexplained movement in the price of traded volumes of the company's securities. In that situation, ASX's position is that, in the absence of an alternative explanation, it will assume that the confidential information has leaked.

It will ask the company whether it has any undisclosed market-sensitive information and whether there is any other explanation for the share movement. If the company replies that it has undisclosed market-sensitive information and cannot provide another explanation for the movement, ASX's view is that the movement has been caused by the information.

Have the letter ready

ASX advises companies that are relying on the confidentiality carve-out to do two things:
• monitor the media (including social media) to ensure that the information hasn’t leaked;
• have a draft letter already prepared so that, if there is a leak, the company can quickly ask for a trading halt or issue an announcement.

What about inaccurate rumours?

There are three situations in which a company may have to respond to inaccurate information.

The first is where a media report or market rumour is a mix of accurate and inaccurate information. ASX appears to believe that the company's market announcement in response to the accurate parts of the leak should also deal with the inaccuracies: “in some cases, it may be appropriate to correct those details, while in others it may be appropriate simply to indicate that they are inaccurate or that they are still under negotiation.

The second situation in which a company may be forced to deal with a rumour or report that is wholly inaccurate. Although there has clearly been no leak of confidential information, ASX may require the company to make an announcement denying the rumour, in order to ensure that there isn’t a false market in the company's securities.

Finally, there may be situations in which the company doesn’t know whether a rumour or report is accurate or not (eg. where the story is that someone is planning a hostile bid for the company). ASX may ask the company to announce that it has no knowledge of the matter and so can neither confirm nor deny.
The James Hardie case highlighted the uncertainty surrounding the role of the board in continuous disclosure.

How does one reconcile the fact that the board is legally responsible for a company's actions with the listing rule requirement that price-sensitive information has to be disclosed immediately, since it is almost impossible to call a board meeting of a major company without notice?

In James Hardie, the Court appeared to say that not all continuous disclosure announcements require board approval. However, it did not provide any bright line test for determining where the board's approval is and is not required.

The new Guidance Note on continuous disclosure does not provide a bright line test, either, appearing to say that this is a matter for each individual company to decide. Nevertheless, it suggests a number of processes to address the approval issue.

Perhaps the most important part of the guidance on this point deals with the situation in which:

- the company has become aware of information that unequivocally must be disclosed “immediately”;
- the information is so significant that any announcement ought to be approved by the full board; and
- the board has not yet met to consider it.

ASX says that the company should call a board meeting specifically to approve the ASX announcement. It would not be acceptable to postpone consideration of the announcement until the next scheduled board meeting.

However, it also says that the company should not allow trading in its shares pending the holding of the board meeting:

“if the market will be trading at any time after the entity first became obliged to give market sensitive information to ASX ... and before the board can approve the giving of an announcement ... the entity should consider carefully whether it ought to request a trading halt to prevent the market trading on an uninformed basis over that period”.

In the case of announcements which do not require the approval of a full board, ASX suggests that the approval process should be bifurcated:

- there should be delegations to senior management of authority to release some announcements of their own accord;
- matters which have not been specifically delegated to senior management should be approved by a disclosure committee which can meet at short notice or by phone to consider the announcement.

Reference should also be made to ASX's comments about the need for speedy Chairman/CEO approval of any request for a trading halt.

"The new Guidance Note suggests a number of processes to address the board approval issue."
Dealing with takeover approaches

The new Guidance Note address the vexed issue of the disclosure of takeover approaches.

For some time, there has been a view that a potential target may be required to disclose even incomplete confidential approaches. This is based on the fact that the carve-out from Listing Rule 3.1 has three elements:

- the information must be confidential; and
- it must concern an incomplete proposal; and
- a reasonable person would not expect the information to be disclosed.

It has been argued that a takeover approach may be confidential and incomplete, but that a reasonable person would expect it to be disclosed, so that the carve-out does not apply.

In the new Guidance Note, ASX says that this interpretation would have a chilling effect on the market for corporate control. Its view is that a reasonable person would not expect disclosure of a confidential and incomplete proposal, because that would mean that the putative bidder and target would not be able to conduct confidential negotiations.

That, of course, only means that the potential target is under no obligation to disclose a takeover approach. As ASX admits (and as allegedly happened in the past), there is nothing to prevent the target from voluntarily disclosing the approach. This may be done in order to put the target into play, for example. For obvious reasons, ASX does not comment on the fact that, if going public results in the withdrawal of the takeover approach, the directors of the target would first have to satisfy themselves that that outcome was in the best interests of the company.

