ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 5

Heard it on the grapevine

November 1999

ASIC

Australian Securities & Investments Commission

“Heard it on the grapevine ¼”

Draft ASIC guidance and discussion paper

Disclosure of information to investors

and

Compliance with continuous disclosure and insider trading provisions

November 1999

Your comments

We invite your comments on the draft guidance and discussion paper.

Comments are due by Friday 17 December 1999 and should be sent to:

Alison Champion
Regulatory Policy
Australian Securities & Investments Commission
GPO Box 5179AA
Melbourne Vic 3001
Facsimile 03 9280 3339
Email: alison.champion@asic.gov.au

Contents

I Introduction

Alan Cameron AM, ASIC Chairman

Fair access to information for all investors

Information is critical to the process by which investors and analysts decide how to price stocks. ASIC wants to encourage the flow of information between listed companies and investors, and analysts. But this must happen in a way which builds public confidence, and that depends on investors having equal and timely access to price sensitive information. Selective briefings can create opportunities for insider trading and also undermine ordinary investors' confidence in the market as a level playing field. The purpose of the continuous disclosure requirements in the Corporations Law and stock exchange listing rules is to ensure that investors do receive equal and timely access to information.

Private briefings create a perception that institutional investors and fund managers have access to information that is not available to other investors. Selective briefings can create suspicion among ordinary investors that those 'in the know' can profit by trading on privileged information at the expense of people like themselves. The best solution to these negative perceptions is for companies to show that they have good disclosure procedures.

There are some simple, practical measures that companies can adopt to ensure good disclosure practice and compliance with regulatory requirements. Listed companies should establish disclosure policies which minimise the likelihood of selective disclosure; companies should develop procedures for monitoring their contacts with analysts; if any price sensitive information is disclosed in discussions with analysts, it should be disclosed more generally without delay.

Analysts' briefings and other forms of selective disclosure have increasingly become a cause for concern amongst regulators in Australia and overseas.

In order to ensure that Australian markets and companies are respected world wide, ASIC's guidance has been drafted to promote best practice. Hopefully, companies will recognise the benefits of good disclosure in terms of corporate credibility and market integrity before regulatory action becomes necessary.

We are seeking comment on the draft guidance issued by ASIC. At the same time we encourage companies to begin considering the adequacy of their own corporate disclosure practices in light of the types of measures outlined and being adopted by a number of companies already.

The measures proposed in the guidance are not intended to be prescriptive: companies should implement them flexibly to meet their individual needs and circumstances.

Market integrity and investor confidence are the objectives. It is in the interests of market participants to ensure that our system lives up to the highest standard of integrity.

II Draft guidance

This section provides guidance to companies on good disclosure practices.

Avoiding selective disclosure

Establishing policies and procedures

1. Establish written policies and procedures on information disclosure. Focus on continuous disclosure and equal access to information for all investors.

Using current technology

2. Use current technology to improve investor access to your information. In particular, post significant information on your company's web site as soon as it is disclosed to the market.

Developing a disclosure policy

Overseeing and coordinating disclosure

3. Nominate a senior officer as your corporate disclosure manager with responsibility for:

   - making sure that your company complies with continuous disclosure requirements;
   - overseeing and coordinating disclosure of information to the stock exchange, analysts, brokers, shareholders, the media and the public; and
   - educating directors and staff on the company's disclosure policies and procedures.

   In smaller companies, this person is likely to be the company secretary.

Authorising company spokespersons

4. In order to maintain control over disclosure, it assists if you keep to a minimum the number of directors and staff authorised to speak on your company's behalf. Make sure that these persons know they can clarify information that the company has released publicly through the stock exchange, but they should avoid commenting on other price sensitive matters. The corporate disclosure manager should outline the company's disclosure record to these persons before they brief anyone outside the company. This will safeguard against inadvertent disclosure of non-public information.

**In this Guidance note, references to listed companies are to be read as including other listed entities and references to shares are to be read as including other securities.*

Authorising disclosures in advance

5. The corporate disclosure manager should authorise information disclosures in advance, including information to be presented at private briefings. This will minimise the risk of breaching the continuous disclosure requirements.

Releasing company information

6. Price sensitive information must be publicly released through the stock exchange before disclosing it to analysts or others outside the company. You should post it on the company's web site once the stock exchange has released it. If you give other significant background information to analysts or institutions, you should make it available to investors on the company's web site.

Handling rumours, leaks and inadvertent disclosures

7. Develop procedures for responding to market rumours, leaks and inadvertent disclosures. Any unauthorised disclosure of information should be reported immediately to the corporate disclosure manager. If the information is price sensitive, the company must immediately release it through the stock exchange. Even if leaked information is not considered price sensitive, give investors access to any significant background information related to the rumours, leaks or inadvertent disclosure on the company web site.

Briefing analysts

Reviewing discussions

8. Have a procedure for reviewing briefings and discussions with analysts and ensuring that shareholders are not denied access to any significant background information given to analysts.

