ASIC

Australian Securities & Investments Commission

Continuous disclosure: Guidance Note 8 rewrite

Speech delivered by Belinda Gibson, Deputy Chairman, and John Price, Commissioner, Australian Securities and Investments Commission

ASX Forum

22 & 29 April 2013

Introduction

Thank you for the opportunity to speak today about continuous disclosure. I want to congratulate ASX, and especially you Kevin, for this rewrite of Guidance Note 8. It's a very fine exposition of the issues.

ASIC sees continuous disclosure by listed companies as fundamental to market integrity. Why does market integrity matter? It's what gives our companies a competitive edge for securing capital for investment, and promotes an efficient market, the market that is the engine room for economic growth in this country.

ASIC's view is that there is, broadly speaking, very good compliance with the continuous disclosure regime in Australia.

We take very few actions relative to the number of announcements made, and far fewer than the market commentators say 'must' be breaches. ASX refers about 25 cases a year for consideration. We take enforcement action on about five, and have an active dialogue on a handful more.

We definitely understand that continuous disclosure issues can be very difficult, and judgement calls are required. For this reason, ASIC welcomes and supports ASX's release of the re-written Guidance Note 8.

As already mentioned by Kevin Lewis, ASIC worked closely with ASX on this rewrite. Its words broadly reflect our understanding of the principles that we apply in assessing possible breaches of the continuous disclosure requirements.

We are confident that the revised Guidance Note 8 will provide companies with the guidance they need to assist them in complying with their continuous disclosure obligations.

Scope

I want to cover four topics today:

Firstly, the importance of having a solid continuous disclosure compliance system in place.

Second, some practical tips for drafting announcements.

Third, the issue of monitoring and responding to social media.

And last, ASIC's enforcement practices in this space.

Continuous disclosure compliance systems

The first message that I would like to emphasise is the importance of having a robust continuous disclosure system in place.

Good continuous disclosure is about preparation and organisation.

When continuous disclosure is discussed in Australia, it is often based on the image of directors being caught by surprise and paralysed by a difficult disclosure decision. This is not our experience. Most announcements are about information that is well known to the company; the problem lies in not recognising it should be disclosed or spending too long looking for reasons not to disclose.

ASX's updated guidance will help companies to ensure they have procedures in place that allow them to identify and respond in a timely manner to events that may trigger their continuous disclosure obligations.

At a practical level, we suggest that companies consider some of the following:

- Having delegations in place for who has authority to speak on behalf of the company – whether in response to an ASX 'price query' or 'aware' letter, or when they become aware of information that needs to be released to the market, perhaps in response to speculation.
- Ensuring that there is a designated contact person to liaise with the ASX, who has the requisite organisational knowledge and is contactable by ASX.
- Have a clear rapid response plan and ensure all board members and senior executives are fully appraised of it. Give it a practice run every so often – a stress test of sorts.
- Have a plan for when you will consider a trading halt appropriate. Have a 'Request for trading halt' letter template ready for use.
- Have guidelines for determining what is 'material' information for disclosure, tailored to your company.
- Prepare a draft announcement where you are doing a deal that will likely require an announcement at some time, and a stop-gap one in case of a leak.

Content of announcement (or how to disclose)

As an overriding principle, any announcement must contain information sufficient to be useful to investors and must not be misleading. Not much magic in that statement. However the practical application can be difficult.

We agree with the ASX that not every potential merger transaction needs to be announced, as some have been suggesting.

We have some practical suggestions for managing the content of disclosure.

- Be careful in the headings for the announcement – try and encapsulate the tenor of message there. Headings are often the things that will get reported in the media. There are algorithms that are triggered by headlines with key words such as takeover, or profit downgrade. These algorithms do not read the announcement for a nuance, such as that there is no takeover bid.
- Don't assume that the reader is sophisticated or leave readers to read between the lines. Companies need to highlight key information and tell it plainly.
- Apply the listing rule requirements consistently, whether good or bad news is required to be disclosed. This is the cherry-picker issue. What does this mean? If you habitually report winning new big contracts, report when they turn into loss contracts.
- If the announcement is made to prevent a false market, explain this context in the announcement to avoid misunderstandings about the materiality of the information. This is really important when responding to speculation that has set the market running,
- If you think people should not trade on an announcement, then consider saying so, as boards do early on when there is a formal takeover bid they don't think is sufficient,
- If an announcement proves to have been wrong it may be necessary to update the market to ensure it is fully informed of material information.

ASIC supports ASX's discussion in the Guidance Note that the use of trading halts can be an effective tool to manage continuous disclosure obligations.

