



**Guidance note: Disclosure of material information**

31 May 2021

## 1. Purpose

Catalist Markets Limited (Catalist) operates the Catalist Public Market, which is an online stock exchange for small and medium-sized businesses. The Catalist Public Market enables investors to buy and sell financial products in regular auctions and enables listed businesses (issuers) to raise capital by selling financial products.

A key requirement of the Catalist Public Market issuer rules<sup>1</sup>, is that issuers must disclose **material information** to the market prior to, and during, each auction.

The purpose of this guidance note is to provide guidance to issuers on complying with this disclosure obligation.

Compliance with the requirement to disclose material information is essential in maintaining the integrity of the Catalist Public Market – and ensuring it is fair, orderly and transparent. This is because:

- Investors are provided with all the material information they need, about an issuer, to make a good investment decision; and
- The same material information is provided to all investors at the same time and in the same manner.

The Catalist Public Market operates under a periodic disclosure framework, rather than requiring continuous disclosure of information. This means issuers must complete a review of their business (sometimes called ‘due diligence’) to identify all material information prior to each auction, but they do not need to keep that review up to date between auctions.

Issuers must have a process in place to ensure they are able to regularly complete the necessary due diligence review before each auction. Appendix 2 to this guidance provides some suggestions to assist issuers in designing a due diligence review process that is appropriate for their business.

## 2. The Material Information Disclosure Rules

The “**Material Information Disclosure Rules**” are set out in Issuer Rule 6 (*Disclosure of Material Information*). All issuers with financial products listed in public auctions must comply with these Material Information Disclosure Rules.

Issuers must not enter into any agreement with a third party, for example an agreement containing confidentiality provisions, that would conflict with the Material Information Disclosure Rules. In any event, any such agreement would not excuse the issuer from the requirement to comply with the Material Information Disclosure Rules.

The obligation to disclose material information is a fundamental obligation placed on issuers under the issuer rules. Catalist may refer breaches of the Material Information Disclosure Rules to the Financial Markets Authority (FMA), who can take action against issuers who do not comply.

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<sup>1</sup> See Issuer Rule 6 (*Disclosure of Material Information*).

This guidance note covers the following key aspects of the Material Information Disclosure Rules:

- **Identification of material information** – An issuer must firstly assess whether information meets the definition in the issuer rules to be considered as material information;
- **Exceptions** – The issuer must then assess whether any of the exceptions in the Material Information Disclosure Rules apply, which would permit the information to be withheld, subject to certain conditions; and
- **Updates** – When all necessary information has been disclosed through the Catalist website, prior to an auction taking place, an issuer must have a process to identify material information that arises during an auction, that affects the disclosures made, or should otherwise be disclosed. Any requirement to update the information must be disclosed to Catalist immediately, with an update of the information provided as soon as practicable.

### 3. What is material information?

#### 3.1 The material information test

The most important consideration in relation to complying with the Material Information Disclosure Rules is whether information is “material”, and therefore required to be disclosed (subject to the exceptions).

“**Material information**” is a legal term defined in Issuer Rule 2.1 (*Defined Terms*). This definition is a composite of the different definitions in sections 59 and 231 of the Financial Markets Conduct Act 2013 (the Act).

Generally, the definition in section 59 of the Act applies to a new regulated offer of financial products. In this circumstance, it is most relevant whether the information will affect an investor’s decision to acquire the financial products. In contrast, the definition in section 231 applies to subsequent trading of financial products, where it is more relevant whether the information would affect the price of the financial products.

The definition in Issuer Rule 2.1 picks up both these concepts, because we expect financial products to both be issued into the Catalist Public Market and to be subject to secondary market trading. The definition in Issuer Rule 2.1 is:

**“Material Information”** means:

- (i) In relation to a new issue of Quoted Financial Products, information that a reasonable person would expect to, or to be likely to, influence persons who commonly invest in Financial Products in deciding whether to acquire the Quoted Financial Products of the Issuer; and
- (ii) In relation to any circumstance other than a new issue of Quoted Financial Products, information that a reasonable person would expect, if it were generally available to the market, to have a material effect on the price of the Quoted Financial Products of the Issuer; and
- (iii) In all cases, relates to particular Financial Products, a particular Issuer, or particular Issuers, rather than to Financial Products generally or listed issuers generally.

#### *Reasonable person test*

The test of whether information is material information always involves an assessment of what a ‘reasonable person’ would think.

Part (i) of the definition applies in relation to a new issue of quoted financial products. In these circumstances, the test requires an issuer to consider whether a reasonable person would expect the relevant information to have an impact on an investor’s decision to buy the financial products.

Part (ii) of the definition applies to all other circumstances, such as when there is secondary market trading of the financial products. The test requires an issuer to consider whether a reasonable person would consider the relevant information to have a material effect on the price of the issuer’s quoted financial products.

