

26 February, 2010

Ms Kate O'Rourke
Senior Manager, Corporations
Australian Securities and Investments Commission
GPO Box 9827
Sydney NSW 2000

By email: Kate.O'Rourke@asic.gov.au

Dear Ms O'Rourke

ASIC CONSULTATION PAPER CP 128 "HANDLING CONFIDENTIAL INFORMATION" - SUBMISSION BY STOCKBROKERS ASSOCIATION OF AUSTRALIA LTD

Introduction

The Stockbrokers Association of Australia Limited ("the Stockbrokers Association"), formerly known as the Securities & Derivatives Industry Association, is the peak industry body representing institutional and retail stockbrokers and investment banks in Australia. The Stockbrokers Association is pleased to provide this submission to ASIC in relation to Consultation Paper CP 128 "Handling Confidential Information".

The Association's members have a strong commitment to maintaining the integrity and high standing of Australia's markets. Ensuring the equal and wide dissemination of price sensitive information is fundamental to an efficient and informed market. However, an inference that confidential price sensitive information is being misused prior to its public disclosure or is being selectively disseminated has the potential to be highly damaging to the efficiency and integrity of the market generally, and to the individual securities that may be involved.

The Stockbrokers Association supports the focus given by ASIC to eliminating the potential misuse of confidential information in order to maintain the reputation of the Australian markets.

However, whilst the Association supports the overall approach embodied in the RG 128, some of the proposed requirements in our submission raise serious questions of impracticality and/or create an administrative burden which is excessive and not justified by the supposed benefits. Some of the proposals could impact adversely on the efficiency of the capital markets.

In the following sections of this Submission, we set out a number of general matters, before addressing a number of the specific questions set out in CP 128. We do not address comments to every question in the CP.

Application of the Guidelines to Wider Group of Entities

The Stockbrokers Association supports a broad application of any Best Practice Guidelines to listed companies generally and also to the whole range of advisers and other service providers that may be in possession of confidential information in relation to corporate transaction.

It is likely that a large number of these entities might not have any formal arrangements, or may have only partial arrangements, dealing with the matters set out CP 128.

ASIC is also correct in identifying the wide range of parties (referred to in paragraph [4] CP 128) who may fall within the category of advisers or service providers in relation to a listed company in relation to corporate transactions. Nowadays, there are a significant number of people across a broad spectrum of functions who are required to have some knowledge of potential transactions. It is noted that in the enforcement history in Australia relating to insider trading offences, defendants have included parties such as a public relations consultant or, as in recent announcements, employees of a credit rating agency.

We also note in paragraph [10] that ASIC has consulted institutions and fund managers in the course of its information gathering. Whilst these investors are not advisers, they are entities who are likely to commonly be the recipient of confidential price sensitive information in relation to corporate transactions.

It is important that stockbrokers and investment bankers not be singled out to bear the weight of any new regulatory obligations imposed in order to deal with this risk only, ignoring the broader group of advisers and service providers, or institutional investors.

In our submission, it can safely be said that much attention has already been devoted by stockbrokers and investment banks to the subject of managing confidential information and the obligation to avoid a breach of insider trading laws, particularly the prohibition on “tipping”. Few things can be more damaging to the reputation of a broker or investment bank than the accusation that it cannot keep its clients’ affairs confidential. It is noted that ASIC has drawn heavily from existing best practice by brokers and investment banks in the course of preparing CP 128.

Hence, for these reasons, it is our submission that stockbrokers and investment banks do not present the main risk of information leakage in relation to confidential transaction information. The objective of addressing the potential misuse of confidential information may be better served by the devotion of regulatory attention by ASIC to investigation and enforcement of the other groups of advisers and service providers. Imposing additional compliance burden onto stockbrokers and investment banks may not in fact deliver any material corresponding benefit that would justify the cost.

These additional administrative costs will all ultimately impact on transaction costs borne by investors, at a time when every effort should be made to reduce transaction costs in order to boost the competitiveness of Australia as a regional financial centre and reduce the drag of transaction costs on the growth of funds under management, including superannuation funds.

Importance of Flexibility

The Stockbrokers Association stresses the importance for there to be flexibility in the application of the controls and procedures contained in the Best Practice Guidelines.

There should be an awareness that smaller capitalised companies do not have the level of staffing and administrative resourcing available to larger companies. Their activities are often conducted on a relative “shoestring”. This is particularly relevant to companies in start-up phase.