Handling unanticipated questions

9. Be particularly careful when dealing with analysts' questions that raise issues outside the intended scope of discussion. Some useful ground rules are:
   - avoid disclosing price sensitive information — only clarify information that has been publicly released through the stock exchange;
   - take questions on notice if they can only be answered by releasing price sensitive information. Then announce the information through the stock exchange before responding.

Commenting on draft financial statements and reports

10. Confine your comments to errors in factual information and underlying assumptions if you are commenting on analysts' draft financial statements. Seek to avoid comments to the effect that the analyst's profit forecasts or other projections are too high or too low. This may be price sensitive information if it indicates that the company's, or the market's, current projections are incorrect.

III Discussion

This section outlines the legal requirements relating to disclosure and insider trading and their role in ensuring market integrity; sets out some views about the possible benefits of good disclosure practices for companies, directors and analysts; and discusses some practical examples of what may be involved in implementing the draft guidance on good disclosure practices set out in Section II.

Part 1 — The issue: Fair access to information v selective disclosure

Importance of disclosure to market integrity

1 Information is essential to the efficient functioning of stock markets. The market cannot operate effectively without public confidence in its integrity, and public confidence depends on investors having equal and timely access to information which may affect share prices. That is the purpose of the continuous disclosure requirements in the Corporations Law and stock exchange listing rules, which oblige listed companies to notify the stock exchange once they become aware of information that may have a material effect on the company's share price[1].

2 Private briefings can create a perception that institutional and broker analysts have access to information that is not available to other investors, giving them opportunities to trade on inside information. Privileged access to information is seen to give analysts, brokers and major shareholders a better appreciation of company strategies and opportunities and a sharper insight into future prospects. Even if no inside information is disclosed at selective briefings, those present have a chance to ask questions and gain a fuller understanding of publicly released information. This perception that significant information is being selectively disclosed, whether correct or not, has the potential to undermine confidence in the existence of a level playing field, causing small investors to lose trust in the fairness of the marketplace.

3 ASIC is not suggesting that listed companies routinely breach the continuous disclosure requirements in analysts briefings. Many listed companies have

[1] *Corporations Law section 1001A; ASX listing rule 3.1.*

excellent disclosure policies and follow industry best practice in conducting analysts briefings. These companies are using the benefits of current technology to make their information available to shareholders more quickly and in more user friendly ways. The quality of their disclosure practices is impressive.

4 The best solution to the negative perceptions surrounding private briefings is for companies to show that they have good disclosure procedures aimed at ensuring a level playing field. Companies that have adopted open disclosure policies and procedures find that keeping their shareholders fully informed has benefits in terms of corporate credibility and investor confidence.

The law on continuous disclosure and insider trading

5 The Corporations Law and stock exchange listing rules require listed companies[2] to notify the stock exchange once they become aware of any information that could reasonably be expected to have a material effect[3] on the company's share price (except in strictly limited circumstances).

6 Information that is required to be given to the stock exchange under the continuous disclosure requirements must not be disclosed to anyone else until the company receives an acknowledgment that the stock exchange has received the information and released it to the market[4].

7 Insider trading, buying or selling shares while in possession of price sensitive information that the buyer or seller ought reasonably to know is not generally available, is an offence under section 1002G(2)[5]. 'Tipping' or communicating non-public price sensitive information to another person who is likely to trade in the company's shares is also prohibited: section 1002G(3). These prohibitions apply to company directors and staff as well as to anyone outside the company who has non-public information which may affect the company's share price.

---

[2] *For convenience, this guidance note refers throughout to listed companies. The continuous disclosure obligations discussed here apply to all listed entities, not only listed companies. References to listed companies are to be read as including other listed entities and references to shares are to be read as including other securities. Note also that Corporations Law section 1001B imposes continuous disclosure obligations on unlisted disclosing entities.*

[3] *This means information that is likely to influence the investment decisions of persons who commonly invest in securities: Corporations Law section 1001D*

[4] *ASX listing rule 15.7.*

[5] *All references to sections are to sections of the Corporations Law.*

Relationship between disclosure and insider trading

8 This guidance note has a positive focus. It concentrates on compliance with the continuous disclosure requirements rather than insider trading offences. The goal of both the continuous disclosure regime and the insider trading prohibition is to support investor confidence in market integrity. By implementing good disclosure procedures, listed companies can reduce the risk of insider trading in their shares.

Stock exchange company announcement platform

9 Listed companies must give all information required to be notified to the stock exchange under the continuous disclosure requirements to the stock exchange company announcements office. The stock exchange releases the information to ASIC and information vendors. Announcements are publicly available for a fee from the stock exchange or ASIC. They are also available on subscription from information vendors. While the information is then officially in the public domain, members of the public must pay to obtain access to it.

10 Documents lodged with the stock exchange are often supplemented by more comprehensive background information given to analysts at private briefings. ASIC would like to see companies exploring ways of improving investor access, both to their public announcements and to information provided at private briefings. There are benefits in terms of corporate credibility, investor confidence, enhanced shareholder value and general market integrity in having a fully informed investor community.