In both cases, the reasonable person test is an objective test and requires consideration of the likely view of an independent third party. In practice, we expect the analysis, under either part (i) or part (ii), will generally come to the same result, because the auctions of financial products on the Catalist Public Market set the price to be paid by all buyers and sellers, based on the total supply and demand for those financial products. This means that anything that affects a buyer’s or seller’s decision whether to acquire or sell the financial products is also likely to affect the price of those financial products, set at the auction.

#### *Specific rather than general information*

In all cases, in order for the information to be material information, it must relate to particular financial products, a particular issuer, or particular issuers, rather than to financial products generally, or issuers generally. So, for example, information about the general economic climate is unlikely to be material information, however information about how a particular issuer’s business is more sensitive than most other businesses to certain economic conditions would be likely to be material information.

#### *Guiding principle*

A guiding principle to follow is that, when an issuer is unsure whether information is material, it is more likely than not that the information should be disclosed. It is recommended that issuers err on the side of caution when considering whether information is material or not. However, issuers should also be careful

not to overwhelm investors with the provision of large volumes of information that isn't relevant to their investment decision. The issuer rules require information to be disclosed clearly and concisely. We encourage you to discuss your proposed disclosures with your legal or financial advisors.

When considering whether to provide information, issuers should also make sure that sufficient context and explanation of any information is given, to avoid any risk of misleading or confusing investors. Issuers should be aware that part 2 of the Act also prohibits the supply of information that is, or is likely to be, misleading or deceptive.

### **3.2 Material information regarding debt securities and managed investment products**

The Material Information Disclosure Rules apply to all types of quoted financial products, however whether information is material or not may differ depending on the type of financial products in question. What is material information for an equity security may not be material or relevant for a debt security or managed investment product.

#### *Debt Securities*

Information that is material for debt securities will usually include any information that may significantly affect the issuer's financial health, or is relevant to their ability to continue paying interest and principal payments on its debt securities. Information that is likely to be relevant and material to a debt security may include:

- Changes in the business that may impact the issuer's ability to make payments,
- Any issuance of additional debt securities, or other borrowing, that significantly changes the issuer's debt levels or reflects significantly different costs of funding,
- Breaches of banking covenants or defaults on any of its debts,
- Changes in the credit rating of the relevant debt securities or any issuer/corporate credit rating held by the issuer,
- Anything that materially impacts on the value of an asset or obligation that is used as security for the debt securities.

Information that could affect the profitability of an issuer is not necessarily material information, in relation to a debt security, if it does not impact the issuer's ability to make payments. However, issuers are required to be honest and not misleading when providing general updates about their business.

#### *Managed investment products*

To decide whether information is material information in relation to a managed investment product or other fund security, where that information relates to an underlying investment, the issuer must take into account the value of that underlying investment, when compared to the whole fund.

Some managed investment products may have a wide range of investments, therefore judgment will be required on whether information about a particular underlying investment is material information. In all cases, the approach should be to use the reasonable person test described above.

## **4. Exceptions to the Rules**

The requirement to disclose material information is subject to certain exceptions described in Issuer Rule

6.2 (*Exceptions to the fundamental rule*). Where an exception applies, an issuer may choose not to disclose the relevant information to investors at an auction, to the extent the information falls within that exception.

However, if an issuer does rely on any exception to withhold information, the issuer must notify Catalist that information is being withheld and disclose the nature of the information being withheld. The issuer must maintain a list of “insiders”, who are aware of the information that is not being disclosed, and provide that list to Catalist if requested.

Where material information is withheld, in line with one of the exceptions, it is illegal for insiders to buy or sell any financial products, until such time as all material information has been released again.

The exceptions to disclosing material information apply where:

- release of the information would be a breach of law; or
- the information concerns an incomplete proposal or negotiation; or
- the information contains matters of supposition or is insufficiently definite to warrant disclosure; or
- the information is generated for internal management purposes; or
- the information is a trade secret.

The exceptions can only be relied on, and will only apply to the extent that:

- the issuer is not raising new capital by selling additional financial products at the relevant auction; and
- the information is confidential, and its confidentiality is maintained; and
- a reasonable person would not expect the information to be disclosed.

If in doubt, an issuer should consult with their professional advisers and then talk with Catalist as early as possible. Where an issuer holds infrequent auctions, they should try to time the auctions, and any business transactions, so that the issuer does not need to rely on these exceptions.

For example, an issuer’s expected auction schedule can allow for auctions to be started any time within a 6-week period. This flexibility can allow an issuer to delay an auction, within this period, to avoid relying on the exceptions. Alternatively, issuers may apply for a short-term waiver of Issuer Rule 11.1(b) (*Expected Auction Schedule*) under Issuer Rule 12 (*Waivers*), although this is only likely to be given where the issuer can show the delay is likely to be the fairest and most reasonable outcome for existing investors.