In the same vein, the continuous disclosure rules will do nothing to prevent a would-be bidder from going public itself, in an effort to put the target board in a bear hug. And loss of confidentiality of the approach, for any reason, will normally mean the target needs to make some announcement about the approach. While the new guidance means target directors can now assess whether to disclose a confidential approach based on their response strategy rather than the disclosure requirements, market practice in relation to disclosure of such approaches is unlikely to change significantly. Target boards will either want to disclose or feel they need to do so as to avoid the tactical disadvantages that flow from losing control of the timing and messaging of disclosure if confidentiality is lost.

“Market practice in relation to disclosure of takeover approaches is unlikely to change significantly.”
Trading halts and voluntary suspensions

ASX has long advocated that companies should make greater use of trading halts and voluntary suspensions to help manage their continuous disclosure obligations.

Companies have tended to be less enthusiastic. For obvious reasons, trading halts and voluntary suspensions can be unpopular among traders, and they can give the impression that the company is having difficulty managing its continuous disclosure obligations.

The Guidance Note says that trading halts may help to reduce the exposure of companies and their officers to the legal and financial consequences of non-compliance with their continuous disclosure obligations. However, the Guidance Note also indicates that the circumstances in which a trading halt may be useful are fairly limited.

That's because ASX expects that, before it requests a trading halt, a company will have assessed whether the information is market sensitive. In many cases, that means that the company will already be in a position to disclose the information immediately, and so wouldn't be able to justify a trading halt.

As a result, the actual circumstances in which trading halts can be used to manage continuous disclosure obligations can be fairly limited. The Guidance Note suggests that a trading halt may be sought and granted if:

- the company “is not in a position to give an announcement to ASX” and
  - information has leaked before the announcement can be released;
  - ASX has asked the company to provide information to correct or prevent a false market;
  - the information is especially damaging and likely to cause a significant fall in the company’s share price (eg. that the board has resolved to appoint an administrator or a receiver has been appointed);
  - the announcement has to be approved by the board and a board meeting can’t be held promptly and without delay;
  - the situation is uncertain or evolving, it is likely to be resolved within a short time and the company believes that it would be better for the announcement to be delayed until there is greater certainty or clarity around the outcome (eg. where there has been a leak about a deal that is on the verge of signing);
  - where the announcement relates to a contract with government and the government wants to announce the contract some time after trading has opened.

These are all largely commonsense positions (although it is difficult to understand why a board which has resolved to appoint an administrator would not be able to announce that immediately).

One other point: ASX does not regard the need for Chairman and/or CEO approval as a good reason for delaying a request for a trading halt. If that approval is required (as it mostly would be), the company also should have processes in place to ensure that it is obtained “within a matter of minutes”. The significance of this mainly lies in the fact that, if ASX thinks that the company is delaying an application for a trading halt, it will suspend trading in the company’s securities, which would raise reputational issues for the company. It might also lead to regulatory action by ASIC.

“ASX does not regard the need for Chairman and/or CEO approval as a good reason for delaying a request for a trading halt.”
Earnings guidance and earnings surprises

ASX's new Guidance Note on continuous disclosure contains a detailed policy on the disclosure of information about earnings.

The basic theme is that a company has a continuous disclosure obligation to update the market's expectations about the company's future earnings, rather than just the company's own published statements about earnings.

Companies’ earnings statements

Listed entities disclose their earnings forecasts in a number of ways – straightforward announcements to ASX, prospectuses, PDSs and takeover documents. ASX says that it does not want to discourage this practice, but warns that, as a forward-looking statement, an earnings guidance must have a reasonable basis and have been subjected to due diligence. It must also be signed off at a suitably senior level (ASX suggests the board).

As well as these formal releases, companies can let slip their earnings expectations in communications with shareholders, analysts and the press (for example, a statement that the company expects its earnings to be in line with analysts’ forecasts). In those situations, ASX may ask for a formal announcement to be posted on its announcements platform. This ensures that all investors are made aware of the de facto guidance. If the guidance referred to analysts’ expectations, the announcement to ASX should indicate which analysts are being referred to.

Earnings surprises: what does the market expect?

Companies do not only have a continuous disclosure obligation to announce material changes to earnings guidance that they themselves have published. They are also required to keep the market updated on deviations from what the market itself expects the company's earnings to be.

Those market expectations can arise from:

• the company's own published earning guidance (announcements to ASX, previous earnings, etc);
• earnings forecasts by sell-side analysts;
• in the case of companies not covered by sell-side analysts, the company's earnings results for the prior corresponding reporting period.

