Continuous Disclosure:
an Abridged Guide

Important notice: ASX has published this abridged guide to assist listed entities and their officers to understand and comply with their continuous disclosure obligations under the Listing Rules. Nothing in this guide necessarily binds ASX in the application of the Listing Rules in a particular case. In issuing this guide, ASX is not providing legal advice. Listed entities and their officers should obtain their own advice from a qualified professional person in respect of their obligations. ASX may withdraw or replace this guide at any time without further notice to any person.

More detailed guidance on the issues covered in this guide can be found in ASX Listing Rules Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B*, available on the ASX website at:

[*insert web address*]

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ASX
COMPLIANCE

1. Introduction

This Guide is published to assist listed entities and their officers to understand and comply with their disclosure obligations under Listing Rules 3.1 and 3.1A. These rules provide:

> *3.1 Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information.*
>
> *3.1A Listing rule 3.1 does not apply to particular information while each of the following requirements is satisfied in relation to the information:*
>
> *3.1A.1 One or more of the following 5 situations applies:*
>
> - *It would be a breach of a 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 entity; or*
> - *The information is a trade secret; and*
>
> *3.1A.2 The information is confidential and ASX has not formed the view that the information has ceased to be confidential; and*
>
> *3.1A.3 A reasonable person would not expect the information to be disclosed.*

Compliance with Listing Rule 3.1 is critical to the integrity and efficiency of the ASX market and other markets that trade in ASX quoted securities or derivatives of those securities. Reflecting this, Parliament has given the rule statutory force in section 674 of the Corporations Act.

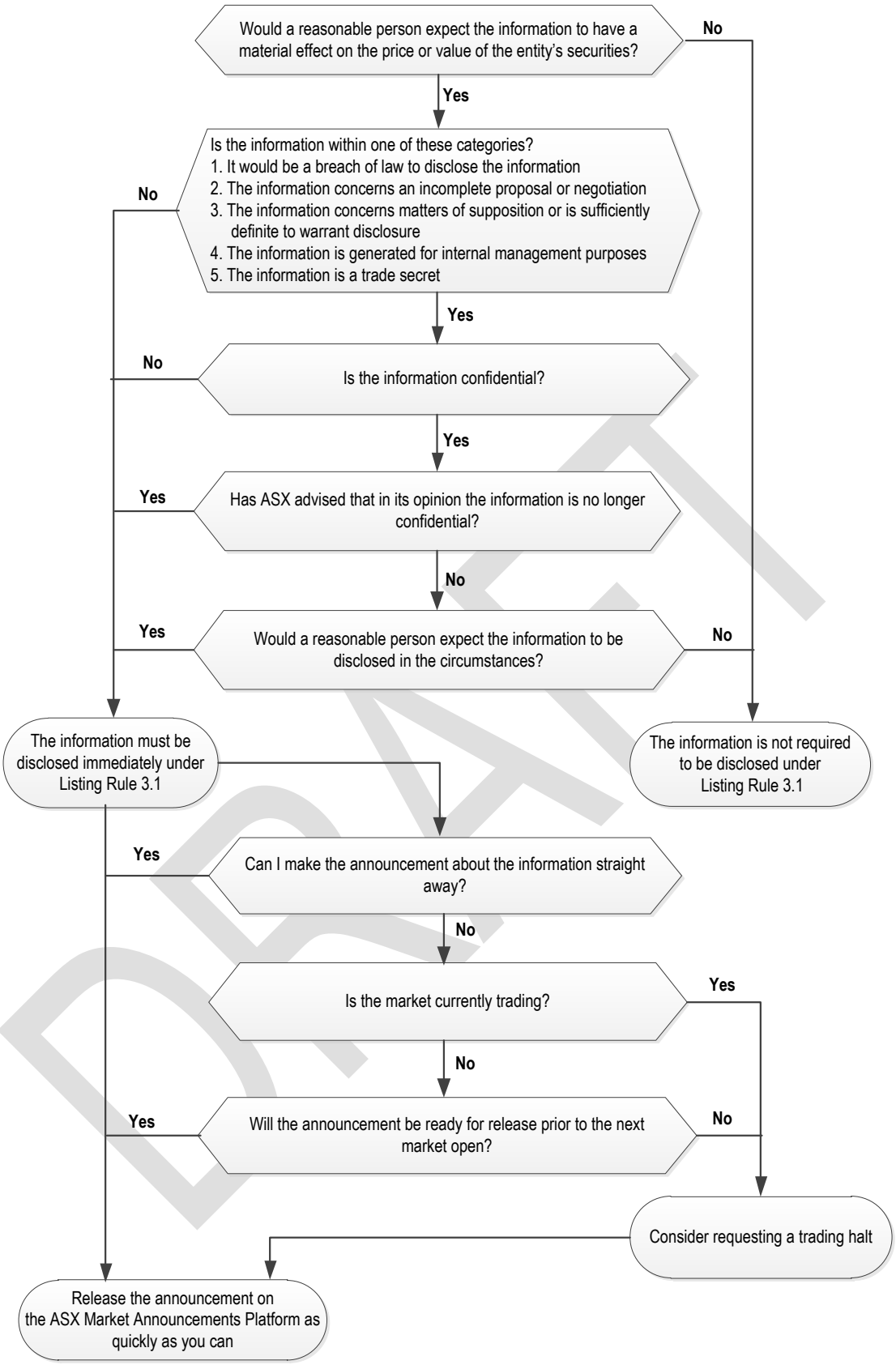
If a listed entity breaches Listing Rule 3.1, it may also breach section 674(2). This is a both criminal offence and a financial services civil penalty provision, punishable in the former case by a fine of up to $110,000 and in the latter case by a civil penalty of up to $1,000,000. Alternatively, if ASIC has reasonable grounds to suspect a breach it may, by administrative action, issue an infringement notice imposing a penalty of up to $100,000. The entity may also be liable to pay damages to any person who suffers loss or damage as a result of the breach.