## **5. Updating disclosures of material information**

An issuer is required to provide its proposed information for upload to the Catalist website, prior to an auction taking place. Catalist will work with issuers to set suitable timeframes to allow the information to be reviewed. Catalist is not responsible for the information provided about any issuer, but we will only allow an auction to proceed if we do not have any objections to the information provided.

Issuers must also keep their information up to date during the auction period by providing any updated information to Catalist as soon as practicable.

### *Trigger for updates during an auction*

Issuers must have a process in place so that, during any auction period, they regularly assess whether any director or senior manager has become aware of new information that would trigger the requirement to update the information disclosed to investors.

If an issuer's directors or senior managers become aware of such information, the issuer must notify Catalist immediately. Issuers should not wait until they have produced updated information to notify Catalist, because the auction may need to be extended or delayed. The updated information should then be provided to Catalist as soon as practicable.

## Appendix 1: Material Information Disclosure Rules

*The following is a copy of Issuer Rule 6 (Disclosure of Material Information). Issuers should familiarise themselves with the full issuer rules to ensure they are aware of all their obligations.*

### 6. Disclosure of Material Information

#### 6.1 Fundamental rule

The Issuer must ensure that all Material Information relevant to the Quoted Financial Products is available on or through the Information Page no later than the start of each Auction Period and at all times during each Auction Period.

#### 6.2 Exceptions to the fundamental rule

- (a) Where the Issuer would be obliged under Rule 2 (*Fundamental Rule*) to release information on their relevant Information Page, the Issuer shall not be obliged to release that information if one or more of the following applies:
- (i) release of the information would be a breach of law; or
  - (ii) the information concerns an incomplete proposal or negotiation; or
  - (iii) the information contains matters of supposition or is insufficiently definite to warrant disclosure; or
  - (iv) the information is generated for internal management purposes; or
  - (v) the information is a trade secret.
- (b) The exceptions in this Rule 6.2 (*Exceptions to the Fundamental Rule*) will only apply, in each case, to the extent:
- (i) the issuer is not raising new capital by selling Financial Products at the relevant Auction, and
  - (ii) the information is confidential and its confidentiality is maintained, and
  - (iii) a reasonable person would not expect the information to be disclosed.
- (c) Issuers are encouraged to avoid relying on the exceptions in this Rule 6.2 (*Exceptions to the Fundamental Rule*) where reasonably practical. For example, an Issuer may delay an Auction within any time range specified in their Expected Auction Schedule where the delay may allow the Issuer to avoid relying on these exceptions.

#### 6.3 Requirements relating to the exceptions

Where an issuer withholds Material Information in reliance on Rule 6.2 (*Exceptions to the Fundamental Rule*), the Issuer must:

- (i) Notify Catalist that it is withholding such information and the nature of the information withheld; and

- (ii) Confirm that it is maintaining a list of 'insiders' who are aware of such Material Information and promptly provide such list to Catalist if requested.

#### 6.4 Updating information during an auction

During each Auction Period, an Issuer must immediately notify Catalist if it becomes aware that any information:

- (i) required to be available on or through the Information Page is missing, or
- (ii) any information available on or through the Information Page is, or has become, inaccurate or misleading, or is likely to become inaccurate or misleading during an Auction Period,

and must provide updated information to Catalist as soon as practicable.

#### 6.5 Quality of information

Catalist may cancel, delay, extend or suspend an Auction if it has reason to believe any information on the Information Page, or information otherwise made available to Registered Investors, may be inaccurate or misleading or is likely to become inaccurate or misleading during the Auction Period, however nothing in these Rules shall be interpreted as making Catalist responsible for the quality of the any information available on or through the Information Page.

## Appendix 2: Suggested policies, procedures and controls

Prior to their first auction, every issuer must have a policy and process describing how they will complete information updates for future auctions. This due diligence policy and process should be a written document that is approved and regularly reviewed by the board of directors. It does not need to be a long document, but it will help ensure the issuer is easily able to provide updated information when the time comes.

The due diligence policy and process document should, at a minimum, provide for the following:

### *Suggestions for due diligence policy*

- State who is responsible for collating the material information disclosures<sup>2</sup>.
- State who is responsible for providing information, on their relevant business areas, to the person / people responsible for collating the material information disclosures.
- State who is responsible for preparing the update document or updated information memorandum for each auction.
- State who the contact person is for communications with Catalist and who will stand in their place if they are not available.
- Describe what is expected of other employees, and contractors who perform roles that an employee might otherwise be expected to perform, including
  - All employees and relevant contractors must know who to notify, and that they must make such notification immediately, if they become aware of any new material information relating to the issuer or its financial products.
  - Employees and contractors must not buy or sell any of the issuer's financial products if they are aware of material information that has not been publicly disclosed (i.e. when they are 'insiders').
  - Employees and contractors must not disclose any material information about the issuer or its financial products, to anyone other than those in line with this policy and the related processes.
  - Directors and senior managers must disclose any intention to buy or sell the issuer's financial products in advance of any auction commencing.
  - Directors and senior managers must disclose their interests in the issuer's financial products or in the financial products of any related entity<sup>3</sup>.
  - Directors are responsible for ensuring the due diligence process remains robust and fit for purpose. They are also responsible for the final information that is released.