Guidance note's interaction with the law

11 This guidance note suggests practical steps that listed companies can take to ensure that they meet the letter and spirit of the regulatory requirements on continuous disclosure. It is intended to assist company directors and executives to manage their disclosure obligations and minimise the risk of breaching the Corporations Law and stock exchange listing rules. Its objective is to outline what ASIC considers to be good disclosure practice, not to impose regulatory requirements.

12 ASIC's goal in publishing this guidance note is to encourage companies to aim for best practice in their disclosure regime, not just a minimum level of compliance with the law. The focus is on giving investors access to all significant information disclosed to analysts or institutional investors that is not already publicly available, regardless of whether it is considered price

sensitive. ASIC believes it is good corporate practice to provide shareholders with access to all significant background information that they provide to analysts.

Flexibility in implementation

13 Each listed company needs to exercise its own judgement and develop a disclosure regime that meets its own needs and circumstances. ASIC recognises that many large listed companies have specialist investor relations staff and devote considerable resources to disclosure, while in smaller companies this is often just one of the many roles of senior management. ASIC encourages companies to adopt the measures suggested in this guidance note, but they should be implemented flexibly and sensibly to fit the situation of individual companies. They are not intended to be prescriptive. Where particular methods of achieving good disclosure are suggested, the intention is to give meaningful guidance, not to tell companies that no other way is acceptable. To the extent that this guidance note suggests a higher level of disclosure than the law requires, the measures suggested are not mandatory and the aim is to encourage companies to provide investors with useful and meaningful information.

Scope of guidance

14 This guidance note does not deal with all aspects of the insider trading and continuous disclosure requirements set out in the Corporations Law and the stock exchange listing rules. For example, it does not duplicate stock exchange guidance notes.[6] Nor does it examine how companies can decide which information is price sensitive. Listed companies will need to obtain their own legal advice in order to ensure compliance with the legal and listing requirements.

15 Communications between listed companies and the media are beyond the scope of this document, although most of the general principles discussed can be applied to that context.

---

[6] *ASX guidance notes on continuous disclosure: listing rule 3.1 and on the company announcements platform.*

Part 2 — Policy considerations: Impact of increased disclosure on companies, analysts and institutional investors

Benefits for companies, directors and analysts

16 Developing good disclosure policies and procedures which ensure equal and timely distribution of information to all investors as well as compliance with the law on continuous disclosure will have benefits for listed companies and for investors. It will give company directors and management freedom to focus on their business in the certainty that they are complying with the continuous disclosure requirements. A fully informed shareholder base has benefits for listed companies in terms of corporate credibility and investor confidence, providing a basis for enhanced shareholder value.

17 Releasing information provided at analysts briefings to the wider investor community could potentially also have benefits for analysts. When information is disclosed at private briefings, the first thing those present must do is consider whether it is price sensitive. If so, the prohibition on insider trading prevents them taking advantage of the information. Analysts' firms must either cease trading in securities about which they hold price sensitive information, or create an effective Chinese Wall, or internal barrier within the firm, between the person with the information and those who make the trading decisions.

Value of analysts

18 ASIC recognises the important place that analysts occupy in Australian markets and the valuable contribution their research makes to keeping the market informed. The role of analysts in seeking out information, applying their skills to it and formulating recommendations is important to the market. Analysts' work is particularly significant in bringing to the market information about smaller companies.

19 ASIC is not suggesting that listed companies should not continue briefings for institutions and analysts, or that these briefings are inherently unfair or illegal. Many listed companies have excellent disclosure policies and follow industry best practice in conducting private briefings without harming their relations with analysts and institutions. The market will continue to rely on analysts' skills in researching and analysing company information.

Analysts' intellectual property

20 Some analysts have expressed concern at the prospect of transcripts of questions and answers at private one-on-one briefings being publicly released because they consider this will give their intellectual property to the world, free of charge. ASIC acknowledges that this is a genuine concern for analysts and believes it can be accommodated. It is important that shareholders are not denied access to information provided to analysts, but companies may choose to publish either a transcript or a summary. The summary can be prepared by the analyst or the company, but the company must be satisfied it is accurate and comprehensive. It is for the company to decide the most appropriate form in which to publish information. Analysts who do not want their questions published need to establish in advance whether the company will agree to publish a summary rather than a transcript.

Performance of institutions and analysts

21 Critics of analysts briefings have suggested that they give analysts who have better contacts in listed companies an unfair advantage over their counterparts who may be better analysts but without such good contacts. Likewise, there have been suggestions of institutional investors using their investment power to extract preferential access to information from listed companies through private briefings.

22 Listed companies need to consider the wider implications of conferring these advantages on analysts and institutions. Private briefings create negative perceptions among the majority of those interested in their shares.

23 United States research[7] indicates that companies benefit from having more open disclosure policies. Keeping the investor community fully informed and resisting pressure to give preferential access to analysts and institutions enhances corporate credibility and investor confidence, with a positive influence on share prices. Adherence to good disclosure policies also ensures that analysts and institutions are seen to be performing wholly on their merits.

