HERBERT SMITH FREEHILLS

Mavis Tan
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Exchange Centre
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7 December 2012

By email
mavis.tan@asx.com.au

Dear Ms Tan

Submission on draft revisions to ASX Listing Rules Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B*

Herbert Smith Freehills is please to provide this submission on the ASX's draft revisions to the Listing Rules Guidance Note 8 issued on 17 October 2012 (**GN 8**).

Our submissions are contained in Annexure 1. In preparing this submission, we have obtained the views of a number of listed entities and other interested stakeholders.

We would be happy to discuss with the ASX any queries or comments on our submission.

Yours sincerely

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Annexure 1

1 Submissions on guidance note 8

	Proposed Amendment	Issue
1	**Page 11, Paragraph 3.5 – The meaning of 'immediately'**	The confirmation that 'immediately' should be read as meaning 'promptly and without delay' is a helpful clarification. The list of relevant factors provided is a practical guide for companies and will assist them to make decisions about the speed at which they need to respond. In this context, we are concerned that examples which are referable to a guidance compliance regime when 'immediately' was considered by ASIC to mean 'immediately', even 'instantaneously', should not be used to inform the new meaning attributed to 'immediately', meaning 'promptly and without delay'. We request that ASX consider not using the examples in paragraph 3.5 which illustrate that 60 and 90 minute delays have resulted in the issuance of infringement notices by ASIC. We note that these examples are not cases and that while ASIC did decide to issue these infringement notices, publication of these notices would not have resulted but for the listed entities deciding to accept the notices. The decisions to accept the notices may have been motivated by pragmatism and should not necessarily be taken as agreement that the rule was infringed by announcements not being made within those very short periods of market operation.
2	**Page 12, Paragraph 3.6 – Trading halts**	We welcome the ASX's clarification in paragraph 6 that whether and how promptly an entity has requested a trading halt will be a significant factor which the ASX takes into account when assessing whether the entity has complied with 'the spirit, intention and purpose' of Listing Rule 3.1. The indication that greater latitude is allowed during a halt, or indeed outside trading hours is also helpful in confirming that the Listing Rules are to be interpreted in accordance with their spirit, intention and purpose by looking beyond form and substance and is a welcome clarification of ASX's approach to the interpretation of the Listing Rules. However, notwithstanding this clarification, the revised guidance actively encourages listed entities to consider trading halts to assist with the management of potential disclosure issues and help reduce exposure to the legal consequences that could follow if an entity is found to have breached its obligations to disclose market sensitive information immediately. Paragraph 3.6 states that whether and how promptly an entity requests a trading halt will be significant factors taken into account in assessing whether Listing Rule 3.1 has been complied with. The intention in paragraph 3.6 and 3.7 appears to be that companies should request trading halts and use them to determine

	Proposed Amendment	Issue
		whether or not information whether to make an announcement to the market. We are concerned that this new emphasis on requesting trading halts to manage disclosure potentially undercuts the helpful guidance provided on the meaning of 'immediately' as a requirement to act not 'instantaneously' but 'promptly and without delay'. In particular, we are concerned that listed entities will be under greater pressure to call trading halts and that the time permitted for a listed entity to consider whether to request a trading halt may be extremely short. This may also lead to the trading of securities being paused more frequently, and we query whether this is helpful for market participants in general. Accordingly, we submit that the enhanced significance of trading halts needs to be reviewed and recommend that the guidance is clarified to make clear that whilst listed entities are encouraged to consider trading halts, entities will also be afforded sufficient time to consider whether a trading halt is in fact needed, stemming the negative impact resulting from unnecessary trading halts and embracing the same principle of interpretation as that which construes 'immediately' as a requirement to act 'promptly and without delay'. **Who can call a trading halt?** The Guidance Note is currently silent as to whom within a company the ASX will accept instructions from to call a trading halt if the person designated by the company as required by Listing Rule 12.6 is unavailable. It would be helpful if ASX would consider whether they would accept instructions from directors, and failing that, instructions from the CEO or General Counsel of that entity.
3	**Page 31, Paragraph 5.2 – ASX's power to correct or prevent a false market / Listing Rule 3.1B**	Under Listing Rule 3.1B, if ASX considers that there is or is likely to be a false market in an entity's securities, it may require the entity to give ASX any information it asks for to correct or prevent the false market. The revised guidance gives the ASX power to request any information regarding a companies activities which it asks for, including non-market sensitive information. This information will be disclosed to the market. If a company has two confidential transactions underway, but is confident one of those transactions remains confidential and therefore is having no effect on the price, it could be compelled by the ASX to disclose both transactions. We submit that there is no policy reason for the increased powers of ASX to procure any information set out in paragraph 5.2. We do not see there being a policy basis for the result of a request under this rule being that the recipient listed entity discloses all market sensitive information as it would need to do in the context of a capital raising. The unintended consequence of paragraph 5.2 may be that entities are compelled to disclose an 'incomplete proposal or negotiation' which remains confidential. We submit that the ASX should retain the wording of previous Listing Rule 3.1B / Guidance Note 8 which grants the power to ask companies for 'the information needed to correct or prevent the false market'.