Smaller brokers likewise do not have the resourcing of a large broking house or global investment bank. Lastly, not all capital raisings are at the large end. The significance of capital raisings at the small to middle end should not be underestimated.

Whilst there is no justification for activities to be conducted recklessly or without due regard for the requirements of the law, any Best Practice Guidelines should take into account smaller entities whose business and resourcing do not permit elaborate or detailed administrative and other documentary requirements. In our view, some of the proposed requirements, particularly those which set out potentially complex IT controls and document management fall into this category.

In a smaller environment, effective management of confidential information may successfully be undertaken without the need for unduly complicated procedures.

Obligations to meet standards of every company

In a number of places, CP 128 states a general principal that companies should require third parties, at a minimum, to comply with their confidentiality policies and procedures. See paragraph 13, and also RG 000.45. Imposing a requirement in terms as broad as this has the potential for a considerable duplication of effort.

Each particular company could have a myriad of variations in terms of the drafting and content of their particular policies and procedures. Some may go beyond what is incorporated in RG 128. To require each advisor to benchmark their own policies and procedures against every individual company to satisfy themselves and each company that they meet this criterion, and be required to adopt a host of variations to policies and procedure to meet any discrepancy, is a wasteful outcome in terms of time and resources.

A preferable outcome is for there to be one set of fundamental set of principles governing the handling of confidential information that would satisfy regulatory objectives and which all parties could adhere to. It should be a matter of choice for parties if they wish to go beyond those guidelines

SPECIFIC QUESTIONS

B1 Q1

Are best practice guidelines the appropriate mechanism or should ASIC pursue other regulatory approaches such as licence conditions, changes to the ASX Listing Rules, incorporation of the guidelines into the ASX's Corporate Governance Principles and Recommendations, industry codes or law reform?

We support the use of Best Practice Guidelines as the appropriate mechanism for these provisions. As indicated, the provisions need to be flexible in their application, and hence, Best Practice Guidelines are better suited than more inflexible instruments, such as licence conditions or regulations.

As also indicated, the need for these provisions to be of application to broader groups other than holders of an AFS Licence would suggest that licence conditions are not the desired approach. The requirement for broad application is also a reason for the Guidelines to be issued by ASIC rather than by ASX under the umbrella of its Listing Rules or Corporate Governance Council rules.

C2 Q1

Q1 Is it too onerous to require all information created by or given to a company to be classified according to the level of protection needed, or would it be helpful in assisting companies to apply the overall level of protection to different classes of information?

There should be no requirement for complex forms of classification of every piece of information created by or given to a company. Information should either be public, price sensitive or deal-related, and should be managed accordingly. If appropriate policies are put in place to manage information relating to a transaction, then that should be sufficient.

C3 Q1 and Q2

Q1 For advisers, should a leak investigation only be conducted if the company requests one?

Q2 What barriers do you see limiting or preventing effective investigations into leaks?

There should not be a requirement for advisers to conduct an investigation every time there has been a leak of information. There may be many advisers and service providers engaged in a transaction, and it would be wasteful for each one to be required to carry out an investigation in the absence of any factor to suggest that the leak may have emanated from within their entity. If the adviser has robust procedures in place, and there is no information to suggest that the leak emanated from within their organisation, that adviser should be entitled to assume their procedures are working.

C5 Q1 and Q2

Q1 What are the benefits of confidentiality agreements? Are there any disadvantages?

Q2 Should any category of adviser or other service provider be excluded from the requirement to execute confidentiality agreements? If so, on what basis?

There should not be a requirement to enter into separate confidentiality agreements for every transaction. This is a costly and bureaucratic requirement, and would impose unnecessary additional transaction costs.

If there is a general agreement in place between a company and an adviser dealing with the arrangements governing the use of the company's confidential information, then mandatory separate agreements at the time of each and every subsequent transaction would be an unnecessary duplication of effort without any additional benefit.

In our view, there is no reason for any particular group of advisers to enjoy any exemption from the obligations regarding the handling of confidential information.

D1 Q1

D1Q1 Is it beneficial to require all staff involved in a sensitive transaction to sign individual confidentiality agreements?