Trading halts are also useful where it is suspected that a false market exists. Placing a trading halt on the stock until the leak or rumours are identified and adequately responded to can minimise the likelihood that the stock is traded on the ASX on the basis of false information. However, ASIC and ASX are not suggesting that boards use the trading halt as a 'time out' mechanism in a heated market – there must be a genuine market information gap.

Social media

ASIC recognises the growing importance of social media informing financial markets, and the complexity that brings. To slightly misquote a recent heading – the twitterverse does not let a true fact get in the way of a good line.

ASX's guidance discusses the importance for companies to pay attention to what information the market is trading on.

ASIC agrees with the guidance. We consider it to be to good practice for entities, as part of their already existing investor relations activity, to consider monitoring well-known social media feeds on a regular basis. This can help flag whether a false market might be developing in the entities' securities, as well as indicating a leak of confidential information.

For larger companies this means monitoring major sources of news and information, on mainstream outlets and significant social media sites. Smaller companies at the very least need to monitor the regular postings by regular commentators – such as brokers that research the company.

Companies should also be aware of how their shares are trading in the market, in terms of price and volume. This is particularly important where the company is relying on one of the disclosure carve-outs, for example, if it is considering a confidential, incomplete takeover offer.

Of course, it would be impractical to monitor every social media outlet or every feed on a particular social media site, and we do not expect companies to do so. But companies need to think about sites that are important to a material portion of their investing community.

We are seeing in the market the advent of social media monitoring service providers. They are primarily concerned with brand management, but that's not far from market trading information. I gather they will identify and follow the influencers, track the hash-tags, and run other screening functions. This, I should say as an aside, is the type of technology that some professional traders deploy in the market in setting their strategies and algorithms.

Companies may also use social media to their advantage as a method of keeping investors up-to-date with company information and events. That can complement continuous and periodic disclosure releases, disseminating information to a wider audience. The legal obligation is to send material price information first to the ASX and we strongly recommend that companies wait for it to be posted there before they tweet it. Don't put more (or less) information in the feed than the release. A link to the release is safest. Non price-sensitive information of course does not need to go through ASX.

Enforcement

What are ASIC's processes and considerations when deciding whether we should take action against a company for a breach of continuous disclosure rules?

It is important to note that the fundamental principles in the revised Guidance Note 8 largely reflect ASIC's view. We do not intend to release our own guidance on this subject. There is nothing in the revised Guidance Note 8 that would change any action we have taken in the past.

Companies that consider ASX's updated guidance and adopt appropriate processes will minimise the risk that ASIC will seek to take a continuous disclosure enforcement action against them.

ASIC acknowledges the delicate balancing act that companies must undertake to comply with their disclosure obligations and to that end, we think very carefully before taking any action on continuous disclosure breaches.

However, we are conscious that an entity's failure to abide by their continuous disclosure obligations can cause serious damage to individual investors, as well as the integrity of the financial markets. ASIC will use its enforcement powers to highlight the importance of this obligation.

ASIC undertakes a careful assessment of what enforcement action to take, and what enforcement tools to use, after considering factors such as:

- the nature and seriousness of the suspected misconduct;
- the strength of our case; and
- the likely deterrent impact.

There is a range of alternatives open to ASIC. We would only bring criminal actions where there is evidence of fraud or seriously negligent conduct. We can bring a civil penalty action, or more commonly, issue an infringement notice.

ASIC will consult with the ASX in deciding what course to follow.

Infringement notices

Continuous disclosure infringement notices are designed to provide a fast and effective remedy for less egregious breaches, so that redress is proportionate and proximate in time to the breach. We consider them a very important and useful tool in our regulatory armour, and I think the business community is growing to prefer them to civil actions.

I would like to touch on the question of the length of time it takes ASIC to issue an infringement notice.

When we were given the power to issue these notices some ten years ago we had estimated that it would take around three months to issue a notice. This has proved to be optimistic. I am sure you agree it is important that we get it right as the issue of a notice has significant reputational implications. This can take time, especially when the matter involves large entities with complex businesses and reporting lines. Frankly, the debate about what material is legally privileged can take three months alone, and only then do we get access to documents. Companies that would prefer an infringement notice to a civil penalty action might well heed the fact that we must make our decision within 12 months. After that we must take the civil penalty route in the courts.

Conclusion

In closing, ASIC commends the work that ASX has done in revising its guidance. We consider its collaborative approach with ASIC and the market has resulted in a thorough and useful tool for listed entities and their advisors.

We believe the continuous disclosure regime in Australia is sound and that it plays a vitally important role in the transparency and integrity of the market.

We acknowledge that sometimes boards can be confronted with difficult decisions about continuous disclosure. We are confident that the revised guidance will significantly assist entities in better understanding and complying with their continuous disclosure obligations.