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Elmer Funke Kupper
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Dear Sir

Review of ASX Listing Rules Guidance Note8 - Continuous Disclosure: Listing Rules 3.1 – 3.1B

The Australian Bankers Association (ABA) is the peak national body representing 26 banks that are authorised by the Australian Prudential Regulation Authority to carry on banking business in Australia.

A number of the ABA's members are listed entities on the ASX and on a number of overseas exchanges.

The ABA is pleased to have this opportunity to draw to the ASX's attention some possibly unforeseen consequences of proposed changes to the ASX's guidance notes on continuous disclosure under Listing Rules 3.1 – 3.1B.

1. Banks and Australia's financial system

These concerns are of particular consequence because of the connection banks have as prudentially regulated entities with the Australian financial system and the security and stability of that financial system.

This relationship can be considered in the context a technical note issued by the International Monetary Fund in November 2012 (see http://www.imf.org/external/pubs/ft/scr/2012/cr12310.pdf). Paragraph 27 of the technical note is instructive as follows:

> *"27. Legislative changes should be made to forestall premature disclosure of sensitive crisis resolution information. The Australian securities law regime requires immediate and continuous disclosure to investors when a covered entity becomes aware of information which is not generally available and which a reasonable person would expect to have a material effect on the price or value of the shares, debentures or other interests in the entity.*
>
> *Failure to do so could result in liability for directors that fail to comply with this requirement. The need for a resolution package, or the early stages of crisis resolution discussions, for example, would reasonably be expected to have a material effect on the price or value of the ADI's*

securities. Any ADI covered by the securities regime (i.e., a publicly listed ADI) would be required to make the appropriate disclosures so as to comply with the Corporations Act. Poor coordination of compliance with the disclosure requirements with resolution actions and the overall public communication strategy could pose risks to financial stability (including through depositor runs); stripping of the ADI's assets by insiders; or market disruptions. Legislative changes could usefully: (1) make clear that a direction by APRA to keep certain information confidential is binding and supersedes any requirement to the contrary in the Corporations Act; (2) the failure of a director to disclose such information in accordance with the continuous disclosure regime will not result in liability for the director; and (3) require ASIC to consider systemic stability issues and consult APRA when evaluating contraventions of the disclosure requirements."

The ABA considers that a revised ASX Guidance Note should make reference to these three criteria for the avoidance of doubt.

2. Operational aspects

In relation to the operational burden that proposed Listing Rule 3.17A would impose, lodging of the specific additional announcements each year alone would not be unduly onerous. However, in aggregate the burden across all impacted companies, the additional work involved is likely to be significant for what appears to be very little benefit.

There are several substantive issues for our affected members.

2.1. New Listing Rule 3.17A

The requirement under the proposed new Listing Rule 3.17A that a listed entity gives the ASX copies of documents it gives to an overseas stock exchange would potentially capture filings on a number of overseas exchanges (one member has stated the LSE, Luxembourg, Channel Islands, Swiss stock exchanges). This could be quite onerous (and voluminous). Previously, the document had to contain market sensitive information.

The ABA does not consider that proposed Listing Rule 3.17A should be implemented despite ASX's need for 'informational parity' between Australian investors and overseas investors. In our view, current ASX Listing 3.1 should suffice to meet Australian investors' needs. If the proposed listing rule was to be implemented, then a carve out should at least be considered to exempt announcements that are released to overseas stock exchanges if they replicate information already released to ASX.

Otherwise, additional ASX announcements a bank would be required to release pursuant to the new listing rule would result in either:

- duplication of announcements/information already announced to ASX; or
- information that would not be relevant (let alone material) to Australian investors.

The proposed listing rule would require a bank to undertake additional processes with little to no benefit to its Australian investors. In fact, the additional announcements may 'muddy the waters' for investors –

- they will see mainly duplicate ASX-released information or information that is just not of interest to them, and
- they will also only be given a partial view of a bank's funding position because no foreign jurisdictions require issues of notes to be announced on their exchanges, but instead, for instance, require a filing with their regulator.

We query whether this could also cause material information to be lost among immaterial information.

To give some perspective to this issue of duplication and the relevance of information a member bank has provided below some background information that illustrates these aspects.