For similar reasons to C5 Q1 above, requiring individual agreements for each staff member for every transaction would be a costly and bureaucratic requirement. It should be sufficient for an entity to have a policy in place which governs the obligations of the staff member, together with reasonable procedure for making relevant staff members aware of their obligation by way of periodic training and/or reminder.

D3 Q1

D3Q1 Should these restrictions be mandatory for all investment banks, at least for staff in the advisory and equities areas?

D3Q2 Should law firms have these trading restrictions in place in relation to the financial products of:

There appears to be an assumption in this question that it is only investment banks that are involved in corporate transactions. Stockbroking firms who are not part of an investment banking group may also be engaged in connection with capital raisings, market soundings, buybacks and takeovers.

There has historically been a high standard applied to ASX Market Participants in relation to procedures for approval of personal account trading of broking staff under ASX Market Rules. There have also traditionally been high standards adopted on a global basis by broking firms and investment banks forming part of a global organisation.

There is no reason for personal account trading approval regimes to be applicable to some advisers and not to others. In particular, there is no reason for law firms to be exempt from this requirement, as lawyers are just as privy to market sensitive information as are other advisers.

E1

E1 We propose that investment banks should adopt the following practices and procedures:

.....
(b) soundings should only take place when the market is closed, or the particular stock is in a trading halt,.....;

There are significant difficulties presented by this proposed Guideline. A strategic corporate transaction may take weeks or even months to negotiate. It is simply not feasible in the vast majority of cases to bring about the entire transaction when the market is closed. Nor would it be appropriate to obtain a halt of trading in the stock for the entire period that the transaction is being negotiated.

In many cases, deals fall away without successful conclusion. There is a carve-out from the continuous disclosure obligations precisely to deal with transactions which are incomplete and not yet sufficiently definite. A premature trading halt would create the problem of what to announce to the market after the failure of negotiations. The end result of a premature halt can be highly misleading to the market.

E1

E1 We propose that investment banks should adopt the following practices and procedures:

.....

(d) when an institution agrees to become an insider, the institution must also agree to comply with insider trading restrictions before any confidential information is communicated. Following this verbal agreement, the investment banker should obtain written confirmation (e.g. by email) from the institution that it agrees to uphold the confidentiality of the information and comply with insider trading restrictions;

Mandating the obtaining of written confirmation could be an onerous requirement in a fast moving capital raising or market sounding. The time period for some of these transactions can be extremely brief. The requirement to obtain prior written confirmation could present difficulties.

It is noted that, in the age of widespread availability of email and mobile devices such as blackberry, it might not be hard to obtain such a confirmation simultaneously with approach by the broker to the investor/soundee, provided that such a form of confirmation is considered adequate for the Guidelines (which should be the case). However, there should be scope for the broker in cases of necessity to be able to obtain oral acknowledgment from the investor/soundee and make a suitable note of the agreement and/or, in cases where a recorded telephone line is used, for the recording to be relied upon without the need for a written confirmation.

E2

We propose that within 48 hours of conducting a sounding, an investment bank should notify ASIC of certain details about the sounding including:

- (a) the name of all institutions contacted (and the contact person at each) and whether each of them agreed to be made an insider;*
- (b) the time and date contact was made with each institution as well as details of when the institution was made an insider or refused to become an insider; and*
- (c) the particular transaction that forms the subject of the sounding.*

We do not support this requirement. It represents a significant ongoing administrative burden. Whilst ASIC may be justified in requiring records to be kept of a sounding, we would argue that the cost of reporting this information on a routine basis is not justified if, in the majority of cases, there is no issue with respect to the transaction. If there is an issue with suspicious trading, then it is a simple matter for ASIC to use its powers to obtain details of the transaction from the adviser. If there is no issue with the transaction, then adopting this requirement would generate large scale over-reporting.

An additional concern with this requirement is that the reporting to ASIC is likely to constitute a breach of a duty of client confidentiality in many instances. Again, the use by ASIC of its investigative powers to obtain this information would enable the broker or investment bank to furnish the information to ASIC without breaching this duty. However, in the absence of such a requirement, it would be inappropriate to expect the broker or investment banker to adopt voluntary guidelines that would expose them to potential breach of their client obligations.

We would be happy to discuss any issues relating to this matter at your convenience. Should you require any further information, please contact Peter Stepek, Policy Executive on (02) 8080 3200 or email pstepek@stockbrokers.org.au

Yours sincerely,



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