An officer who is involved in such a breach may infringe section 674(2A) of the Corporations Act. This is a civil penalty provision punishable by a penalty of up to $200,000. The officer may also be liable to pay damages to anyone who suffers loss or damage as a result of the breach, although there is a due diligence defence in section 674(2B), which protect officers of a listed entity from civil penalties and civil claims for damages if they can prove that they took all steps that were reasonable in the circumstances to ensure that the entity complied with its continuous disclosure obligations and, after doing so, believed on reasonable grounds that the entity was complying with those obligations.

It should also be noted that an officer or employee of a listed entity who gives, or authorises or permits the giving of, materially false or misleading information to ASX under Listing Rule 3.1 (including in response to any enquiry ASX may make of the entity under that rule) may commit a criminal offence under section 1309 of the Corporations Act.

2. An overview of the continuous disclosure decision process

The diagram on the next page outlines the decision making process a listed entity should generally follow, if it becomes aware of information that could have a material effect on the price or value of its securities, to determine whether the information needs to be disclosed under Listing Rules 3.1 and 3.1A and, if it does and the entity is not in a position to issue an announcement straight away, whether it should consider requesting a trading halt:



3. What information does a listed entity have to disclose?

Listing Rule 3.1 requires a listed entity to disclose information "concerning it" that "a reasonable person would expect to have a material effect on the price or value of the entity's securities". This type of information is referred to in this Guide as "market sensitive information".

The notes to Listing Rule 3.1 give the following examples of the type of information that could be market sensitive:

- a transaction that will lead to a significant change in the nature or scale of the entity's activities;
- a material mineral or hydrocarbon discovery;
- a material acquisition or disposal;
- the granting or withdrawal of a material licence;
- the entry into, variation or termination of a material agreement;
- becoming a plaintiff or defendant in a material law suit;
- the fact that the entity's earnings will be materially different from market expectations;
- the appointment of a liquidator, administrator or receiver;
- the commission of an event of default under, or other event entitling a financier to terminate, a material financing facility;
- under subscriptions or over subscriptions to an issue of securities (a proposed issue of securities is separately notifiable to ASX under Listing Rule 3.10.3);
- giving or receiving a notice of intention to make a takeover; and
- any rating applied by a rating agency to an entity or its securities and any change to such a rating.

This list is by no means exhaustive and there are many other examples of information that potentially could be market sensitive.

The obligation to disclose information under Listing Rule 3.1 is not limited to information that is generated by, or sourced from within, the entity. Nor is it limited to information that is financial in character. An entity must disclose information concerning it that it becomes aware of from any source and of any character, if the information is likely to have a material effect on the price or value of its securities.

4. When is information market sensitive?

The test for determining whether information is market sensitive and therefore needs to be disclosed under Listing Rule 3.1 is set out in section 677 of the Corporations Act. Under that section, a reasonable person is taken to expect information to have a material effect on the price or value of an entity's securities if the information "would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of" those securities.

ASX acknowledges that this test gives rise to some difficulty in practice for listed entities in assessing whether or not they have an obligation to disclose information under Listing Rule 3.1. They are effectively required to predict how investors will react to particular information when it is disclosed. However, that difficulty is inescapable. It is the entity, and only the entity, that can and must form a view as to whether the information it knows, and the rest of the market does not, is market sensitive and therefore needs to be disclosed under Listing Rule 3.1.

An officer of a listed entity who is faced with a decision on whether information needs to be disclosed under Listing Rule 3.1 may find it helpful to ask two questions:

(1) "Would this information influence my decision to buy or sell securities in the entity at their current market price?"