Background

A bank has notes listed on the following stock exchanges:

Luxembourg

Switzerland

Channel Islands

London

In the 2011 calendar year, the bank released 28 announcements to each of these exchanges i.e. each announcement was released to each of the exchanges. Of those:

- 20 were merely announcements which had already been released to ASX, for example the bank's 2011 Annual Report;
- 7 announcements were documents that incorporated by reference information that had already been released to ASX, for example a supplementary prospectus was released to the above exchanges which supplemented the bank's Euro Medium Term Note Programme to incorporate by reference the bank's 2011 Annual Report; and
- 2 announcements included information that was not released to ASX.

The latter two announcements contained the following information:

- the final terms of a note trade contained a manifest error that was corrected; and
- the final terms of a Canadian dollar note trade.

A further announcement was released to the Swiss stock exchange alone - a Swiss listing prospectus in connection with an issue of Swiss Franc notes under the bank's Euro Medium Term Note programme

The latter three announcements contain information that is arguably not relevant to Australian investors, let alone material.

In addition, the three announcements released to the foreign exchanges but not to ASX related to one of the ways in which the bank funds its business, that is, via the issue of notes to offshore investors. The ABA queries whether other listed entities make announcements when they successfully obtain funding, for example pursuant to a banking facility. They will make an announcement when, for example, they breach a covenant under their funding facilities or otherwise run into financial difficulty.

Furthermore, the bank conducts many issues of notes that are not announced on foreign exchanges, e.g. pursuant to its Japanese programmes, for which the bank merely lodges a filing with the Japanese regulator. Australian investors would therefore only see some of the bank's trades and not all, causing a further 'muddying of the waters' for them. Specifically, they may only see that the bank has raised a small proportion of the funds it is required to raise per year in order to operate, which may in fact raise unnecessary concerns.

The latter three announcements contain information that is arguably not relevant to Australian investors, let alone material.

Finally, in 2011 the bank released over 260 announcements to ASX. If it had also released to ASX information that it had released to the foreign exchanges during the year, it would have released approximately 10% additional announcements that year.

2.2. Trading halts

The guidance that appears to set trading halts as the approach to follow in circumstances where time is needed to manage obligations in relation to continuous disclosure.

Whilst this may work in some cases, the market can react negatively to trading halts and in addition a trading halt is a dangerous step to take in the scenario where time is required to decide whether or not something should be disclosed - for example, if a trading halt is put in place, a decision is made that no disclosure is required, and then the halt is lifted without any announcement being made, this could be very de-stabilising in the market.

This is also a relevant consideration given the approach recommended by the IMF's technical note.

It would be helpful if the Guidance Note included an additional example of how a listed entity is to fulfil its continuous disclosure obligations when it does not wish to call a trading halt.

2.3. Listing Rule 3.17.2

This new Listing Rule 3.17.2 provides that listed entities immediately give ASX a copy of any notice the entity receives under ss 249D, 249F, 249N, 252B, 252D or 252L of the Corporations Act or under any equivalent overseas law or equivalent provisions in the entity's constitution from a holder or holders of securities calling, or requesting the calling of, or proposing to move a resolution at, a general meeting.

A listed entity may receive an initial approach from a third party in relation to requisitioning a meeting or proposing to move a resolution at a general meeting, and sometimes (after discussion between the parties) it does not proceed further. Alternatively the notice received may not be valid.

It would be inappropriate to require notification to the market in these circumstances.

2.4. Footnote 180 in the Guidance Note

In section 7.7 of the Guidance Note, there is guidance in footnote 180 to the effect that, all other things being equal, the higher the market capitalisation of an entity, the lower the threshold is likely to be for ASX to consider a movement in the price of its securities to be material.

This potentially implies that a materiality test lower than the 5% test under accounting standards could be applied to very large listed entities. This specific commentary does not appear in the related section 3.2, and in our view, it is not entirely clear whether ASX is merely commenting on when it may refer matters to ASIC or that this principle may apply more generally in determining when information may be materially price sensitive.

This issue is likely to be relevant to all of the largest listed companies (of which the banks are obviously 4 of the top 10).

We think that it would be helpful if footnote 180 clarified this aspect.

2.5. Drafting in the Guidance Note at page 28

On page 28, the second set of bullet points set out the circumstances where the ASX may form the view that information about a matter has ceased to be confidential. We think that the word 'and' should be inserted in place of 'or' at the end of the second dot point so that it reads as follows:

"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, or*
- *a rumour known to be circulating to the market about the matter**, and***
- *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.*

The ABA appreciates the opportunity to raise these matters and looks forward further consultation about them. We would be happy to arrange for a member bank to provide further detail of these concerns for your convenience.

Yours sincerely,

Ian Gilbert