---

[7] *Russell Lundholm and Mark Lang, "The Benefits of More Forthcoming Disclosure Practices", University of Michigan School of Business Administration, 1994.*

Part 3 — What information must be publicly released and when do companies risk selective disclosure?

Material and non-material information

24 The obligation on a company to notify the stock exchange applies only to information that could reasonably be expected to have a material effect on the price or value of the company's shares. This requirement is based on the principle that there should be timely disclosure of information which may affect share prices or influence investment decisions, or in which investors and the market have a legitimate interest. Its purpose is to ensure market integrity by keeping the market informed and giving investors equal access to information.

25 Companies are under no formal obligation to notify the stock exchange of information that may not, of itself, reasonably be expected to affect their share price. Consequently, a company that releases this type of material to selected individuals or groups does not contravene the law on continuous disclosure. However, ASIC believes it is good corporate practice to provide shareholders with access to all significant background information provided to analysts. There is no need to release non-material information through the stock exchange's company announcements platform, which is intended for price sensitive information, but supplementary information provided to analysts can be made available to shareholders and the wider investor community on the company's web site.

26 There is not always a clear line between what is price sensitive and what is not. Directors should be aware that there may be dangers in disclosing even seemingly innocuous information at a private briefing without first releasing it publicly through the stock exchange. A particular piece of information may, when fitted together with other information in the possession of those present at a private briefing, affect the company's share price. As a guiding principle, if there is any doubt about whether particular information is material, the safest course of action is to make a public announcement through the stock exchange.

Embargoes

27 Giving information to analysts or journalists and telling them not to use it until it is publicly released is bad disclosure practice and, if the information is price sensitive, contrary to the law on continuous disclosure. Once market sensitive information becomes known to anyone outside the company and its professional advisers, it should be released to the market. Information that is considered significant enough for a company to place an embargo on it,

almost by definition, is likely to affect the company's share price. It should therefore be given to the stock exchange before disclosing it to analysts.

Situations in which companies risk selective disclosure

28 Listed companies run the risk of selective disclosure in a range of situations, from formal analysts briefings to informal social settings. Whatever the situation, companies and their officers should avoid selectively disclosing information that is or may be price sensitive. Companies should ensure that any significant background information that is disclosed to select individuals or groups is given to all investors.

Analysts briefings: Roadshows and presentations

29 Listed companies present information to analysts and institutions in a range of settings. Some are by invitation only. Others are large, public roadshows such as those sometimes used by listed companies to put forward a major proposal to raise additional capital. Information from public roadshows is generally picked up by the media and disseminated widely and quickly, but companies need to ensure that information presented at these roadshows is publicly disclosed. Where the briefing is by invitation only, it is even more important for the company to make full and timely public disclosure.

30 Listed companies are obliged by law to give price sensitive information to the stock exchange before presenting it at roadshows and analysts briefings. Even if the information is not considered price sensitive, ASIC believes it is good corporate practice to provide shareholders with access to all significant background information given to analysts or institutions. Companies should consider giving investors access to background briefing materials, to the presentation or briefing itself and to questions and answers at the briefing.

Individual briefings

31 Briefings to a single institutional investor are no different in principle from roadshows and group briefings. Companies should avoid disclosing non-public price sensitive information in these briefings. Discussions should be reviewed afterwards to decide whether information was revealed that was not already available to the market. If non-public information has been disclosed, steps should be taken to ensure that it is immediately made available to all investors.

Ad hoc communications

32 Companies are commonly asked for information in situations other than formal briefings. The finance director of a listed company may be asked to comment on draft financial statements prepared by an analyst, or an analyst may simply telephone a company director or executive and ask questions. Directors and senior executives need to develop their own tools for handling these situations. Some suggestions include taking careful notes or recording discussions; having two persons present; taking questions on notice; promptly reporting back to the corporate disclosure manager; and reviewing the discussion to check whether any non-public information was released. Again, care should be taken not to disclose non-public price sensitive information.

Part 4 — How to ensure good disclosure practice

Some practical measures for achieving good corporate disclosure

33 ASIC considers there are some simple measures that listed companies can adopt on corporate disclosure to ensure compliance with regulatory requirements and best practice. Many Australian companies already have excellent disclosure policies and procedures. Nevertheless, the mere fact that small investors know private briefings occur can create a perception that analysts and institutional investors are getting information that is not available to other investors. This perception can be dispelled by companies adopting open disclosure policies and making the information provided at briefings available to all investors. Some companies are already addressing this issue by giving investors access via the internet to live broadcasts of analysts briefings and posting transcripts of briefings, including questions and answers, on the company web site. This is a positive development and ASIC encourages other companies to imitate it.

34 ASIC urges companies to aim for best practice in their disclosure regime, rather than just a minimum level of compliance with the law. It is emphasised that the measures outlined below are intended as a framework which can be tailored to fit the needs of individual companies, not as a prescriptive set of rules. The goal of these measures is to maximise trust and confidence in the integrity of the market by minimising selective disclosure and improving investors' access to information.

