ASX GUIDANCE ON CONTINUOUS DISCLOSURE OBLIGATIONS IN LIGHT OF THE SAFE HARBOUR REFORMS

Date: 15 March 2017

By: Monty Loughlin, Zina Edwards

In a previous Legal Insight, we foreshadowed potential guidance from the ASX on the interaction between the new insolvent trading safe harbour laws and the continuous disclosure obligations of a public company. On 9 March 2018, the ASX released that guidance in an update to 'Guidance Note 8 Continuous Disclosure: Listing Rules 3.1 – 3.1B'.

The guidance issued by the ASX is timely and provides much needed clarification on whether directors of a public company relying on the insolvent trading safe harbour in section 588GA of the Corporations Act should disclose that fact to the market.

ASX GUIDANCE ON SAFE HARBOUR

There are no surprises in the guidance issued by the ASX. In line with the explanatory memorandum accompanying the safe harbour laws, the ASX has made it clear that the safe harbour provisions do not affect a listed company's continuous disclosure obligations. The view of the ASX is that a listed company in financial distress (whether it takes advantage of the new safe harbour provisions or not) is subject to the same disclosure obligations as any other company.

The ASX has also clarified that where a director is relying on the safe harbour to develop a course of action that may lead to a better outcome for the company than the immediate appointment of an administrator or liquidator, this of itself is not something that the ASX would generally require a company to disclose under Listing Rule 3.1. The rationale given by the ASX is that most investors have an expectation that the directors of the company would consider whether there is a better option than a formal insolvency – the fact that the directors are considering alternatives is therefore not something the ASX would expect be disclosed to the market. During the early stages of safe harbour where the directors are fact gathering and developing potential alternative courses of action with their advisers, the mere fact that safe harbour is being relied on is likely to fall within the existing exceptions to the disclosure requirements in Listing Rule 3.1, namely that the information is (without limitation):

- information of supposition and insufficiently definite for it to be price sensitive; or
- information that is confidential and the ASX has not formed the view that the information has ceased to be confidential; or
- information that a reasonable person would not expect to be disclosed.

WHEN DISCLOSURE TO THE MARKET IS RECOMMENDED

©2005-2020 K&L Gates LLP. All Rights Reserved.

The information is unlikely to fall within the exceptions to the disclosure requirements in Listing Rule 3.1 where the directors' consideration of a better outcome ceases to be confidential or a definitive course of action has been determined, such as where a formal restructuring deal has been agreed. At those junctures, the information is likely to be price sensitive and subject to the continuous disclosure requirements, no matter how materially negative and sensitive the information will be to completing the formal restructuring deal. In this regard, the ASX has clarified that the proper course for a public company faced with market sensitive information (such as a restructuring deal) that is materially negative is not to disregard its continuous disclosure obligations. Instead, the ASX suggests that the company approach the ASX to discuss the possibility of a voluntary suspension or trading halt, although restructuring deals may require a voluntary suspension rather than a trading halt due to the maximum two day period for which a trading halt may be granted. During a voluntary suspension or trading halt, the company may be better placed to manage its disclosure obligations until the completion of the restructuring deal.

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2020 K&L Gates LLP. All Rights Reserved.