



ASIC

Australian Securities & Investments Commission

Continuous disclosure

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Introduction

Thank you for the opportunity to speak today about continuous disclosure.

ASIC sees continuous disclosure by listed companies as a bedrock of market integrity. It is essential to two of ASIC's priorities: fair and efficient markets and confident and informed investors.

A number of recent cases – such as NuFarm, Leighton, James Hardie and, more recently, David Jones and Fortescue – have put continuous disclosure back on the agenda as a talking point for companies and their advisers.

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

We take very few actions relative to the number of announcements made, and for far fewer than the market commentators say 'must' be breaches.

We understand that continuous disclosure issues can sometimes be very difficult, and judgement calls are required.

For this reason, ASIC welcomes and supports ASX's release of a substantially rewritten draft Guidance Note 8 *Continuous disclosure: Listing Rules 3.1–3.1B* (GN 8). ASIC worked closely with ASX on this rewrite.

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

Good continuous disclosure is about preparation and organisation, particularly as we venture deeper into the age of social media and the instantaneous sharing of information.

When continuous disclosure is discussed in Australia, it is often based on the image of directors being caught by surprise by a difficult disclosure decision. This creates the misconception that continuous disclosure is something done on a purely reactive basis and in an hour or so.

The reality is – when problems arise, it is frequently because the right frameworks to comply with continuous disclosure are not in place, rather than directors simply making decisions under pressure.

In my presentation today, I am going to cover a few topics:

- the key messages of proposed GN 8:
 - the need to have adequate systems in place;
 - how, when and what to disclose; and

- challenging issues we anticipate will arise from consultation; and
- when companies don't get it right – ASIC's considerations.

The key messages from the revised GN 8

The revised guidance contains important detail and clarification to assist companies manage compliance with their continuous disclosure obligations.

Some of the key messages are:

- Companies need to be prepared to act quickly to respond to continuous disclosure issues, by having established policies and practices.
- If the company can't act quickly (e.g. if board approval of an announcement is required), you should consider whether to request a trading halt.
- It is important for companies to know what information about them the market is trading on. This may require monitoring of major sources of news and information, which in some cases will include significant social media sites. They should also be aware of how their company's shares are trading.
- Good practice when making an announcement is not to assume the reader is sophisticated or leave readers to read between the lines. Companies need to highlight key information and tell it as it is – for instance, don't describe a scheme of arrangement proposal using takeover bid language.
- Be careful in the headings for the announcement – try to encapsulate the tenor of message there. Headings are often the things that will get reported in the media.
- Apply the listing rule requirements consistently, whether it is good or bad news required to be disclosed.
- If an announcement proves to have been wrong, it may be necessary to update the market to ensure the market is fully informed of material information.

We believe that any architect of a continuous disclosure compliance system needs to focus on the two following issues:

- the importance of having adequate systems in place, especially in the age of social media; and
- the need for companies to know what, how and when to disclose.

Having adequate systems in place

It is important that companies have procedures in place that allow them to identify and respond to events that may trigger their continuous disclosure obligations as and when they fall due.

We hope that the draft guidance will help companies achieve this. At a practical level, we would also suggest that companies consider things such as:

- 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;
- ensuring that there is a designated contact person to liaise with ASX (required to be appointed under Listing Rule 12.6), and that this person has the requisite organisational knowledge and is contactable between 9 am and 5 pm on business days – to this end it is often useful to have a chain of command for circumstances where the designated liaison is not available;
- having a written rapid response plan and ensuring all board members, their advisers and senior staff are fully apprised of its contents – this plan and the systems that fall within it need to be subject to periodic review and stress testing to ensure effectiveness;
- having a plan for when you will consider a trading halt appropriate;
- having a template ‘Request for trading halt’ letter ready for use if needed;
- preparing a draft announcement where there is prior notice of an event that may likely require an announcement be made;
- anticipating what may happen if confidential information is leaked and putting in place a contingency plan and having a draft announcement ready; and
- having written guidelines for determining what is ‘material’ information tailored to your company.

Social media

ASIC recognises the growing role of social media in financial markets.

ASX’s proposed guidance emphasises the importance for companies to know what information about them the market is trading on.

This may require monitoring major sources of news and information, which in some cases will include significant social media sites (such as investor blogs, chat sites or other social media that the company is aware regularly

includes posts about it). They should also be aware of how their company's shares are trading.

This is particularly important where the company is relying on one of the carve-outs (e.g. if it is considering a confidential, incomplete takeover offer). These companies must also very carefully control confidential information and I can recommend the guidelines published by the CSA and the Australasian Investor Relations Association (AIRA) in this regard.

Of course, it would be impracticable to monitor every social media outlet and we do not expect companies to do so, but I think companies need to think about sites that are important to a material portion of the investing public. The obvious ones are Twitter and HotCopper.

I'd like to now discuss what, how and when to disclose.

What, how and when to disclose

What to disclose

As you will be aware, a company's continuous disclosure obligations are centred around the concept of 'material' information.

ASIC recognises that continuous disclosure decisions are difficult and have to be made very quickly. Boards or management are required to make an informed estimation of whether a piece of information will be material and therefore should be disclosed.

We recognise that it is sometimes easier to see that a decision was wrong with the benefit of hindsight. For example, it might become clear when information is released to the market that it is material based on the movement in the market.

It is unlikely that we would bring an action if there is no price movement when the information does become generally available, whether through formal company release or by other sources. We may do so if there is a significant change in market volumes, so the company's securities are trading on a different basis. I will discuss matters ASIC takes into consideration when assessing what enforcement actions or tools to use later on in this talk.