35 It is recognised that listed companies come in a wide range of sizes and complexities. Each listed company needs to exercise its own judgement and develop a disclosure regime that meets its own needs and circumstances. For example, it may be impractical for smaller companies to have two representatives present at briefings.

36 This guidance is not intended to cause undue costs to listed companies. However, listed companies must accept that the costs of complying with continuous disclosure are a necessary part of gaining the substantial benefits of public listing in Australia's efficient and respected markets.

Compliance policies and procedures

37 Listed companies should establish a structured regime for compliance with regulatory requirements, including those on continuous disclosure. Developing compliance policies and procedures is an excellent way of making sure directors and management focus on the practical steps the company needs to take to achieve compliance.

Corporate disclosure manager[8]

38 There are considerable practical benefits for a listed company in having one of its senior staff take overall responsibility for ensuring compliance with the regulatory requirements on continuous disclosure; and overseeing and coordinating disclosure of information to the stock exchange, analysts, brokers, shareholders, the media and the public. The nominated person ('corporate disclosure manager') should be at senior management level, since these issues require careful management and considerable judgement. The corporate disclosure manager should report and make recommendations directly to the board of directors, or its compliance committee, on disclosure issues. The corporate disclosure manager should also be responsible for providing education on the company's disclosure policies and procedures for directors and staff.

39 Each company needs to decide what level of autonomy the corporate disclosure manager has in making decisions about disclosure. Some boards of directors will want to have total control of decisions about lodging information with the stock exchange, other boards may wish to delegate this function to various degrees. The corporate disclosure manager needs to work closely with a deputy who is fully familiar with the area and can take over responsibility for disclosure when the corporate disclosure manager is absent.

40 The corporate disclosure manager should oversee and maintain accurate records of <u>all</u> disclosures of information by the company, regardless of whether the information is considered price sensitive. The corporate disclosure manager must have an overview of all information about the company in the public sphere: seemingly innocuous statements may affect the company's share price when combined with other information the company has disclosed.

Company spokespersons

41 A listed company has better control over disclosure if it keeps the number of persons authorised to speak on its behalf to a minimum. Directors and staff should be aware of the need to confine their comments on price sensitive matters to clarification of information that the company has released publicly through the stock exchange. The corporate disclosure manager can reduce the risk of inadvertent disclosure of non-public information by briefing directors and staff on the company's disclosure record before they give briefings to analysts or other persons outside the company.

---

[8] *The description 'corporate disclosure manager' is used for convenience only. For major listed companies this may be their full time role. For smaller companies it will likely be just one of the many roles of existing senior management, for example, of the company secretary.*

Authorisation and reporting

42 All briefings, presentations and other information disclosures should be approved in advance by the corporate disclosure manager. This will reduce the risk of breaching the continuous disclosure requirements in the Corporations Law and the listing rules by disclosing price sensitive information before notifying the stock exchange.

43 If there is a breakdown in disclosure procedures and information is disclosed without prior approval, the corporate disclosure manager should be advised immediately, regardless of whether the information is considered price sensitive. The corporate disclosure manager is then responsible for deciding whether any previously undisclosed information has been released, and if so, taking appropriate steps to release it. If the information is price sensitive, the company has breached the continuous disclosure legislation and the stock exchange listing rules, and the stock exchange must be notified immediately. Even if the information is not considered price sensitive, any information, that has been disclosed, unless clearly not relevant, should be made available to all investors without delay.

Reviewing discussions

44 Companies should have a procedure for reviewing information given to analysts. There are many ways to do this and listed companies are encouraged to develop procedures that suit their circumstances. There are benefits in having two company representatives present at meetings with analysts, brokers or institutional investors. While one of the company representatives does most of the talking, the other can take notes or record the meeting on audiotape, or alternatively, the discussions can be taken down by a stenographer. Having two people present and recording the discussion serves two purposes. First, there can be no dispute about what was said. Secondly, the corporate disclosure manager can review the tape or notes to see whether any information was disclosed that is not publicly available. If price sensitive information has been released in breach of stock exchange rules, the exchange must be notified immediately. Other information can be posted on the company web site.

45 It is recognised that it may be impractical for companies to have two persons present every time a company representative speaks to an analyst. Particularly in smaller companies, it may be more practical to make a tape recording and review it after the meeting, or to spend a few minutes giving the company secretary a report on the discussion. In larger companies, the head of the investor relations department may conduct briefings and answer analysts' questions. Since this person's job is to know precisely what information the company has released publicly, there may be little value in having a second person present. The important thing is to review what was

said afterwards, decide whether any non-public information was released, and if so, take appropriate steps to release it.

