HERBERT SMITH FREEHILLS

COVID-19: GOVERNANCE: HASTEN SLOWLY WITH THE MARKET ON DISCLOSURE (AUSTRALIA)

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Legal Briefings – By **Timothy Stutt**

In the context of current media reporting and other commentary regarding COVID-19 (coronavirus), there is a significant level of concern from Australian listed companies' regarding their continuous disclosure obligations and the timing for making ASX announcements about the impact of COVID-19 on their businesses.

Our guidance is - hasten slowly!

While the tendency may be to regard early disclosure as a panacea for continuous disclosure risk, the reality is that the situation with COVID-19 is so fluid that many companies will not yet have a firm grip on whether they hold any information that is materially price sensitive (aside from information which is already in the public sphere). Given the current level of uncertainty regarding COVID-19, supposition from listed companies creates a real risk of inadvertently misleading the market or spiralling into successive announcements as our understanding of the impact of COVID-19 continues to evolve over time.

JUDGING WHEN TO DISCLOSE

The test in ASX Listing Rule 3.1 is whether the listed company is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the company's securities.

As a threshold issue, where companies know they are impacted by COVID-19, but they are grappling with quantifying the impact for their business, those companies will need to realistically consider whether they currently have enough certainty to be confident at this stage that the impact of COVID-19 is (or is reasonably likely to be) material for them.

For companies which know that the impact of COVID-19 is likely to be material, those companies will need to carefully consider what they can meaningfully say now that is not already public knowledge. To the extent that companies' understanding of the impact of COVID-19 for their business is supposition or insufficiently definite, and it remains confidential, then it is likely to be excepted from the requirement for immediate disclosure under the ASX Listing Rules.

CONSIDERATIONS WHEN DISCLOSING

Even where there is a clear impact on the business which is material of itself and needs to be disclosed immediately, for example having to shut down a material operation or facility or the loss major contracts, care should be taken to stick to the facts and not to speculate on ongoing impact or how quickly the issue might be resolved.

Where companies make disclosure to the market regarding COVID-19, particularly with respect to the expected impact of the virus on forward financial forecasts or plans, they will need to ensure that they have reasonable grounds for the statements they make, as any forward-looking statements made without reasonable grounds will be automatically deemed to be misleading by law if they ultimately prove inaccurate. This is the case regardless of whether the company genuinely believed the statements at the time.

Companies also need to appreciate that once they disclose the expected impact of COVID-19 for their business, they will have a positive obligation to consider, and continue to test, whether the statements they made continue to be accurate as the situation with COVID-19 unfolds and their understanding of its impact for the company evolves. This will be particularly challenging for companies publishing new or revised guidance, given ASX's recent changes to Guidance Note 8 to reflect a materiality threshold closer to 5% for ASX300 companies that normally have stable earnings. It is not sufficient to simply qualify forward-looking statements or guidance by saying that things remain uncertain and subject to change.

CONCLUSION

Given that circumstances regarding COVID-19 are presently so uncertain, we are sceptical of any guidance suggesting listed companies should be hurrying to make ASX announcements.

Some companies are clearly in a position to know already that the impact of COVID-19 is material for their business and will be able to make sensible disclosure in relation to it. However, for a significant proportion of listed companies, there may not be much that they can meaningfully say which is not already public information and, for many, they could potentially be leaving themselves open to regulatory and other litigious risks by moving with too much speed and not enough caution.

Please don't hesitate to contact us if you need help understanding how your disclosure obligations may apply in relation to COVID-19.

More on navigating the COVID-19 outbreak

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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