

Article Information

Authors: Josh Steele, David Cornwell

Service: Corporate & Commercial

Updated guidance on Continuous Disclosure

The ASX has released its updated guidance note on Continuous Disclosure, Guidance Note 8, which includes expanded guidance on listed entities' continuous disclosure obligations in the context of 'earnings surprises', recommended procedures to be applied when undertaking investor briefings and the publication of analyst forecasts and consensus estimates.

The Guidance Note incorporates feedback received on the consultation draft released in March 2015, and follows the extensive rewrite of the Guidance Note in May 2013 and concerns arising following that rewrite that some listed entities may have misinterpreted that guidance and may, in some circumstances, be selectively disclosing material information to analysts so as to avoid having to make announcements to pre-empt 'earnings surprises'.

The key changes to the Guidance Note from the ASX's existing Guidance Note 8 include:

- **Additional guidance regarding when earnings surprises and post balance date events may be required to be disclosed**

The ASX has clarified that additional disclosure regarding 'earnings surprises' and 'post-balance date events' will, generally, only be required where they are considered to be 'market sensitive'. That is, where the reported earnings are expected to differ so significantly from market expectations that a reasonable person would expect the information to have a material effect on the price or value of its securities.

In assessing what is 'market sensitive' and whether additional disclosure is required, the ASX has recognised that earnings guidance provided by the entity itself are likely to be more reliable than analyst forecasts and the entity's prior period results.

In this context, the ASX has also recognised that, when assessing market expectations, publicly known external events affecting the entity (i.e. commodity and currency fluctuations) should already be factored in by the broader market and, therefore, analyst forecasts or earnings guidance provided prior to those events are generally understood to be out of date and, therefore, do not need to be addressed by additional disclosure.

- **Providing additional clarity regarding the distinction between entities that have previously provided earnings guidance to the market and those that have not**

The ASX has expressly recognised that an assessment of what the market's expectations are for a listed entity will be influenced by whether the entity has previously published earnings guidance to the market for the current period.

Specifically, the ASX has clarified that the 5% to 10% methodology proposed for those entities who have previously published earnings guidance may not be appropriate for entities who have not previously so as when considering their own internal projections against market expectations. For these entities, the ASX primarily suggests that officers' of these entities consider the following:

- Would this information influence my decision to buy or sell securities in the entity at their current market price?
- Would I feel exposed to an action for insider trading if I were to buy or sell securities in the entity at their current market price, knowing this information had not been disclosed to the market?
- **Clarification that listed entities have no obligation to correct analyst forecasts and estimates**

The ASX has clarified its recommendation that listed entity's monitor analyst forecasts and consensus estimates is to assist in gauging market expectations and that there is no general obligation to correct analyst forecasts or estimates, although an announcement may be required if the entity consider that such forecasts indicate that the market is not aware of material information that should be disclosed.

In this context, the ASX has emphasised that caution needs to be exercised when engaging with analysts in circumstances where the entity considers the analysts' forecast includes a factual or computational error, so as to avoid inadvertent disclosure of material information that has not previously been disclosed to the market.

- **Confirming that analyst forecasts and consensus estimates should not generally be disclosed via the markets announcement platform**

The Guidance Note includes updated guidance that the ASX does not generally consider that a single analyst forecast or a consensus estimate should be published on the market announcements platform.

ASX's concern is that publishing such information could be considered to be an endorsement of the estimate/ forecast and, in turn, constitute earnings guidance, and has therefore recommended that where an entity wishes to publish a single analyst forecast or consensus estimate, that it instead publish either^[1]:

- A list of the individual earnings forecasts of the analysts known to be covering its securities, or
- A range showing the low, average (or consensus) and high earnings forecasts of the analysts known to be covering its securities.

In this context, the ASX has cautioned against excluding an individual analyst's forecast when publishing a table of forecasts or its calculation of consensus estimates where it considers that the forecast is incorrect or an "outlier", so as to minimise any inference that the excluded forecast is incorrect and otherwise inconsistent with it's the entities own internal forecasts.

Feedback received during the consultation process was generally supportive of the amendments to the Guidance Note, although a number of areas have been further refined in the final draft. The more substantive of these amendments include:

- No longer including reference to a requirement that a listed entity release every single analyst or investor briefing to the market in circumstances where that information includes materially the same information that has already been disclosed to the market.
- Removing references to requests for analysts to provide listed entities with information regarding their underlying assumptions for their estimates as signalling to analysts that these forecasts are materially inaccurate, which is of particular importance for entities whose businesses are influenced by varying foreign exchange and/or commodity prices – given the limitations that this could impose on any meaningful engagement with analysts on these issues.
- Express guidance that the requirement to disclose material information regarding a new contract requires more than just disclosure of the legal name of the relevant counterparty to that contract and that, if a party to a contract is a subsidiary of, or controlled by, another entity, disclosure of the details of the relevant parent entity/ controller may also be required to satisfy the entity's continuous disclosure obligations.

The new Guidance Note is expected to come into force on 1 July 2015.

^[1] Which the ASX will permit to be released to the markets announcement platform.