(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 had not been disclosed to the market?"

If the answer to either question is "yes", then that should be taken to be an indication that the information may be market sensitive and, if it does not fall within the carve-outs from disclosure in Listing Rule 3.1A (see below), should be disclosed to ASX immediately.

Given the potential penalties involved in breaching Listing Rule 3.1 and section 674(2), ASX recommends that listed entities and their officers err on the side of caution and, if they have any doubts as to whether information is market sensitive or falls within the carve-outs from disclosure in Listing Rule 3.1A, they disclose the information to, rather than withhold it from, the market. ASX also recommends that listed entities carefully weigh up the potential consequences of not disclosing particular information. Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B* has an example (example H1 in Annexure A) that illustrates this point.

It should be noted that a listed entity must disclose information under Listing Rule 3.1 and section 674(2), even if does not appear to be in its short term interests to do so (eg because the information might have a materially negative impact on the price of its securities and jeopardise a transaction that it is trying to conclude). It must also comply with those obligations even where it is party to a confidentiality or non-disclosure agreement that might otherwise require it to keep information confidential.

5. The need to assess information in context

In assessing whether or not information is market sensitive and therefore needs to be disclosed under Listing Rule 3.1, the information needs to be looked at in context, rather than in isolation, against the backdrop of:

- the circumstances affecting the listed entity at the time;
- any external information that is publicly available at the time; and
- any previous information the listed entity has provided to the market (eg in a prospectus or PDS, under its continuous or periodic disclosure obligations or by way of earnings guidance).

For example, a small drop in earnings, by itself, may not be considered market sensitive. However, if that small drop in earnings results in the entity breaching a financial covenant and committing an event of default under its banking facilities, the situation is quite different. Conversely, information that an entity has received a formal offer from someone interested in purchasing a major asset at a premium price would usually be considered market sensitive (although, under Listing Rule 3.1A, the entity may not be required to disclose information about the offer for so long as it remains confidential and negotiations on the transaction are incomplete). However, if, at the time it receives the offer, the entity has no intention of selling, or no capacity to sell, the asset, or the prospective purchaser does not have the resources or the wherewithal to proceed with the transaction, the information may not be market sensitive.

The need to assess information in context also means that new information may need to be disclosed because of its impact on information previously disclosed. For example, information that an entity has investigated and decided not to pursue a particular material business opportunity may not be market sensitive, if the market has no knowledge or expectation that the entity is considering the opportunity. However, if the entity has previously announced that it was intending to pursue the opportunity, the fact that it has changed its mind may well be market sensitive and need to be disclosed under Listing Rule 3.1.

6. When does an entity become "aware" of information?

Under the Listing Rules, an entity becomes *aware* of information if, and as soon as, an officer of the entity (or, in the case of a trust, an officer of the responsible entity) has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of that entity.

The term "officer" has the same meaning as in the Corporations Act and includes directors, secretaries and certain senior managers.

The reference to information that an officer "ought reasonably have come into possession of" is intended to prevent a listed entity from seeking to avoid its continuous disclosure obligations by not having proper processes in place to ensure that market sensitive information is brought to the attention of its officers. It effectively buttresses the obligation that the directors of a listed entity have under the general law to ensure that the entity

has appropriate information reporting systems in place so that they are kept apprised of material developments affecting the entity in a timely manner.

7. The requirement to disclose information "immediately"

Under Listing Rule 3.1, market sensitive information must be disclosed to ASX *immediately* upon the entity becoming aware of the information, unless it falls within the carve-outs from disclosure in Listing Rule 3.1A (see below).

The word "immediately" does not mean "instantaneously", but rather "promptly and without delay".

Prompt disclosure of market sensitive information is critical to the integrity and efficiency of the market. The standard of promptness expected by the market and by regulators is justifiably high. ASIC has issued infringement notices for breaches of section 674(2) where market sensitive information has been withheld from the market for periods as short as 60 and 90 minutes and a trading halt has not been requested to cater for the delay.

Hence, it is important that listed entities have in place appropriate compliance systems to ensure that information which is potentially market sensitive and which comes into the possession of its directors, secretaries and senior managers is promptly assessed to determine whether it requires disclosure under Listing Rule 3.1 and, if it does, that it is promptly given to ASX or a trading halt is promptly requested. In designing those policies, listed entities should have regard to the commentary accompanying Recommendation 5.1 of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations*, ASIC Regulatory Guide 62 *Better disclosure for investors* and the Chartered Secretaries Australia publication *Good Governance Guide No 5.2: Disclosure policies and procedures*.

