

JUNE 2014

# CORPORATE GOVERNANCE UPDATE

## HANDLING OF CONFIDENTIAL INFORMATION - BRIEFINGS AND UNANNOUNCED CORPORATE TRANSACTIONS

**SUMMARY:** ASIC recently released Report 393 Handling of confidential information: Briefings and unannounced corporate transactions (the "**Report**"). The Report results from ASIC's attendance at sample investor briefings, media-based analysis, academic research and market practice interviews, and contains important observations and recommendations regarding current market practice. These include:

- Identifying the importance of both having and implementing appropriate policies and procedures on the conduct of briefings to prevent disclosure of confidential, market-sensitive information;
- Suggesting that listed entities must take greater responsibility for the management of their own confidential, market-sensitive information, to minimise risks of disclosure by third parties; and
- Encouraging listed entities to manage the risk of leaking confidential, market-sensitive information at market soundings, by preparing draft requests for trading halts and draft announcements.

In this corporate governance update we set out some of the key findings and recommendations as they relate to listed companies.

ASIC's recent action against Newcrest Mining in relation to selective briefing of analysts and investors with market-sensitive information prior to an announcement and the proposed penalties of \$1,200,000 serves as a timely reminder of the consequences that can flow if proper procedures are not in place or not properly followed.

## THE LEGAL ISSUE

The leakage of market-sensitive information about a listed entity ahead of a market announcement threatens market integrity. It does so by creating selective access to information, increasing the risk of insider trading and it can also pose threats to the outcome of corporate transactions. Particular risks arise through the process by which parties handle confidential, market-sensitive information during briefings held by listed entities for analysts and institutional investors. Risks also arise in the context of unannounced, market-sensitive corporate transactions.

Inadvertent or deliberate disclosure of confidential, market-sensitive information may result in:

- Breach by a listed entity of its continuous disclosure obligations under the ASX Listing Rules (which may lead to infringement notices, or criminal or civil penalties).
- Insider trading (which may result in criminal sanctions, civil sanctions and reputational damage).
- A detrimental effect on a proposed transaction, share price or the integrity of the market generally.

## KEY ASIC FINDINGS

The Report draws a distinction between:

- Analyst and investor briefings; and
- Market practice on handling confidential, market-sensitive information about transactions.

## ANALYST AND INVESTOR BRIEFINGS

Key findings with respect to briefings are that:

- Some entities have reasonably sound documented policies and procedures on the conduct of analyst and investor briefings, but do not always follow them. ASIC stresses that listed entities must have appropriate policies and procedures and ensure that they are implemented;
- Some entities try to manage the market's expectations through selective briefings. When the market's expectations diverge materially from the entity's internal forecasts, they conduct analyst briefings to bring analysts 'in line' so that the market is not surprised when

the entity releases its results or provides profit guidance. This is a practice that is at odds with how the continuous disclosure regime operates and ASIC recommends that listed entities should refrain from such conduct;

- There are instances where staff below the board and officer level - who may not be adequately aware of the obligations surrounding confidential, market-sensitive information - have been involved in discussions with analysts. ASIC suggests that restrictions be imposed by a listed entity to limit the authority of its staff to speak with, or have inappropriate communications with, analysts and investors; and
- Participants in briefings are generally institutional investors and analysts, which represents only a portion of the market. ASIC suggests that access to briefings should be extended as widely as possible, including recording and transcribing briefings to disseminate over the internet.

## CORPORATE TRANSACTIONS

Perhaps the key finding in relation to the handling of confidential, market-sensitive information about transactions is that some listed entities are heavily reliant on their advisors to set the practices in this area. This is particularly problematic in relation to the conduct of 'soundings' ahead of a proposed capital raising (where the interests of the listed entity and the advisors who act as underwriters may not perfectly align).

ASIC has also expressed concerns that soundings are being conducted prior to a trading halt or whilst the market is open. This may allow investors to trade whilst possessing confidential, market-sensitive information. ASIC encourages listed entities to request a trading halt where it is not possible or practical to conduct soundings whilst the market is closed. However, listed entities will invariably be reluctant to do so as it may have a detrimental effect on the entity's share price through disclosing a proposed transaction which may not ultimately proceed.

