

ALERT

24 OCTOBER 2012

The ASX revises Listing Rules 3.1 – 3.1B and continuous disclosure guidelines

On 17 October 2012, the ASX released a *Review of ASX Listing Rules Guidance Note 8* for public comment (**Review**). The Review considers the practical impact of the High Court decisions involving James Hardie Industries and Fortescue Metals Group on corporate disclosure and provides a much anticipated revision of Guidance Note 8. Guidance Note 8 indicates how the ASX and ASIC will interpret and apply ASX Listing Rules 3.1 – 3.1B, which deal with the continuous disclosure of market sensitive information.

Each of the Review documents can be viewed by following the links below:

- consultation paper entitled **Review of ASX Listing Rules Guidance Note 8 – Continuous Disclosure: Listing Rules 3.1 – 3.1B**;
- revised **Guidance Note 8: Continuous Disclosure: Listing Rules 3.1 – 3.1B**;
- abridged version of Guidance Note 8 entitled **Continuous Disclosure: An Abridged Guide**; and

- proposed amendments to ASX Listing Rules 3.1 – 3.1B in a document entitled **Proposed Disclosure Related Amendments to the ASX Listing Rules**.

The revised Guidance Note 8 reframes continuous disclosure obligations within the primary purpose of the ASX Listing Rules – which is to prevent the ASX markets trading on an uninformed basis. It advocates for greater utilisation of trading halts to manage delay between an entity becoming aware of market sensitive information and the dissemination of that information in accordance with its disclosure obligations. Guidance Note 8 also introduces flexibility to the ASX's approach to regulating an entity's responsibility to disclose market sensitive information 'immediately'.

Board approval and the requirement to disclose information 'immediately'

ASX Listing Rule 3.1 states that an entity must disclose information to the ASX 'immediately' after the entity becomes aware of that information. Guidance Note 8 provides that the word 'immediately' should not be taken to mean 'instantaneously' but rather 'promptly and without delay'. The



length of time that accords with the requirement to disclose information 'promptly and without delay' will depend on factors including the amount and complexity of the information, the need to verify its accuracy and any forewarning the entity has had with regard to the matters that are the subject of the announcement.

In light of the James Hardie decision, Guidance Note 8 makes it clear that boards should not sacrifice a considered review of significant market announcements in the pursuit of expeditious disclosure. Directors are reminded of the need for the company to balance its concurrent legal duties, which include an obligation to ensure the content of announcements is not misleading or deceptive or likely to mislead or deceive.

A board meeting must be convened as soon as is practicable for the purpose of approving a significant disclosure announcement to satisfy the requirement to act 'promptly and without delay'. It will not be sufficient to postpone the announcement to accommodate board approval at a pre-scheduled meeting. Entities are encouraged to utilise a trading halt in circumstances where board approval of an announcement is required. A trading halt is also indicated where the entity becomes aware of information within trading hours.

Market sensitive information

The test for the requirement to disclose information remains in its present statutory form, which is whether or not the information 'would, or would be likely to, influence persons who commonly invest in securities ... to acquire or dispose of those securities. The ASX acknowledged the difficulty faced by entities when applying this test but suggested that this difficulty is 'inescapable'. Guidance Note 8 emphasises the need to assess the likely impact of the information on trading behaviour

against the backdrop of prior announcements by the entity. It outlines two practical tests that officers of disclosing entities may use to identify market sensitive information:

- Would the information influence his or her personal decision to buy or sell securities in the entity at their current price?
- Would he or she feel exposed to an action for insider trading if they were to buy or sell securities in the entity at their current price, if the information had not been disclosed to the market at the time of the transaction?

If the answer to either of these questions is yes, the entity is required to disclose the relevant information to the ASX 'immediately' (subject to the exceptions in Listing Rule 3.1A).

Market monitoring

A disclosing entity that delays the release of information without first arranging a trading halt, is encouraged to monitor the market during the period of delay for fluctuation in the price of its securities. Entities are also encouraged to formalise their procedures for monitoring newspapers, investor blogs and social media and to assess enquiries by analysts and journalists for indications of an unauthorised release of information.

Next steps

Public consultation regarding Guidance Note 8 is due to conclude on 30 November 2012, after which the proposed amendments will be finalised and enter into force. In light of the extensive practical assistance provided by Guidance Note 8, a comprehensive disclosure policy with accompanying procedures is likely to become a valuable tool in minimising the risk of non-compliance with the *Corporations Act 2001*

(Cth) and the ASX Listing Rules. Policies and procedures that address continuous disclosure should focus on the management of high risk events including inadvertent disclosure, general delays and delay as a consequence of a requirement to obtain board approval.

Authored by: **Lesley Naik**, Cornwall Stodart

Want to republish any of this article?

If you would like to republish any part of this article in your staff newsletter or elsewhere please contact our Marketing Team on **+61 3 9608 2168**

Disclaimer

This Alert is intended to provide general information on legal issues and should not be relied upon as a substitute for specific legal or other professional advice.



For further information please contact:

Ian Sinclair, Partner
Phone (direct) **+61 3 9608 2166**
Mobile **+61 412 906 896**
Email **i.sinclair@cornwalls.com.au**