Rumours, leaks and inadvertent disclosures

46 Listed companies are sometimes asked to comment on market rumours with potential to affect their share price. Company disclosure policies should direct requests of this type to the corporate disclosure manager. The safest initial response to requests to comment on this type of rumour is always to say 'we do not respond to market rumours.'[9] The corporate disclosure manager will then need to assess whether a public announcement is warranted in the circumstances. Policies on responding to rumours should aim for consistency: saying 'we do not respond to market rumours' on some occasions and at other times indicating there is no substance in a rumour may send a signal to the market.

47 Company disclosure policies should emphasise how unauthorised leaks of information can place the company in contravention of the legal requirement to disclose price sensitive information first to the stock exchange.

48 Information disclosures should normally be approved in advance by the corporate disclosure manager. If there is a breakdown in disclosure procedures and information is inadvertently disclosed without prior approval, the person responsible should inform the corporate disclosure manager immediately, even if the information is not considered price sensitive. The corporate disclosure manager can then decide whether previously undisclosed information has been released, and if so, take appropriate steps to make the information publicly available without delay.

Unanticipated questions

49 Listed companies and their officers need to be particularly careful in responding to analysts' questions that raise issues outside the intended scope of discussion. Directors and senior executives will develop their own techniques for dealing with unanticipated questions. The ground rules include confining answers to clarification of information that has been publicly released and being aware of the need to avoid disclosing price sensitive information.

50 If the answer to an analyst's question touches on non-public information, the safest response is to say 'let me take that on notice and get back to you.' Then the normal process in the company's disclosure policy for authorising and releasing information can operate. Company representatives have reported that they feel pressured to answer analysts' questions on the spot: they believe telling an analyst they will respond later gives the impression

---

[9] *Unless the request comes from ASIC or the stock exchange, in which case a substantive response must be given.*

they do not know the company's business. ASIC recognises that this is a difficult situation and company representatives must deal with it in the way that seems best in the circumstances. If responding would clearly involve breaching the continuous disclosure requirements in the Corporations Law and the listing rules, then there is no option but to decline to answer. ASIC encourages companies to take questions on notice if there is any risk the answer will touch on non-public price sensitive information. If more companies adopt this technique and it becomes an accepted practice, there will be less pressure to provide immediate answers.

Draft financial statements and reports

51 It is a common industry practice for analysts to send draft financial analyses or reports of companies to the chief financial officer (or similar officer) and request comments on the analysis and correction of any factual errors. A company may comment on errors in factual information and underlying assumptions, but it should avoid giving any comment on price sensitive information. For example, any comment to the effect that 'your profit forecasts are too high/low' may be price sensitive information if it indicates that the company's current market projections are inaccurate. The Corporations Law and stock exchange listing rules require the company to publicly correct its earnings forecasts or any other projections that may affect its share price before responding to the analyst.

Vehicles for informing the public

The stock exchange company announcement platform

52 Stock exchange rules require listed companies to notify the company announcements office once they become aware of any information that could reasonably be expected to have a material effect on the company's share price (except in strictly limited circumstances): ASX listing rule 3.1. This requirement is reinforced by section 1001A of the Corporations Law. Traditionally this has been the main source of information for most investors, and it will remain so. Alternative disclosure vehicles and delivery systems will operate along side the companies announcement platform.

Company web site

53 In addition to press briefings and traditional methods of communication, one way for a company to facilitate corporate disclosure is through the use of an internet web site. The internet allows companies to publish information about events and developments as they occur. It offers fast and direct communication with a wide audience at low cost. While many small investors are not yet connected to the internet, the proportion of households with internet access is growing rapidly and surveys show a strong correlation between share ownership and internet access.

54 ASIC encourages companies to explore the use of developments in technology to improve disclosure and increase access to information, both for shareholders and the investment community generally. An obvious starting point for ASX listed companies is to post all information lodged with ASX under listing rule 3.1, and all other significant background information given to analysts or institutions, on the company web site. In addition, companies are urged to look at ways of using the internet to give ordinary investors access to the comprehensive information provided at analysts briefings. Combined with notification to the stock exchange, the web site can also be used to quickly remedy any selective disclosure that occurs in other settings.

Company web sites and analysts briefings

55 Until relatively recently it was not practical for most investors to attend or have access to analysts' briefings. The company web site now provides a means of giving investors direct access to briefing materials, the briefing itself and questions and answers. When posting briefing material on the company web site, companies should aim to ensure that ordinary investors have full access to all significant background information on equal terms (or as near as practicable to equal terms) with those who attend the briefing in person. Best practice for web site disclosure procedures for analysts briefings might include:

- Allowing shareholders to register their internet address on the company web site so the company can give them advance notice of proposed briefings. This will not always be practical, since companies are legally obliged to notify the stock exchange as soon as they become aware of price sensitive information. Clearly, a company cannot give shareholders several days notice that it intends making a major announcement and will hold a briefing afterwards. But shareholders can be notified of routine briefings such as those that follow the release of financial results.
- Placing reports, presentations or slide shows and other written or visual material for presentation and discussion at analysts briefings on the company web site at the time of the briefing.
- Using the company web site in combination with video or audio technology to give investors access to live broadcasts of analysts briefings, and making telephone conferencing facilities available on an 1800 number to allow shareholders to listen to briefings.
- Recording analysts briefings and placing a transcript or summary of the briefing and questions and answers on the company web site as soon as possible after the briefing, preferably within 2 or 3 hours. Consideration should also be given to placing a video or audio recording of briefings on the company web site.

