DLA PIPER

12 FEBRUARY 2014

CLIENT UPDATE:

THE INS AND OUTS OF INSIDER TRADING

(PART 2 OF 2)

In our earlier client update on 4 February 2014 (click here to view) we:

- outlined the nature and scope of the insider trading prohibition under the Corporations Act; and
- highlighted the extent of ASIC's recent activity and success in the prosecution of insider trading and market misconduct offences.

In this follow-on article (designed to be read in conjunction with the earlier article), we:

- detail what types of transactions give rise to a heightened risk of insider trading;
- highlight the importance of confidentiality and risk management in corporate transaction planning; and
- provide practical guidance on the ways in which insider trading risks can be managed and how the reputational risk stemming from allegations of insider trading or market misconduct can be managed.

TRANSACTIONS THAT GIVE RISE TO A HEIGHTENED RISK OF INSIDER TRADING

The possible contraventions of the insider trading provisions are many and varied. However, some corporate transactions give rise to a heightened risk. For example:

- a proposed change of control transaction involving a listed entity; or
- a proposed capital raise by a listed entity.

Using the first example, the fact that a person proposes to make an indicative, non-binding offer to engage with a listed entity regarding a potential control transaction is information that a reasonable person would expect to have a material effect on the price of the listed entity's shares. Accordingly, anyone who has knowledge of this fact is likely to be considered an "insider" for the purposes of the prohibition.

Similarly, using the second example, if a person (including any officer) has actual knowledge of a pending capital raise by a listed company (irrespective of whether details of price or timing are known) and that information is not *"generally available"*, it may constitute *"inside information"* for the purposes of the prohibition.

Because of the heighted risk associated with such transactions, it is recommended that listed entities and companies dealing with listed entities in connection with potential control or capital raise transactions:

- have strict security protocols / policies / procedures (including physical and system information barriers if necessary) in place;
- ensure that all officers and employees understand those security protocols / policies / procedures and the reasoning underpinning them[1]; and
- monitor adherence to those security protocols / policies / procedures,

so as to ensure that inside information is not inadvertently disclosed.

It is further recommended that[2], where a corporate transaction is being contemplated by (or involves) a listed entity:

- management of the potential "insider trading" risk be incorporated into the transaction planning process;
- until the possibility of a transaction is formally announced, knowledge of the proposed transaction should be strictly limited to those that "need to know". In this regard, consideration should be given to establishing and maintaining an 'insider list' detailing:
  - members of the deal team with knowledge of the proposed transaction;
  - other staff with potential access to transaction information, but who may not necessarily access such information (i.e. staff involved in internal review committees or senior oversight roles); and
  - other staff or classes of staff who have an administrative, support or risk management function (i.e. legal, compliance, IT administration, word processing etc.) that could potentially access transaction information.
- transaction specific confidentiality agreements (covering use of confidential information, persons to whom such information may be disclosed and conflicts of interest) should be entered with third party advisors / intermediaries;
- deal team members should not trade (whether as principal or agent), or suggest to third parties that they should trade, in the shares of the relevant entity or entities;
- no public comments should be made other than pre-approved statements made in accordance with the agreed media strategy. Any such public comments should be limited to a discussion of publicly released information; and
- the listed entity should have a procedure for reviewing public comments / announcements / analyst briefings, and if inside information has been inadvertently disclosed, immediate disclosure of that information to the relevant market operator.

Whist adoption of these recommendations will not eliminate risk, they should assist in reducing the occurrence of market-sensitive leaks or breaches of the insider trading prohibition.

---

[1] Ideally, officers and employees should agree to comply with the security protocols / policies / procedures in their terms of employment, and this should be reinforced in staff inductions and ongoing training.

[2] ASIC has not issued a current regulatory guide addressing the handling of confidential information. However, it did release Consultation Paper 128: Handling confidential information in December 2009, which contains a range of 'best practice' proposals in relation to the handling of confidential information and accordingly provides useful guidance. AFMA's 'Best Practice Guidelines for handling confidential & price-sensitive information and soundings' released in November 2011 is also a useful reference for persons handling confidential and potentially price-sensitive information.

CONCLUSION

Certain corporate transactions give rise to a heighted risk of insider trading. The risk extends beyond personal liability for contravention of the prohibition on insider trading under the Corporations Act to reputational risk for the persons or entities affected by an alleged contravention. Consequently, the management of insider trading risk forms (or should form) an essential part of corporate transaction planning for listed entities and their advisors.

DLA Piper Australia can assist clients by advising on the scope of the insider trading prohibition (including the statutory defences), the establishment of governance protocols / development of strategies for particular corporate transactions, the establishment of training programs and providing guidance in the event of ASIC investigations.

MORE INFORMATION

For more information, please contact:

Mark Burger
Partner, Corporate
T +61 3 9274 5586
mark.burger@dlapiper.com

Andrew Crean
Special Counsel, Corporate
T +61 8 6467 6148
andrew.crean@dlapiper.com

Contact your nearest DLA Piper office:

BRISBANE

Level 28, Waterfront Place
1 Eagle Street
Brisbane QLD 4000
T +61 7 3246 4000
F +61 7 3229 4077
brisbane@dlapiper.com

CANBERRA

Level 3, 55 Wentworth Avenue
Kingston ACT 2604
T +61 2 6201 8787
F +61 2 6230 7848
canberra@dlapiper.com

MELBOURNE

Level 21, 140 William Street
Melbourne VIC 3000
T +61 3 9274 5000
F +61 3 9274 5111
melbourne@dlapiper.com

PERTH

Level 31, Central Park
152–158 St Georges Terrace
Perth WA 6000
T +61 8 6467 6000
F +61 8 6467 6001
perth@dlapiper.com

SYDNEY

Level 38, 201 Elizabeth Street
Sydney NSW 2000
T +61 2 9286 8000
F +61 2 9286 4144
sydney@dlapiper.com

www.dlapiper.com