	Proposed Amendment	Issue
4	**Page 32, Paragraph 5.4 – Market rumours**	The ASX requires companies to respond to media reports which appear to contain containing credible market sensitive information (whether true or false) which has a 'material' effect on the price of its securities. If the company does not respond to the report in a timely manner, the ASX may use its power under Listing Rule 3.1B to compel the company to do so. On its face, this rule appears that it will force companies to be extremely proactive in tracking their share volumes and price movements against rumours in the market. One concern is that this policy may encourage journalists to invent or circulate rumours without regard to fact, which would force the company to publicly rebuff these market rumours. The arena of potential journalists, commentators and analysts has expanded greatly in recent years. Additionally, information is dispersed at great speed during trading hours on the internet. Clarification would be welcome from the ASX as to which types of sources and information (such as blogs or twitter) a listed entity is not required to monitor. We recommend that the guidance is toned down to ensure that a listed entity is not faced with a blanket obligation to respond to all market rumours, especially those arising from 'fishing expeditions' of the news media and not from a loss of confidentiality. We also submit that false rumours should not require a response.
5	**Page 37, Paragraph 6.3 – Earnings surprises**	The 10-15% rule provided companies with a very useful 'rule of thumb' against which to measure their earnings with certainty. The new test of 'materially differ' is more subjective and, as the ASX acknowledges, a 'difficult question to answer'. Paragraph 6.3 states that an entity which expects to differ from 'materially' from a published earnings guidance, analyst consensus or earnings for the prior corresponding period will need to disclose this to the market. A deviation greater than 10% is presumed to be 'material', and a deviation of between 5-10% will require the entity to make a judgement call as to materiality. Entities which have a policy of not publishing release earnings guidance but need to disclose in response to a material deviation from either analyst consensus or earnings from a prior corresponding period will potentially find themselves within a cycle of earnings disclosure. Any revision to earnings guidance disclosure will be triggered by as little as a 5-10% deviation from that previously disclosed guidance. We submit it is not appropriate for companies who do not have a policy of releasing earnings guidance be compelled to so by the operation of paragraph 6.3. The materiality threshold of 5-10% is too low for companies whose earnings are cyclical or 'lumpy', and would be too easy for companies to inadvertently trigger. Accordingly we submit that that the 10-15% rule should be retained in relation to published earnings guidance. Notwithstanding the abovementioned limitations, the guidance provided regarding changes to earnings during a reporting period is helpful. We support ASX's view that 'for a disclosure obligation to arise in relation to an expected difference in earnings compared to