ASX recognises that the speed with which a notice can be given under Listing Rule 3.1 will vary, depending on the circumstances. Relevant factors may include:

- where and when the information originated;
- the forewarning (if any) the entity had of the information;
- the amount and complexity of the information concerned;
- the need in some cases to verify the accuracy or bona fides of the information;
- the need in some cases to comply with specific legal or Listing Rule requirements, such as the requirement for an announcement that relates to mining or oil and gas activities to comply with Chapter 5 of the Listing Rules; and
- the need in some cases for an announcement to be approved by the entity's board or disclosure committee (see below).

ASX will take these factors into account, as well as whether or not the entity has promptly requested a trading halt to minimise the period that the market is trading on an uninformed basis, in assessing whether an entity has complied with its obligation to disclose information in a timely manner under Listing Rule 3.1.

8. How can trading halts be used to manage a listed entity's obligations under Listing Rule 3.1?

The sensitivity of the market to information will be at its highest during trading hours on licensed Australian securities markets, which is when and where most trading in ASX listed securities takes place and when the need to issue information promptly is especially high. Consequently, if an entity becomes aware of market sensitive information that needs to be disclosed under Listing Rule 3.1:

- during trading hours on licensed Australian securities markets and it is not in a position to issue an announcement straight away; or
- outside of trading hours on licensed Australian securities markets and it anticipates that it will not be in a position to issue an announcement before trading next commences,

it needs to give careful consideration to whether it is appropriate to request a trading halt. The application of a trading halt will ensure that its securities are not trading on ASX and other licensed securities markets in Australia on an uninformed basis and that may help to reduce its exposure to the legal consequences that could follow if it is found to have breached its obligation to disclose that information immediately.

This applies whatever the reason may be for the entity not being in a position to issue the announcement straight away or before market opens (as the case may be), including because the amount and complexity of the information to be disclosed is such that it needs time to prepare the announcement or the announcement is so significant that the entity considers it appropriate to have the announcement approved by its board of directors.

It should be noted that the Listing Rules, including Listing Rule 3.1, continue to apply while an entity's securities are in a trading halt. Hence, the mere fact that an entity has requested and been granted a trading halt technically does not relieve it of the obligation to announce information under Listing Rule 3.1 promptly and without delay. However, ASX does not apply the Listing Rules in a technical manner but rather in a manner that accords with their spirit, intention and purpose, and in a way that best promotes the principles on which they are based. Whether and how promptly an entity has requested a trading halt so as to prevent trading in its securities happening on an uninformed basis are significant factors that ASX takes into account in assessing whether the entity has complied with the spirit, intention and purpose of Listing Rule 3.1 and also whether it ought to refer a possible breach of the rule to ASIC.

9. The approach ASX takes to requests for disclosure-related trading halts

ASX recognises that, faced with the difficulty of predicting whether information will have a material effect on the price or value of its securities and the serious legal consequences that may flow if information is not disclosed when required, a listed entity may err on the side of caution and seek to disclose information where there may be some doubt as to whether the information is in fact market sensitive. Not all announcements an entity may wish to make will warrant a trading halt. It is for this reason that when an entity requests ASX for a trading halt to allow it the time it needs to prepare an announcement under Listing Rule 3.1, ASX will usually ask the entity to outline the nature of the information in question and assess for itself whether the circumstances warrant the granting of a trading halt.

If ASX considers that the information is of a character that is likely to be market sensitive and that the circumstances warrant the granting of a trading halt, ASX will invariably agree to the request for a trading halt so as to afford the entity the time it needs to prepare and issue an announcement. In that case, provided the entity has requested a trading halt promptly after it became obliged to disclose the information under Listing Rule 3.1 and, after the trading halt has been granted, then acts to issue an announcement as quickly as it can in the circumstances, ASX will regard the entity as having complied with the spirit, intention and purpose of Listing Rule 3.1.

If ASX considers that the information is of a character that is unlikely to be market sensitive or that the circumstances do not warrant the granting of a trading halt, ASX may decline the request for a trading halt and ask the entity to complete and lodge its announcement as quickly as it can. In that case, should the information ultimately turn out to be market sensitive, provided the entity approached ASX promptly after it became obliged to disclose the information under Listing Rule 3.1 to discuss its request for a trading halt and, after the request was refused, then acted to issue an announcement as quickly as it could in the circumstances, ASX will regard the entity as having complied with the spirit, intention and purpose of Listing Rule 3.1.

ASX may also explore with an entity whether an interim announcement about a particular event could be made under Listing Rule 3.1 and whether trading could resume after the interim announcement has been made. In such a case, ASX may agree to a short trading halt to afford the entity the time it needs to make an appropriate interim announcement.

ASX would strongly encourage any listed entity which is unsure about whether it should be requesting a trading halt to cover the time it needs to prepare and release an announcement to the market, to contact its listings adviser at ASX to discuss the situation.

