



ASIC prepares to strike against insider trading and market abuse

The Australian Securities and Investments Commission (ASIC) has released proposals for reigning in insider trading and market abuse in connection with M&A and fundraising transactions. The proposals take the form of 'best practice' guidelines for dealing with confidential information in the context of such transactions and are set out in Consultation Paper 128 Handling Confidential Information.

1. The risks

A failure to adequately control confidential information in connection with an M&A or fundraising transaction could create serious risks for the entities and individuals involved, including:

- breach of continuous disclosure obligations under Chapter 3 of the ASX Listing Rules
- breach of the pre-prospectus non-disclosure obligations in section 734 of the Corporations Act
- breach of the insider trading prohibitions in section 1042 of the Corporations Act
- jeopardising important aspects of the transaction, such as timing and pricing, and
- damage to the business or reputation of the relevant entities and their advisers.

2. Insider lists

Following the lead of the UK, ASIC has proposed that, in connection with such market-sensitive transactions, the companies involved would need to maintain an 'insider list' of all individuals (including advisers) who have access to confidential information.

ASIC has also proposed that the companies involved would need to:

- classify information according to the level of protection required
- investigate (or request its advisers to investigate) any leak, or suspicion of a leak, of confidential information
- use umbrella agreements that outline the principles and procedures for handling confidential information where the services of investment banks and other professional advisers are used on a regular basis, and
- require all advisers to enter into transaction-specific confidentiality agreements, including limits on individuals with access to confidential information.

3. Individual confidentiality agreements

For highly sensitive transactions, ASIC has proposed that individuals (both employed by the company and external service providers) should be required to sign individual confidentiality agreements.

4. Sounding the market

'Sounding the market' is where investment banks and other advisers directly approach existing and potential investors for feedback on the proposed transactions. ASIC has suggested that all such conversations should follow a formal script that is adopted in advance for the purposes of such approaches.

Furthermore, within 48 hours of sounding by an investment bank, ASIC would need to be notified of:

- the names of all institutions contacted and whether each has agreed to be made an insider
- the time and date when contact was made with each institution and when each institution agreed or refused to become an insider, and

LegalTalk Alert

PRICEWATERHOUSECOOPERS 

- details of the particular transaction that forms the subject of the sounding.

5. Conclusion

While many of the confidentiality proposals reflect existing practices (particularly since ASIC consulted on equity raisings in February 2009), the level of formality and the requirement to notify ASIC changes the landscape considerably. All potential participants in such transactions, as well as investment banks and other professional advisers, should be aware of the proposed changes and be prepared for the increased burden that the guidelines, if adopted, would expect of them.

Submissions on the Consultation Paper are due by 21 February 2010, with the final regulatory guide expected to be released in April 2010.

For further information please contact your usual PricewaterhouseCoopers adviser or:

Andrew Wheeler
Partner
+61 (2) 8266 6401
andrew.wheeler@au.pwc.com

Stephen Moulton
Partner
+61 (3) 8603 4788
stephen.moulton@au.pwc.com