	Proposed Amendment	Issue
		market expectations, there needs to be a reasonable degree of certainty that there will be such a difference'. The revised guidance at paragraph 6.3 states that the ASX will make due allowances for the fact that the preparation of earnings guidance will need to be properly vetted and signed off before it is released when determining whether an entity has acted immediately under Listing Rule 3.1. This a helpful confirmation that a company should only be required to make disclosure of material variations once internal forecasts have been properly verified, are in final form, and have received board approval. In particular, we consider that it would be extremely helpful if Guidance Note 8 were to confirm that, where the particular issue remains confidential, listed entities do have a period for confidential reflection to determine the impact of a particular event on that entity's financial position and performance, before announcement is required.
6	**Page 38, Paragraph 6.4 – Correcting analyst forecasts**	Paragraph 6.4 states that companies do not have an obligation to correct analysts' forecasts to bring them into alignment with their own. This contrasts with paragraph 6.3, where the ASX states that if an entity becomes aware that its earning for a reporting period will 'materially differ (upwards or downwards)' from the consensus of sell side analyst for that period, then it may need to notify the market of that fact. This would place an obligation on entities to correct market analysts even when they have not released earnings guidance for that period. Some entities who have released earnings guidance will be compelled to correct sell side analysts, if their position materially differs from these analysts. This places an unnecessary burden upon companies to re-disclose and clarify information, despite having released earnings guidance which they consider accurate. This will also be problematic for entities who are only reported on by several brokers, as one analyst's forecast could materially impact consensus outcome. The Corporations Act periodic reporting requirements do not require statements as to future matters other than where it is inherent in the value of the asset (e.g. a loan portfolio) or where statements as to future matters are required in disclosure documents. In disclosure documents the inherent risks of forecasts are disclosed and directors are liable for misleading statements unless that statement is made on reasonable grounds. Where a company is effectively forced to make a disclosure because of invalid consensus forecasts or a difference in performance from a prior corresponding period, it shouldn't be required to do so because of a 5-10% difference to earnings guidance. We submit that the position in paragraph 6.4 is the preferable approach in light of the above. We note that sell-side analysts, in addition to releasing earnings forecasts for an impending reporting period, also release longer

Proposed Amendment	Issue
	projections such as five year forecasts. We submit that although paragraph 6.3 is consistent with an entity's obligations to clarify or correct earnings forecasts only relating to the impending reporting period, it may be helpful to clarify this in paragraph 6.4 (especially since it is 3 pages later).

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2 Submissions on Listing Rule amendments

	Listing Rule number	Issue	Suggestions for redraft
1	**3.1B**	Please refer to our submission in section 1.	Revert to current wording of listing rule 3.1B
2	**3.16** **3.16.4**	In our view, no new listing rule is required, and a separate specific disclosure obligation should not be included in the listing rules. The proposed new listing rule is broad and ambiguous in its drafting. In addition it will result in a double-up of disclosure requirements, given much of the information is required by the Corporations Act to be included in a company's remuneration report. If the proposed new listing rule is included, we draw the following to your attention: • Only material variations should have to be notified to the ASX. Changes to directors' fees (within the shareholder approved cap) and to the CEO's annual base salary should not need to be notified on an immediate disclosure basis; • The rule should be clarified that it is intended to apply to 'employment' services not the provision of 'actual' services to or by related parties (which would be disclosed in accordance with accounting standards); • The rule should be clarified as to whether it is intended to apply to non-executive director appointment letters (which are discussed in an entity's annual corporate governance statement); • The reference to 'a related party of the entity' creates ambiguity; and • Theoretically, this rule could extend to require disclosure by a listed	The proposed new listing rule should not be included in the listing rules. If the proposed new listing rule is included, the rule should be redrafted to read as follows: *An entity must ~~immediately~~ tell ASX the following information (unless listing rule 3.16.4 applies).* *…* *3.16.4 (a) The material terms of any employment, service or material consultancy agreement it or a related entity enters into with:* • *its chief executive officer (or equivalent); or* • *a director, or any other person or entity, who is a related party of the director or other person or entity;* *and of any material variation to such an agreement.* *(b) An entity must give ASX this information no more than 5 business days after entering into the agreement or variation.*