ASX Guidance Note 16 *Trading Halts and Voluntary Suspensions* has further guidance on how to apply for a trading halt.

10. Does the board need to approve an announcement under Listing Rule 3.1?

The courts have acknowledged that it is appropriate for some particularly significant continuous disclosure announcements to be considered and approved by the board of directors before they are released. They have also made it clear, however, that this is not legally necessary in all cases.

Given the requirement for announcements under Listing Rule 3.1 to be issued immediately, a listed entity should have suitable arrangements in place to enable this to occur. Such arrangements may include giving appropriate delegations to senior management to release some announcements of their own accord and, if the matter falls outside those delegations, having a disclosure committee that can meet by phone or on short notice to consider the announcement.

Where an entity considers an announcement to be so significant that it ought to be approved by its full board before release, it needs to think carefully about how it will manage its disclosure obligations. This will require a close consideration of the nature of the information to be disclosed, the applicability of the exceptions in Listing Rule 3.1A and whether the circumstances warrant requesting a trading halt.

Where it is the decision of the board itself that is the information to be disclosed under Listing Rule 3.1 (such as a decision by the board to declare a special dividend), the obligation to disclose generally will not arise until the board has made that decision. It usually will not be necessary to request a trading halt ahead of that decision (although that could change if there are signs that information about the impending board decision has leaked and this has or could have a material impact on the market price or traded volumes of the entity's securities).

Where the information to be disclosed falls within the exceptions to immediate disclosure in Listing Rule 3.1A but the board determines that it is now appropriate and timely to announce the matter to the market, it will be that decision of the board that is the trigger for the announcement rather than any legal obligation under Listing Rule 3.1. Again, it usually will not be necessary to request a trading halt ahead of that decision (although that could change if there are signs that information about the matter has leaked ahead of the announcement and this has or could have a material impact on the market price or traded volumes of the entity's securities).

Where, however, the information relates to a market sensitive event that has already occurred and that information does not fall within the exceptions to immediate disclosure in Listing Rule 3.1A, the obligation to disclose will typically have arisen at the point when the entity first became aware of the event. To comply with the timing requirements of Listing Rule 3.1, an announcement about that event must be released promptly and without delay. In turn, this means that the requisite board meeting to consider the announcement must be convened and the board must settle and approve the announcement for release promptly and without delay. Consideration of the announcement cannot be deferred to a previously scheduled regular board meeting or to a meeting to be convened at a future date. In addition, if the market will be trading at any time after the entity became aware of the event in question and before the announcement is approved and released to the market, the entity should consider carefully whether it needs to request a trading halt to prevent the market trading on an uninformed basis over that period.

Whether a trading halt is appropriate in this latter case will depend on the circumstances. If the matter to be announced is something that a reasonable person would expect to go to the board for approval (such as a maiden announcement by a junior mining exploration entity of material exploration results) and the board can deal with it promptly and without delay, it may not be necessary to request a trading halt ahead of the announcement (although again that could change if information about the matter leaks ahead of the announcement and this has or could have a material impact on the market price or traded volumes of the entity's securities). If not, it will usually be appropriate to request a trading halt to prevent the market trading on an uninformed basis.

ASX would strongly encourage an entity which is unsure about whether it should be requesting a trading halt to cover the time between becoming aware of information and the board being able to approve an announcement, to contact its listings adviser at ASX to discuss the situation.

ASX would also strongly encourage an entity which is awaiting board approval to a market sensitive announcement and which has not requested a trading halt to prevent the market trading ahead of the announcement to monitor:

- the market price of its securities;

- major national and local newspapers;
- major news wire services, such as Reuters and Bloomberg;
- any investor blogs, chat-sites or other social media it is aware of that regularly include postings about the entity; and
- enquiries from analysts or journalists,

for signs that the information in the announcement may have leaked and to immediately contact ASX to request a trading halt if it detects any such signs.

11. What other steps can a listed entity take to facilitate compliance with Listing Rule 3.1?

Steps that a listed entity can take to help manage the requirement to disclose information immediately under Listing Rule 3.1 include:

1. Have a template letter requesting ASX to grant a trading halt ready for use at all times. In this way, if it needs to request an urgent trading halt, it can do so without delay.
2. Anticipate what might happen if information about a confidential transaction being negotiated leaks and have a template announcement ready that can be updated and issued straight away.
3. Where it has advance notice of an event that is likely to require an announcement under Listing Rule 3.1, prepare a draft announcement ahead of time that can be issued straight away.
4. Where the event that gives rise to the need to make an announcement is within its control (for example, the signing of a material contract), be sensitive to the hours when licensed markets in Australia are trading and, where possible, try to ensure that the event happens and the announcement is made before trading commences or after trading has closed, so that it is not necessary to request a trading halt.
5. Ensure that the person appointed under Listing Rule 12.6 to be responsible for communications with ASX in relation to Listing Rule matters:
    - has the organisational knowledge to have meaningful discussions on disclosure matters and has the authority to request a trading halt and to issue an announcement to the market, if that is what is required; and
    - is readily contactable by ASX by telephone and available to discuss any pressing disclosure issues that may arise during normal market hours and for at least one hour either side thereof (that is, from 9am to 5pm AEST on each trading day).