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<sup>2</sup> The directors ultimately need to be satisfied the information disclosed meets the requirements of the issuer rules and relevant law. The directors do not need to collate the information personally, as long as they are satisfied the process is robust. In the policy, it is better to name positions that will have certain responsibilities, rather than individuals responsible for the necessary tasks. Make sure the individuals in those positions are aware of their responsibilities and that the processes are regularly reviewed.

<sup>3</sup> A separate guidance note on disclosure of ownership interests is available on the Catalist website.

- Be clear which positions within the issuer’s business meet the definition of a “senior manager” under the issuer rules.
- Refer to the process that must be followed when producing an information update or updated information memorandum.

### *Suggestions for due diligence process*

The due diligence process should be started well in advance of each auction to ensure there are no delays in providing information to Catalist, but not so early that a lot is likely to change after the process is completed. The length of time the process takes will vary between issuers, the type of securities listed, and depend upon the rate of change within the business.

The process document should set a time before each auction when the process is to be started.

There are various steps involved in collecting relevant material information. We suggest the process should contain, at least, the following steps:

#### **1. Scoping**

- Review the previous updated document / information memorandum.
- Identify any changes to the structure of the business, its main activities, or the people responsible for those activities.
- If there are minimal changes, decide who is best placed to identify exactly what has changed and how to collect the relevant information.
- If there are a number of changes, or a significant change, decide how this needs to be reflected in the type of due diligence process completed. More people may need to be involved to ensure the new information is given its full context.
- Ensure all relevant staff members understand what kind of information constitutes material information.
- Make sure the scoping is designed to identify at least:
  - Any changes to the way the business is conducted, its profitability, supply chain, product lines or sales methods
  - Any material changes to the risks faced by the business
  - Any transactions with related parties
  - Any intended distributions, conversions or calls relating to the issuer’s financial products, or new or proposed issues of additional financial products
  - Any change in dividend policy for equity securities
  - Any decision to change a director, senior manager, auditor or other significant role (regardless of whether such change is effective at a later date)
  - Any change in a credit rating or change in relationship with creditors
  - Anything else that could materially affect the value of the business (for equity securities) or the ability of the business to meet its obligations (for debt securities)

## 2. Due diligence

- Gather information from all those responsible for each area of the business (this may be simple updates if there are minimal changes or more detailed interviews may be required if there have been significant changes).
- Assess all information and make a comprehensive list of everything that appears to be material information.
- Keep records of all decisions and the supporting reasons regarding why certain information is considered material or not.

## 3. Draft information memorandum or update

- Based on the scoping and due diligence information, prepare an updated information memorandum (highlighting the changes made since the previous auction), update the document (if there are minimal changes to the business) or a completely fresh information memorandum if there have been significant changes.
- Regardless of the form in which the material information is provided, it needs to clearly and concisely state what material changes have happened to the business since the previous auction.
- You may wish to keep a check list and tick off all material information, or updates of material information, as they are added into the updated disclosure documentation.
- Review all factual statements or claims in the draft disclosure document and ensure they are all verified by the relevant person within the business who has been allocated responsibility e.g. financial information verified by the CFO or accountant, business segment change verified by the GM or CEO.

## 4. Share the draft information with Catalist

- Provide the updated disclosure document to Catalist within the agreed timeframe, prior to the next auction.
- Provide responses to any queries or feedback received from Catalist.

## 5. Final review and verification

- The issuer's directors need to be comfortable that the process to produce the final information update is robust and comprehensive. A final review should be completed by either the directors or someone acting on behalf of the directors. If someone is delegated this task by the directors, they must be a person with sufficient knowledge of the whole business. This is to make sure the overall impression given by the information is correct, and sufficient context is given to allow investors to properly understand the significance of all the information.
- The depth of the review will depend upon how much has changed since the most recent auction.
- The board of directors should decide how frequently they personally need to review the

disclosure information, if they have delegated this task. Periodic review by the directors can help to ensure they retain effective oversight over the information disclosure process, and are comfortable that the process is effective.

#### **6. Keeping information up to date during an auction**

- Directors and senior managers are required to notify the responsible person if they become aware of any significant change to the business, or its prospects, or anything else that could affect the material information disclosed, during an auction.
- If in doubt, notify Catalist first, and then decide whether an update to the information is required.
- Once the auction has closed, the information update process can be stopped until the next auction.