This is not a passive exercise. For example, if a company publishes earnings guidance and later makes an announcement that will obviously have a material effect on that guidance, market expectations will be governed by the later announcement, rather than the earlier earnings guidance. Similarly, companies may have to engage in some number-crunching if the market's expectations about the company are guided by analysts’ forecasts:

“Some entities may use the ‘consensus estimate’ as a central measure of analyst forecasts. They may obtain this from an information vendor or they may calculate it for themselves. If they feel that the consensus estimate is being distorted by an obvious outlier that is out of line with their own internal forecasts, they might also adjust the consensus estimate to exclude that outlier. Other entities may 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.”

(ASX also recognises that companies’ relationships with analysts are a two-way street: although companies have no obligation to publicly correct what it thinks are incorrect analysts’ forecasts, ASX suggests that it is in their best interests to engage offline with analysts whose forecasts differ materially from the companies’ own internal forecasts. We would, however, caution that companies should be very careful to ensure that such discussions with analysts did not turn into selective briefings, through the disclosure of confidential market-sensitive information.)

Having established what the market’s expectations are, the next step is to determine whether there will be a “material difference” from those expectations.

“Material difference”

ASX says that, when determining whether there will be a material difference from market expectations, two different situations have to be considered:

• the company has not published its own earnings guidance for the current reporting period – in which case, disclosure obligations are governed solely by LR 3.1;
• the company has published earnings guidance for the current reporting period – in which case, disclosure obligations are governed by both LR 3.1 and section 1041H of the Corporations Act (the prohibition of misleading or deceptive conduct).

Under LR 3.1, the overarching question is whether the change in expected earnings is such that a reasonable person would expect it to have a material effect on the price or value of the company's securities (which would be the case if it would be likely to influence the investment decisions of persons who commonly invest in securities). ASX says that there is no bright line test to determine this, and definitely no fixed percentage threshold.
The company would have to look at issues such as:

- the relevance of near term earnings to the company's share price;
- whether the earnings change is due to factors (such as an impairment charge) which don't impact on underlying cash earnings;
- whether the earnings change is permanent or a one-off;
- whether the relative outlook for coming financial periods is positive or negative.

Under section 1041H, a company may be liable if its failure to update previously-published guidance would mislead or be likely to mislead someone. In reality, the relevant difference between LR 3.1 and section 1041H may not be that great. As noted above, LR 3.1 requires the disclosure of earnings information which would be likely to influence the investment decisions of persons who commonly invest in securities; any misleading effect of non-disclosure of earnings would generally manifest itself as an investment decision. Nevertheless, where a company has previously published earnings guidance and there arises a potentially material difference from that earnings guidance, ASX suggests three percentage thresholds:

- a variation of 10% or more should be regarded as material;
- the materiality of a variation between 5% and 10% will depend upon circumstances – smaller entities or those that have relatively variable earnings may consider that a materiality threshold of 10% or close to it is appropriate, while very large companies 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;
- a variation of 5% or less may be considered non-material.

(Strictly speaking, ASX's animadversions on section 1041H are not related to continuous disclosure, since the Exchange does not enforce the Corporations Act. The Guidance Note emphasises that this is only a suggestion to assist companies in determining whether they should be updating their earnings guidance. Nevertheless, its views on section 1014H might be taken into account by ASIC or a court.)

When did it all change?

The correct timing of an announcement is crucial if one is going to avoid the unwelcome attentions of ASIC.

That timing depends upon when the company became aware that there would be a material difference. ASX says that that awareness arises where there is sufficient certainty that there is going to be a material difference at the end of the reporting period. (As ASX acknowledges, the precise point at which a company becomes “aware” of information can be problematic. The burning down of a manufacturing company's major factory is clearly something that would require disclosure without too much discussion of its effect on future earnings (those can be worked out and announced later). However, internally-generated financials might require considerable checking and analysis (perhaps even with board involvement) before their effect on earnings can be ascertained.)

Generally speaking, since material differences early in the reporting period are not necessarily certain to be reflected in the final figures, they may not constitute a disclosable earnings surprise. Similarly, the market expectations of the company's earnings may change over the course of a reporting period.

The announcement

There is presumably no upper limit on the amount of information that can be contained in the announcement of an earnings surprise. On the other hand, ASX makes it clear that there are some minimum requirements:

“An announcement which simply stated that an entity expected its earnings for the current reporting period to differ materially from market expectations would not be particularly helpful and would not provide sufficient information for the market to assess the impact of the difference on the price or value of the entity's securities. The announcement at least needs to indicate the order of magnitude of the difference.”

Since the announcement itself constitutes earnings guidance, it should be prepared and signed off in accordance with ASX's guideline on earnings guidance announcements (above).