12. The requirement to give market announcements to ASX first

Generally speaking, under Listing Rule 15.7, an entity must not release information that is required to be given to ASX under Listing Rule 3.1 to anyone else, unless and until it has been given to ASX and the entity has received an acknowledgement from ASX that the information has been released to the market. This includes releasing the information to the media, even on an embargoed basis.

The reason for this requirement is to make ASX's Market Announcements Platform the central collection and dissemination point for market sensitive information. This ensures that such information is quickly and broadly disseminated to all sections of the market, enhancing the efficiency and integrity of that process and helping to reduce of risk of informational inequities and insider trading.

ASX acknowledges that the requirement to give information to ASX first can pose practical difficulties for listed entities that have business operations in countries in different time zones to Australia. ASX encourages any entity in this situation which has advance warning that it may need to make an announcement in another country at a time when the ASX Market Announcements office is not open, to contact its ASX home branch to discuss the arrangements that can be made to facilitate that occurring in a manner that does not undermine the policy behind Listing Rule 15.7.

ASX also recognises that sometimes events will occur outside of the hours of operation of the ASX Market Announcements office, whether in Australia or overseas, which require an immediate public announcement (eg a major natural disaster affecting the operations of a listed entity where an announcement may be required for health and safety reasons or for the peace of mind of staff and relatives). If a listed entity has a pressing commercial or legal need to make a market sensitive announcement outside of the hours of operation of the ASX Market Announcements office, provided it gives a copy of the announcement to the ASX Market Announcements office at the same time as it makes the announcement, so that it is queued for processing by the ASX Market Announcements office before licensed markets in Australia next open for trading, ASX will generally not take any action against the entity for infringing Listing Rule 15.7.

13. The exceptions to immediate disclosure

Listing Rule 3.1A sets out exceptions to the requirement to make immediate disclosure of market sensitive information under Listing Rule 3.1. These exceptions seek to balance the legitimate commercial interests of listed entities and their security holders with the legitimate expectations of investors and regulators concerning the timely release of market sensitive information. They also seek to ensure that information is not disclosed prematurely when, rather than inform the market, it could misinform or mislead the market.

Unless the requirements in all three of Listing Rules 3.1A.1, 3.1A.2 and 3.1A.3 are satisfied in respect of particular market sensitive information, Listing Rule 3.1A does not apply and the entity must disclose the information immediately under Listing Rule 3.1.

If the requirements in all three of Listing Rules 3.1A.1, 3.1A.2 and 3.1A.3 are initially satisfied in respect of particular market sensitive information but any one of them ceases to be satisfied thereafter, Listing Rule 3.1A ceases to apply at that point and the entity must then disclose the information immediately under Listing Rule 3.1.

13.1 Listing Rule 3.1A.1 - the categories of information excluded

The first requirement for Listing Rule 3.1A to apply is that the information must fall within one of the categories mentioned below:

- it would be a breach of a 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 entity; or
- the information is a trade secret.

More detailed guidance on each of these categories can be found in Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B*.

13.2 Listing Rule 3.1A.2 - the requirement for information to be confidential

The second requirement for Listing Rule 3.1A to apply has two components: (1) the information must be confidential; and (2) ASX has not formed the view that the information has ceased to be confidential.

In relation to the first component, information will be "confidential" if:

- it is known to only a limited number of people;
- the people who know the information understand that it is to be treated in confidence and only to be used for permitted purposes; and
- those people abide by that understanding.

Whether information has the quality of being confidential is a question of fact, not one of the intention or desire of the listed entity. Accordingly, even though an entity may consider information to be confidential and its disclosure to be a breach of confidence, if it is in fact disclosed by those who know it, then it ceases to be confidential information for the purposes of this rule.

It is therefore incumbent on a listed entity which wishes to rely on the carve-out from disclosure in Listing Rule 3.1A to ensure that it has in place suitable and effective arrangements to preserve confidentiality. Guidance on the steps that can be taken in this regard can be found in the joint publication by Chartered Secretaries Australia and the Australasian Investor Relations Association entitled *Handling confidential, price-sensitive information: Principles of good practice*.