	Listing Rule number	Issue	Suggestions for redraft
		entity of the terms of employment of a child of a director even though the child has been employed on his or her own merits without the director exerting influence. The risk of failure to comply with this rule would otherwise be high in large listed entities. If this amendment is to proceed, we query whether there can be at least a "de minimis" exception. Finally, ASX recognises that the information is not necessarily price sensitive and accordingly it would be appropriate not to impose an immediate disclosure obligation, if the information is not otherwise materially price sensitive, but to require disclosure within 5 business days.	
3	**3.17.2**	It is not clear why each of these is required to be disclosed to the market. Often requisitions and notices received under these provisions do not initially comply with the statutory requirements. There may be a number of requisitions or notices received before complying documents are provided. Alternatively, the requisitioning party may determine to withdraw the requisition including by agreement with the listed entity. In addition, the Corporations Act imposes timeframes for the provision of such information to shareholders, and will be provided to the ASX at that time. Requiring disclosure of requisitions under these sections separately from and prior to the finalisation of the notice of meeting and compliance by an entity with its existing disclosure obligations, where the information is not otherwise materially price sensitive, disrupts and is inconsistent with the notice of meeting process.	The proposed new listing rule should not be included in the listing rules. If a requisition or notice received under the sections listed is material an entity would be required to disclose it under listing rule 3.1, otherwise it would be dealt with in accordance with the Corporations Act requirements.
4	**3.17.3**	Based on the stated policy intention, the new listing rule is intended to require foreign companies to comply as if bound by the Corporations Act provisions, however the proposed new listing rule is drafted to apply to all listed entities.	Given the stated policy intention underlying the proposed new listing rule, the new listing rule should be restricted to foreign companies only. The listing rule should be redrafted to require

	Listing Rule number	Issue	Suggestions for redraft
		The proposed new listing rule is cast too broadly and requires the disclosure of additional material beyond what the Corporations Act requires. It imposes new obligations on listed entities subject to the Corporations Act over and above the current Corporations Act requirements. In addition, the new listing rule obligations could lead to incomplete, unhelpful and potentially misleading information being required to be disclosed, because it extends to "any information" received.	foreign companies to comply as if bound by the Corporations Act provisions, but should not otherwise apply to entities subject to the Corporations Act.
5	**3.21**	The proposed new listing rule 3.21 requires an entity to disclose to ASX immediately it declares a dividend or distribution. Current practice of the majority of listed entities is to disclose interim and final dividends in their interim and preliminary final profit announcements respectively, reflecting the requirements of listing rules 4.2A.3 and 4.3A, and Appendices 4D and 4E. Listed entities should be able to continue with this existing practice, provided the information is not otherwise materially price sensitive. If the disclosure obligation is changed to an immediate disclosure obligation, as contemplated by new listing rule 3.21, entities are concerned about the potential timing implications in light of their accounts approval processes, that is, requiring a dividend decision to be announced immediately despite the fact that certain accounting matters may need to be finalised before the accounts can be finally approved and released. Finally, the Corporations Act allows companies to resolve to pay dividends (and imposes different requirements as to when a debt is created if company declares a dividend). Accordingly many companies changed their constitution to remove the requirement to declare dividends. The terminology used in proposed new listing rule 3.21 does not reflect this position.	The proposed new listing rule should not be included in the listing rules.

HERBERT SMITH FREEHILLS

	Listing Rule number	Issue	Suggestions for redraft
6	**4.10.17**	Based on the stated policy intention, the amendments to listing rule 4.10.17 are intended to require foreign companies to comply as if bound by the Corporations Act provisions, however the proposed amended listing rule is drafted to apply to all listed entities and will impose obligations on some Australian entities (ie those who prepare and lodge their directors report as part of their Appendix 4E, and subsequently lodge a full annual report) to effectively prepare two directors report so as to ensure that the timing requirements applying to listing rule 4.10 (ie information being current to within 6 weeks of the date of the glossy annual report) are satisfied.	Given the stated policy intention underlying the proposed new listing rule, the new listing rule should be restricted to foreign companies only. The new listing rule should be redrafted to require foreign companies to comply as if bound by the Corporations Act provisions, but should not otherwise apply to companies subject to the Corporations Act.