Timing — Interaction of stock exchange notification and web site

56 Information that is required to be given to the stock exchange under the continuous disclosure requirements[10] must not be disclosed to anyone else until the company has received an acknowledgment that stock exchange has received the information and released it to the market[11]. Accordingly, the company must not post this type of information on its web site until it receives the stock exchange's acknowledgment.

Organising information of the web site

57 Each listed company needs to consider how best to organise and group information to make it easily accessible and useable for its investors. Most investors are likely to prefer a concise and accurate summary of information given to analysts, but some will want access to a full transcript or recording. Companies sometimes give multiple briefings, for example, in a series of roadshows to potential investors. Posting a recording or transcript of every one of these briefings on the web site would clutter it with masses of repetitive information and serve no useful purpose. The investor relations manager of a large listed company may answer numerous telephone queries from analysts every day. It is clearly impractical to place transcripts of all these conversations on the web site. But care should be taken to review discussions and ensure that shareholders are not denied access to significant background information given to analysts.

Maintenance of web sites

58 Company web sites need to be maintained to ensure the information on them is up to date and accurate. Investors will probably want access to some historical information, for example about dividend history and financial results, but it is a matter for each company to decide how far back this information should go. Regular removal of old information will help to prevent the site from becoming cluttered and difficult for investors to use. Information which was accurate when posted on the web site may sometimes become misleading in light of later events. If this happens, the information needs to be removed or modified. Information on company web sites should show the date of release: it is very relevant to investors visiting the site to know how current the information is.

Analysts' reports on the company web site

59 Companies should not quote analysts' reports on their web site without permission, since analysts' firms own the intellectual property in their reports. Companies should be aware that it is potentially misleading to investors to selectively quote favourable reports and comments. If a

---

[10] *ASX listing rule 3.1.*

[11] *ASX listing rule 15.7.*

company wishes to publish or refer to analysts' reports on its web site, all reports about the company should be included, not just a select few. Similarly, the complete report should be posted, not just favourable excerpts. Another option is to place on the company web site a full list of analysts and brokers who report on the company and their contact details. Certain brokers do not deal with retail clients, but most of these have a relationship with a retail broking firm from which investors can obtain the report. Some brokers will only provide copies of reports to their own clients. They are entitled to do this as they own the intellectual property in their analysts' reports. It is for investors to decide whether they wish to give some of their broking business to a particular firm in order to get access to its analysts' reports.

Cost

60 Smaller companies may be concerned about the cost of setting up a web site and using it as a vehicle for public information about the company. ASIC has been quoted a cost of $3 – 4,000 for a commercial service to set up a 20MB web site plus $45 per month for maintenance and postings. This should not be beyond the means of even the smallest listed company. Alternatively, the development of user friendly web authoring tools means that many listed companies will be able to set up and manage their own web site.

Commercial services

61 There is scope for development of commercial services which provide many of the services described in this guidance note. ASIC welcomes the development of new and innovative ways of delivering high quality, timely information about listed companies as widely and fairly as possible. For example, a service may centralise publicly released information about listed companies on one web site. The service could be paid for by participating companies and available at no cost to investors. Participating companies could use the service to brief the market on new developments publicly via the internet.

62 Unless they can deliver the full range of disclosures set out above, and with the needed timeliness, ASIC would view any commercial service of this type as an adjunct to, not a substitute for, listed companies adopting the measures suggested in this guidance note.

Appendix A

Corporations Law: Continuous disclosure and insider trading

Section 1001A — Continuous disclosure

This is the key provision on continuous disclosure by listed companies. It requires an entity whose securities are quoted on a securities exchange to notify the exchange once it becomes aware of information that could reasonably be expected to have a material effect on the price of its securities. The provision does this indirectly, by requiring entities to comply with the exchange's listing rules on continuous disclosure.

Section 1001A(2) provides that a listed company must not contravene the listing rules by failing to notify the exchange of information that is not generally available and could reasonably be expected, to have a material effect on the company's shares. An intentional or reckless failure to notify the exchange is an offence: section 1001A(3). Only civil remedies are available for negligent failure to disclose.

Section 1001C describes how to determine whether information is 'generally available'. Information can reasonably be expected to have a 'material effect' on the price of a company's shares if the information would be likely to influence the investment decisions of regular stock market investors: section 1001D

Section 1002G — Insider trading and tipping

Section 1002G(2) prohibits a person ('insider') from trading in shares while in possession of information that is not generally available, but if it became generally available, could reasonably be expected to materially affect the price of a company's shares.