Even with strong confidentiality safeguards, it is important to recognise that the more people who know information, the greater the risk that it will cease to be confidential. So, for example, if a party proposing to acquire a business wants, as part of its due diligence, to make enquiries of employees, customers or suppliers, or a party proposing to undertake an issue of securities wants to take soundings from brokers and potential investors, it and the other parties involved in the transaction need to be prepared for the chance that information about the transaction will not be kept in confidence.

An entity which is relying on Listing Rule 3.1A not to disclose information about a market sensitive transaction it is negotiating should as a matter of course be monitoring, either itself or through its advisers:

- the market price of its securities and of the securities of any other listed entity involved in the transaction;
- major national and local newspapers;
- major news wire services, such as Reuters and Bloomberg;
- any investor blogs, chat-sites or other social media it is aware of that regularly include postings about the entity; and
- enquiries from analysts or journalists,

for signs that information about the transaction may no longer be confidential and have a draft letter to ASX requesting a trading halt and a draft announcement about the negotiations ready to send to ASX to cater for that eventuality. The closer the transaction gets to being concluded, the higher the risk of leaks and the more diligent that monitoring should be.

In relation to the second component, ASX may form the view that information about a matter involving a listed entity has ceased to be confidential if there is:

- a media or analyst report about the matter;
- a rumour known to be circulating the market about the matter; or
- a sudden and significant movement in the market price or traded volumes of the entity's securities that cannot be explained by other events or circumstances.

Each of these is evidence that the matter is no longer confidential and therefore Listing Rule 3.1A.2 no longer applies.

In the case of the first two points above, the more specific and the more accurate the media or analyst report or market rumour, the more compelling the evidence that confidentiality has been lost.

In relation to the third point above, ASX occasionally finds a listed entity or its advisors wanting to debate whether a sudden and significant movement in the market price or traded volumes of its securities can fairly be attributed to information about a particular matter ceasing to be confidential. ASX considers any such debate to be misplaced. If an entity advises ASX that there is market sensitive information that has not been disclosed in reliance on Listing Rule 3.1A (as it must, under section 1309 of the Corporations Act, when it is asked that question by ASX) and it is not able to point to any other event or circumstance which explains the movement in the market price or traded volumes of its securities, ASX has no choice but to assume that the information in question has become known to some in the market, is being traded on and therefore is no longer confidential. Upon the entity being advised by ASX that it is of the view that the information has ceased to be confidential, Listing Rule 3.1A will no longer apply and the entity will then be obliged to make an immediate announcement about the information under Listing Rule 3.1.

13.3 Listing Rule 3.1A.3 - the reasonable person test

The third requirement for Listing Rule 3.1A to apply is that a reasonable person would not expect the information to be disclosed.

As a general rule, most information that falls within the prescribed categories in Listing Rule 3.1A.1 and that is confidential under Listing Rule 3.1A.2 will also fall within Listing Rule 3.1A.3, since confidential information within those categories will generally be information that a reasonable person would not expect to be disclosed. That general rule can, however, be displaced if there is something in the circumstances that would cause a reasonable person to expect the information to be disclosed. The following example illustrates the point:

> ***Example:*** *listed company A is the subject of a hostile takeover offer from company B (information about the takeover offer is public). A receives an indicative non-binding confidential offer from another company C interested in pursuing a friendly acquisition at a higher price per share than the offer from B. The offer is expressed to be subject to a number of conditions, including satisfactory completion of due diligence, and includes a statement that it may be withdrawn if it is disclosed by A. A's board is prepared to entertain the offer and resolves to commence negotiations with C.*
>
> *Absent the takeover offer from B, A would ordinarily be entitled to treat the approach from C as falling within Listing Rule 3.1A while it remains confidential and until the negotiations with C have been completed. However, in these circumstances, where shareholders need to make a decision whether or not to accept the takeover offer from B, a reasonable person would expect A to disclose the fact that it has received a potentially higher offer from, and has resolved to commence negotiations with, C.*
>
> *The fact that C has tried to pre-empt disclosure by saying that the offer may be withdrawn if it is disclosed does not override A's legal obligation to make disclosure under Listing Rule 3.1 and section 674(2).*

This example highlights the point made earlier that information needs to be assessed in context. The context in which information arises may mean that even though it satisfies the conditions for non-disclosure in Listing Rules 3.1A.1 and 3.1A.2, a reasonable person would nonetheless expect it to be disclosed under Listing Rule 3.1A.3.

The reasonable person test is an objective one. It is to be judged from the perspective of an independent and judicious bystander and not from the perspective of someone whose interests are aligned with the listed entity or with the investment community. It is also to be judged against the backdrop of the policy reasons underpinning Listing Rule 3.1, namely, that timely disclosure of market sensitive information is critical to the integrity and efficiency of the ASX market and other public markets on which ASX quoted securities trade.