The revised GN 8 discusses what is material information by posing two questions:

- 1 'Would this information influence my decision to buy or sell securities in the entity at their current market price?'; and

- 2 ‘Would I feel exposed to an action for insider trading if I were to buy or sell securities in the entity at their current market price, knowing this information has not been disclosed to the market?’

We think that these two questions would substantially assist companies in determining whether information is market sensitive.

Content of announcements (or how to disclose)

As an overriding principle, any announcement must contain information sufficient to be useful to investors.

It can be difficult for an entity to strike the perfect balance between making timely disclosure of information, and preventing premature disclosure of incomplete or indefinite matters.

The ASX guidance reflects our view that not every potential merger transaction needs to be announced, as we understand some had been suggesting.

Our practical suggestions in managing content of disclosure are:

- 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.
- 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 as it is.
- Apply the listing rule requirements consistently, whether it is good or bad news required to be disclosed.
- 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.
- 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.
- If an announcement proves to have been wrong, it may be necessary to update the market to ensure the market is fully informed of material information.

When to disclose – what does ‘immediately’ mean?

The trigger for your continuous disclosure obligation is the concept of becoming ‘aware’ of the information – then disclosing it ‘immediately’. There has been much discussion about what is meant by ‘immediately’.

The revised guidance note provides that ‘immediately’ means ‘promptly and without delay’.

ASIC takes the view that this interpretation – promptly and without delay – is consistent with ASIC’s prior understanding and application of the listing rule and s674 of the *Corporations Act 2001*. We see the guidance note as a clarification of existing practice, rather than a change in interpretation. ASIC has never applied a meaning of ‘instantaneously’ to the term ‘immediately’ in Listing Rule 3.1.

The guidance note states that the speed at which a notice can be given will depend on the circumstances, including, among others:

- where and when the information originated;
- the forewarning (if any) the company had;
- the amount and complexity of the information; and
- the need in some cases to verify the information.

ASIC has taken the approach that an adequate response time will be determined by the circumstances – for example:

- In the case of merger and acquisition transactions where information about the proposal has reached some of the market, then the confidentiality carve-out is lost and little delay in market disclosure is acceptable. So if detail about a confidential, incomplete merger proposal is leaked, you need to act quickly and if there is insufficient time to make a full announcement or if a full market announcement is not possible then consider a trading halt.
- Going back to our discussion about having established policies and procedures in place, where you have merger negotiations under way that are confidential and incomplete, you should ideally have a draft market announcement ‘ready to go’, so if the information does make its way to the market, you can respond quickly.
- In contrast, in the context of preparing earnings guidance, ‘immediately’ takes into account the entity’s need to ensure the information is sufficiently certain and prepared properly after due diligence is undertaken. I will discuss some of the challenges I believe will arise with these situations shortly.

We understand that there will be occasions where companies will need some time before they are in a position to make disclosure to ASX.

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 basis of false conditions or information.

Challenging issues we believe will arise from the consultation

Overall initial feedback about GN 8 has been very positive. There are a couple of issues that we understand have been raised.

As referred to earlier, the guidance note seeks to address some difficult issues, and we expect these will ignite some debate during the consultation period.

'Earnings guidance'

One proposal that generates a lot of discussion relates to the relevance of a change in earnings, where earnings guidance has been provided, and whether this change triggers a company's continuous disclosure obligations.

When a significant event occurs but the long-term effect on earnings is not yet known, a company may need to address its continuous disclosure obligations by announcing the occurrence of this event immediately, informing the market that it will revert at a later date with the effect the event has had on its earnings forecasts.

This avoids the issue of an entity being seen as not announcing an event 'immediately' where they are aware of its occurrence, and ensuring that any revised earnings forecasts in respect of it are still prepared with the diligence required.

Other issues

We expect there might also be some discussion on the use of trading halts to manage disclosure issues and whether this is appropriate.

Early feedback also indicates there may be a desire for more detailed feedback on how to deal with 'slow burn' issues that won't resolve within a two-day trading halt.

These are tricky issues for ASX to think about.

When companies and advisers don't get it right

Finally, to finish off, I thought it would be useful to also give you some insight into ASIC's process and considerations when deciding whether we should take action against a company for a breach of continuous disclosure.

The fundamental principles in the revised GN 8 largely reflect ASIC's views and in my view it is unlikely that anything in the revised GN 8 changes any action we took in the past.

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 under s674.

However, we remain cognisant 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 uses 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 conduct of the person or entity after the alleged contravention;
- the strength of our case;
- the expected level of public benefit; and
- the likelihood the business community is generally deterred from similar conduct through greater awareness of consequences.

As mentioned earlier, it is unlikely that we would bring an action if there is no price movement when the information does become generally available, whether through formal company release or by other sources. We may do so if there is a significant change in market volumes, so the company securities are trading on a different basis.

If, after an investigation, there appears to have been a breach of s674, there are a variety of avenues open to ASIC, including instituting criminal proceedings or civil penalty proceedings, or through our administrative functions of issuing infringement notices and/or accepting an enforceable undertaking.

ASIC will consult with and take on board the opinion of the relevant market operator; however, we are not bound by their opinion.

Sometimes a combination of an infringement notice and an enforceable undertaking provides the most effective remedy (i.e. Nufarm and Leighton Holdings). It provides a pecuniary penalty to the company to enforce the gravity of the breach as well as assisting in putting in place procedures to improve compliance with the continuous disclosure obligations in the future.

If you are interested in our enforcement approach, further information on our enforcement approach is described in our Information Sheet 151 *ASIC's approach to enforcement* (INFO 151).

I'm happy to take any questions.