Section 1002G(3) prohibits 'tipping', or communicating non-public price sensitive information to another person who is likely to trade in a company's shares. This is a very broad provision. An offence is committed even if the insider tells the person who receives the information not to trade in the company's shares until a public announcement is made, if the insider thinks the person is likely to disregard the instruction not to trade.

Section 1002B describes how to determine whether information is 'generally available'. Inside information becomes generally available once it has been published and enough time has elapsed for it to be disseminated. The prohibition on trading on the information then falls away.

The prohibitions on insider trading and tipping apply not only to company directors and staff, but also to anyone outside the company who has non-public information which may affect the price of a company's shares.

Australian Stock Exchange Listing Rules: Continuous disclosure

The introduction to the ASX listing rules contains a list of principles upon which the listing rules are based. The fifth of these principles is:

"Timely disclosure must be made of information which may affect security values or influence investment decisions, and information in which security holders, investors and ASX have a legitimate interest."

ASX listing rule 3.1 requires listed companies to notify ASX once they become aware of any information that could reasonably be expected to affect the company's share price. There is an exception from this requirement while each of the following applies:

- A reasonable person would not expect the information to be disclosed *(listing rule 3.1.1);*
- The information is confidential *(listing rule 3.1.2)*; and
- One or more of the following applies *(listing rule 3.1.3)*;
  - it would be a breach of the 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 company;
  - the information is a trade secret.

ASIC takes the view that information that has been selectively disclosed to an analyst or other outsider is no longer confidential for the purpose of listing rule 3.1.2. Once information has been selectively disclosed, the company must give the information to ASX for public disclosure.

ASX has published a guidance note to help listed companies to understand how listing rule 3.1 operates.

Appendix B

Electronic corporate disclosure in other countries[12]

Canada

The Toronto Stock Exchange ('TSE') released guidelines on 25 March 1999 for electronic communications by listed companies[13]. The accompanying press release stated that the guidelines reflect a growing use of the internet, with more than 70 per cent of TSE listed companies using the internet for some aspects of their communication, marketing or promotion. The guidelines aim to encourage the use of electronic media while ensuring that information disclosed in this way complies with regulatory requirements.

The TSE recommends that companies develop policies for electronic disclosure as part of their corporate disclosure policies. The TSE's recommendations include:

- all listed companies should maintain a web site to make investor relations information available electronically;
- all documents lodged under the TSE's 'timely disclosure' requirements, as well as other investor relations information, should be posted on the web site;
- information on the web site must not be misleading: it should be kept up to date and accurate, and material should be posted in its entirety, without excluding unfavourable information.
- all supplemental information provided at briefings to analysts and institutional investors, such as fact sheets, slides and transcripts of speeches, should be posted on the web site;
- an e-mail link should be provided on company web sites for investors to communicate directly with an investor relations representative of the company;
- companies should consider establishing an e-mail distribution list, so users who access the web site can subscribe to receive electronic delivery of news directly from the company or, alternatively, consider using software that notifies subscribers automatically when the web site is updated;

---

[12] Dr Elizabeth Boros of the Centre for Corporate Law and Securities Regulation, University of Melbourne, provided the information on which this material is based.

[13] Available on the internet at http://www.tse.com/mregs/index.html

- company web sites should clearly distinguish sections containing investor relations information from sections containing promotional and other information.

In another initiative to address preferential access to company information by institutional investors and analysts, the TSE recently launched a pilot project with Salter New Media to broadcast quarterly earnings conference calls of TSE listed companies over the Internet on Q1234.com, a web site that provides audio files of quarterly reports and press releases from publicly traded Canadian companies[14].

United States

A 1998 survey[15] by the U.S. National Investor Relations Institute ('NIRI') found that:

- 86 per cent of NIRI's member companies had a web site;
- a further 10 per cent expected to have a web site by the end of 1998;
- 92 per cent put news releases, other than earnings, on their web site;
- 89 per cent posted earnings releases; and
- 75 per cent placed U.S. Securities & Exchange Commission ('SEC') filings on their web site.

NIRI published guidelines on corporate disclosure for US listed companies in April 1998[16]. These are similar to the TSE guidelines summarised above.

The US Securities and Exchange Commission has foreshadowed that it intends to introduce rules on selective disclosure.

United Kingdom

In June 1998, the London Stock Exchange launched a new internet service giving private investors easy access to company news and share prices. The Exchange entered into an agreement with 10 licensed data vendors under which the Exchange's "Share Aware" web site acts as a single gateway allowing private investors easy access to the following information:

---

[14] *TSE News Release, 19 May 1999 available on http://www.tse.com/news/news_rel/news_158.html*

[15] Report of NIRI symposium on Corporate Disclosure, Impact of Technology and Role of Media, 8 April 1998.

[16] *Standards of Practice for Investor Relations, April 1998, National Investor Relations Institute.*

- share prices for Stock Exchange companies; and
- company announcements transmitted via the Exchange's regulatory news service.

The information is available free of charge, subject to a 20-minute delay, or immediately for a small charge[17].

[17] *London Stock Exchange press release, 9 June 1998.*