Of course, changes in earnings do not usually happen spontaneously. They are often the result of an external event, such as the loss of a major contract. Where a company experiences an external shock that can reasonably be expected to have a material effect on earnings, it should immediately announce the facts about what has happened, rather than waiting until the actual effect on earnings can be determined.

The final word

Companies and their officers might find some comfort in ASX's assurance that it understands that complying with this guidance involves a lot of variables and judgment calls:

“ASX is mindful of this when it considers whether it should refer a potential breach of Listing Rule 3.1 to ASIC involving a market sensitive earnings surprise. The matters ASX refers to ASIC usually involve a very material difference in earnings compared to the relevant base used to measure market expectations ... and where the announcement of the entity's results triggers a material change in the market price of its securities.”
Implications for mining and resources companies

ASX Guidance Note 8 discusses several issues and examples that are of particular interest to ASX-listed participants in the energy and resources sectors.

“Immediate” disclosure of mineralogical and hydrocarbon information - interaction with Chapter 5 requirements

Assembling and interpreting mineralogical and hydrocarbon data into a form that is suitable for disclosure in accordance with Chapter 5 of the Listing Rules (including the JORC Code and SPE-PRMS respectively) can take significant time and effort. ASX recognises this, and confirms that the necessary time period is accommodated by the Listing Rule 3.1 requirement for “immediate” disclosure provided that the issuer completes the necessary work promptly and diligently.

ASX also accepts that a company’s board may appropriately wish to approve the release of material exploration results or the release of resource or reserve estimates. Again, provided that arrangements for the board meeting are made promptly and without undue delay, ASX endorses such a process as being compliant with the immediate disclosure requirement of Listing Rule 3.1.

Disclosure prior to the conclusion of Chapter 5 and board processes

The Guidance Note does, however, recognise some situations where an issuer will be deprived of the opportunity to work through its due mineralogical and hydrocarbon reporting and sign-off processes without having to make an announcement or to enter a trading halt:

- If, during or following an exploration campaign (but before the release of results) there is a material change in the company’s share price and/or trading volumes which may indicate that exploration information has leaked, ASX advocates the use of a trading halt so that trading in its securities is not taking place in a market that is uninformed as to the outcomes of the exploration campaign. As a result, particularly while completing assay processes and the Chapter 5 compliant reporting of exploration results or resource / reserve estimates, mining and resources companies should diligently monitor the market in the company’s shares for signs that the information to be the subject of the announcement may have leaked.

- While ordinarily the public release of exploration information that has yet to be assayed and reported upon in accordance with Chapter 5 would be inappropriate, ASX recognises that there may be times where exploration results are appropriately released on a pre-emptive basis. The non-specific example offered by ASX is where the style of mineralisation is such that a visual inspection of the results is sufficiently certain and material to permit an announcement. ASX does, however, caution that an announcement in these circumstances should be subject to an appropriate “health warning”, and should not make any statements about grade or quality of the mineralisation in the absence of assay results.

- ASX notes that there may be circumstances where a company cannot rely on the Listing Rule 3.1A carve-out for exploration results even if the information is incomplete or further results are required in order for an assessment of materiality to be conducted. ASX offers the example where a company is undertaking an in-fill drilling program and has conditioned the market by announcing some promising results from the early drill holes which have a positive effect on the share price. If subsequent drill holes are less encouraging or contradict the market’s expectations as to the deposit which were encouraged by previous announcements, ASX suggests that a reasonable person would expect disclosure and therefore the company ought not withhold disclosure pending further results.

Is there an obligation to disclose industry-wide information?

The short answer is “no”.

Listing Rule 3.1 requires a listed entity to disclose information “concerning it” that “a reasonable person would expect to have a material effect on the price or value of the entity's securities”. In general terms, publicly available information about external events or circumstances that affect all entities in the market, or in a particular sector, in the same way is not considered to be information “concerning” a particular listed entity and no disclosure would be expected under Listing Rule 3.1. For example, gold mining entities are not generally required to disclose information about the gold price, and resource companies would not generally be required to make an announcement regarding a proposed increase in taxes or royalties. This information is generally available to the market and it can be assumed that the market will absorb its impact on the price or value of the entity's securities within a short period after the information becoming publicly available.

However, if the entity has previously given earnings guidance to the market and changes in commodity prices or applicable fiscal regimes are likely to cause its earnings to differ from that guidance by a material amount, that is information “concerning” the entity which the ASX expects to be disclosed. Similarly, if such changes would mean that the entity could no longer operate economically and would have to curtail operations, this would be information “concerning” the entity which it would be expected to disclose.
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