

# ASIC CONSULTATION PAPER – HANDLING CONFIDENTIAL INFORMATION

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## **Release of ASIC Consultation Paper**

ASIC has released a consultation paper and draft Regulatory Guide containing proposed 'best practice' guidelines for handling confidential information. The guidelines relate specifically to confidential information associated with capital raisings and mergers and acquisitions. The guidelines are intended to assist companies, advisers and other service providers to implement or improve internal policies and procedures for the handling of price-sensitive confidential information.

## **Proposed 'Best Practice' Guidelines**

The guidelines outline the standards of conduct and practices that ASIC believes are necessary to maximise the protection of confidential information and minimise market-sensitive leaks. The proposed standards include:

### **1. Maintain an 'Insider' Register**

The number of people with access to confidential information should be limited to those who strictly require access to carry out their roles. Companies should maintain a register of all people who are privy to or involved in sensitive transactions. This includes people working for third party advisers. Those advisers would need to advise the company of all their personnel who have access to confidential information.

An insider register would assist a company in its investigate of a leak or suspected leak of confidential information.

### **2. Classify Confidential Information**

All information relating to a sensitive transaction should be classified according to the level of protection it requires. Stringent protection measures may include information technology controls such as passwords to access the confidential information and physical document management procedures such as printers, photocopiers and data rooms allocated specifically for work related to the sensitive transaction.

### **3. Investigate Leaks**

When a leak of confidential information is suspected or confirmed, an investigation should be conducted to identify the source of the leak. Appropriate action can then be taken. This standard will require people to take and assume responsibility for handling of confidential information and may act as a deterrent to people who may otherwise misuse confidential information.

### **4. Strengthen Obligations on Individuals**

Companies, third party advisers and other service providers should ensure that their employees properly understand their obligation to keep confidential all information relating to sensitive transactions.

Individuals involved in sensitive transactions should enter individual, personal confidentiality agreements to increase their accountability. Employment contracts could also include (or be amended to include) increased confidentiality obligations.

ASIC recommends personal account dealing policies and procedures for listed companies. As a minimum, where employees have access to confidential price-sensitive information, they should be restricted from trading in the employing entity's securities without prior approval. Employees in 'sensitive' roles should also be required to disclose their security holdings on a regular basis.

## 5. Dealing with Third Party Advisers

ASIC believes that companies should ensure that third party advisers provided with confidential information have systems in place to protect that information. All advisers should be required to sign transaction-specific confidentiality agreements before they are granted access to confidential information. Potential advisers should also be required to sign confidentiality agreements in order to reduce the risk of leaks following a 'beauty parade' to select advisers.

Companies which are active in capital raisings and mergers and acquisitions are advised to have 'umbrella' agreements in place with investment banks and other advisers prior to working on any transactions. An 'umbrella' agreement would impose obligations on an adviser in relation to handling confidential information and require the adviser to have systems in place which reflect the company's policies.

## 6. Sounding the Market

Market soundings should be done in a carefully controlled manner to ensure that price sensitive confidential information is not leaked. As few institutions as possible should be sounded and soundings should only take place when the market is closed or the particular shares are in a trading halt. Further, a company should understand the process that its investment bank intends to undertake when sounding the market. Important information will include who the bank intends to approach and when the approaches will be made. Investment banks should only sound the market with the approval of the company.

Under the proposed new guidelines, ASIC will also require an investment bank to notify ASIC of certain details about the sounding (such as the institutions contacted, whether they agreed to be 'insiders' to confidential information, the timing of the soundings and the transaction that forms the subject of the sounding). Notification would be required within 48 hours of the sounding.

### ASIC Consultation & Recommendations

ASIC is seeking comments on the financial and other impacts of its proposals and any alternative approaches. Submissions must be made to ASIC by **21 February 2010**. It is expected that the final Regulatory Guide will be released in April 2010.

If the current form of the Regulatory Guide is adopted, listed companies should review their current policies and practices in light of the guidelines. Cowell Clarke can assist with this review process and in relation to amending existing policies or preparing new, 'best practice' policies.