Other notable findings include:

- Listed entities (particularly those in the small-to-mid-market cap range) do not, (i) have documented policies and procedures on the

handling of confidential, market-sensitive information in the context of a material corporate transaction, (ii) have a sophisticated understanding of the issues and risks in this area, and (iii) take proactive steps to address them; and

- It is not common practice for listed entities to have a draft ASX announcement prepared in case there is a leak with respect to a confidential, market-sensitive transaction. Where a listed entity has not requested a trading halt, ASIC further recommends that draft requests for trading halts and draft announcements be prepared to manage the risk of a leak.

### SO WHERE TO FROM HERE?

The Report makes a number of recommendations for listed entities, advisers and analysts which largely accord with existing 'best practice' guidance. ASIC acknowledges that existing regulatory guidance is adequate and does not propose to release any additional guidance. The recommendations for listed entities are summarised in the following table:

#### Listed Entities - Handling of Confidential Information - Guidelines

General
<ul style="list-style-type: none"> <li>Assume responsibility for the management of own confidential, market-sensitive information</li> </ul>
<ul style="list-style-type: none"> <li>Ensure that board members and officers familiarise themselves with the Governance Institute/AIRA guidelines and appropriate training of staff</li> </ul>
<ul style="list-style-type: none"> <li>Adopt written policies and ensure these policies are followed consistently</li> </ul>
At Briefings
<ul style="list-style-type: none"> <li>Refrain from conducting selective briefings and ensure broad access to briefings</li> </ul>
<ul style="list-style-type: none"> <li>Make available transcripts or recordings of briefings</li> </ul>
<ul style="list-style-type: none"> <li>Implement compliance systems to support handling of confidential, market-sensitive information</li> </ul>

Pre-Transactions
<ul style="list-style-type: none"> <li>Procure assurance from third parties that market-sensitive information will be kept confidential</li> </ul>
<ul style="list-style-type: none"> <li>Adopt a formal leak policy and have draft trading halt requests and draft ASX announcements prepared</li> </ul>
<ul style="list-style-type: none"> <li>Have frank discussions with advisers regarding market soundings and implementing trading halts where necessary</li> </ul>

ASIC intends to continue its review of industry practice, and to undertake enforcement action to improve the handling of confidential, market-sensitive information. In particular, it will focus on misconduct resulting from analyst and investor briefings by:

- Conducting a targeted review of research reports by analysts, to ensure that changes in recommendations are not a result of the receipt of non-public material information; and
- Undertaking enforcement action against insider trading and listed entities that fail to comply with continuous disclosure obligations.

The announcement on 18 June 2014 that ASIC has instituted proceedings in the Federal Court against Newcrest Mining for briefing analysts on market-sensitive information ahead of it being disclosed to the market is an example of ASIC's renewed determination to punish what it sees as market misconduct. It is a timely reminder of the potential consequences of getting it wrong. Newcrest Mining has admitted to two contraventions and the parties will jointly propose a penalty of \$1,200,000 in aggregate to the Federal Court (the actual amount of the penalties is a matter for the court to determine).

#### KEY TAKEAWAY

The Report does not introduce any new concerns or recommendations. Rather, it finds that the existing regulatory guidance (found in ASIC Regulatory Guide 62 Better disclosure for investors and the 3rd Edition of the ASX Corporate Governance Principles and Recommendations), is adequate.

Accordingly, the Report should not be read as a directive that listed entities must avoid analyst briefings or market soundings, or make premature market announcements where there is uncertainty about a transaction and confidentiality has not been

lost. Rather, listed entities, analysts and advisers should ensure that they have appropriate policies in place to deal with the handling of confidential information in the context of briefings and unannounced corporate transactions, those policies are understood and adhered to, and particular care is taken where selective briefings and market soundings occur.

DLA Piper can assist with reviewing existing procedures (or establishing procedures) to ensure that the handling of confidential information by listed companies accords with 'best practice' industry guidelines and the findings of the Report. Some additional practical guidance on how to manage market-sensitive information in the context of corporate transactions can be found in our Client Update dated 12 February 2014 [here](#).

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