14. Market sensitive information in financial statements

All other things being equal, a listed entity is not expected to release the information in its half yearly or annual financial statements ahead of their scheduled release date. Sometimes, however, in the course of preparing financial statements, market sensitive information may become apparent that ought to be disclosed immediately under Listing Rule 3.1. Two areas where this issue commonly arises are earnings surprises and post-balance date events.

If, in the course of preparing a periodic disclosure document, it becomes apparent to a listed entity that its reported earnings will differ materially from market expectations to an extent which is market sensitive, the entity must disclose that information to ASX immediately under Listing Rule 3.1. It cannot wait until its financial statements are released. The same is true for information about a market sensitive post-balance date event.

15. Earnings surprises

All other things being equal, a listed entity's earnings for a particular reporting period are not required to be reported to the market until the due date for the release of that information under Chapter 4 of the Listing Rules.

However, for many listed entities, the market's expectations of its earnings over the near term will often be a material driver of the price or value of its securities. Those expectations may have been set by:

- earnings guidance the entity has given to the market;

- in the case of larger entities covered by sell-side analysts, the earnings forecasts of those analysts (with the "consensus estimate" of those analysts usually taken as the central measure of the entity's expected earnings); or
- in the case of smaller entities not covered by sell-side analysts, the earnings results of the entity for the prior corresponding reporting period.

Those expectations may also have been set or modified by the disclosures the entity has made to the market over the reporting period.

If an entity becomes aware that its earnings for a reporting period will materially differ (downwards or upwards) from:

- earnings guidance it has given for the period;
- where the entity is covered by sell-side analysts, the consensus estimate of those analysts for the period; or
- where the entity is not covered by sell-side analysts, its earnings for the prior corresponding period,

it needs to consider carefully whether it has a legal obligation to notify the market of that fact. This obligation may arise under Listing Rule 3.1 and section 674(2), if the difference is of such magnitude that a reasonable person would expect it to have a material effect on the price or value of the entity's securities. Alternatively, in the case of an entity which becomes aware that its earnings for a reporting period will materially differ from specific earnings guidance it has given to the market, it may arise under section 1041H, because failing to inform the market that its published guidance is no longer accurate could constitute misleading conduct on its part.

Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B* has more detailed guidance on earnings surprises and some worked examples illustrating how they should be handled under the Listing Rules.

16. Entities in financial difficulties

The fact that information may have a materially negative impact on the price or value of an entity's securities does not mean that a reasonable person would not expect the information to be disclosed. Quite the contrary, in many cases, this is precisely the type of information that a reasonable person would expect to be disclosed.

ASX recognises that for a listed entity in financial difficulties, the requirement to disclose materially negative market sensitive information immediately can be an impediment to completing a financial restructure or reorganisation necessary for its survival. However, the proper course for the entity in such a situation is not to disregard its continuous disclosure obligations but instead to approach ASX to discuss the possibility of a trading halt or, if the situation is unlikely to resolve itself within two trading days (the maximum period for which a trading halt may be granted), a voluntary suspension.

ASX Guidance Note 16 *Trading Halts and Voluntary Suspensions* has further guidance on how to apply for a trading halt or voluntary suspension.

17. ASX's and ASIC's enforcement activities

As a licensed market operator, ASX is obliged to have adequate arrangements to monitor and enforce compliance with its Listing Rules. To meet this obligation, ASX conducts various monitoring and surveillance activities to detect possible breaches of Listing Rule 3.1. Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B* summarises those activities and, in particular, outlines the action that ASX will take when as part of its surveillance activities it detects abnormal trading in an entity's securities. It also explains ASX's processes regarding 'price query letters' and 'aware letters'.

If ASX suspects that a listed entity has committed a significant contravention of Listing Rule 3.1, or that a listed entity or any other person (such as a director, secretary or other officer of a listed entity) has committed a significant contravention of the Corporations Act, it is required under that Act to give a notice to ASIC with details of the contravention. The purpose of such a notice is so that ASIC can then consider what enforcement action, if any, it may wish to take in relation to the suspected contravention.

As mentioned in the introduction, breaching Listing Rule 3.1 also potentially breaches section 674 of the Corporations Act and this has very serious legal consequences.

18. For further information

This Guide is an abridged version of much more detailed guidance that ASX has provided in Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B*. That Guidance Note, for example, includes material on the headers and contents of announcements under Listing Rule 3.1 and outlines ASX's position on when and how listed entities should respond to comment or speculation in media or analyst reports and to market rumours.

If a listed entity or its officers need further information about their continuous disclosure obligations, they should consult that Guidance Note or speak to the entity's designated listings adviser at ASX.