CHARTERED SECRETARIES
AUSTRALIA

Leaders in governance

23 November 2012

Douglas Niven
Leader
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By email: policy.submission@asic.gov.au

Dear Douglas

Effective disclosure in an operating and financial review: Consultation paper 187

Chartered Secretaries Australia (CSA) is the independent leader in governance and risk management. As the peak professional body delivering accredited education and the most practical and authoritative training and information in the field, we are focused on improving organisational performance and transparency.

Our Members have primary responsibility to develop and implement governance frameworks in public listed, unlisted and private companies, and not-for-profit and public sector organisations. In listed companies they have primary responsibility to deal with the Australian Securities Exchange (ASX) and interpret and implement the Listing Rules. Our Members have a thorough working knowledge of the operations of the markets and the needs of investors, as well as compliance with the Corporations Act (the Act), and are involved in the preparation of annual reports. We have drawn on their experience in our submission.

General comments

CSA broadly supports the intention of Consultation paper 187: *Effective disclosure in an operating and financial review* and the draft Regulatory Guide (the guidance). CSA Members strongly support disclosures that ensure the market is informed and that provide transparency to shareholders. Indeed, many companies already prepare and issue a detailed operating and financial review (OFR). However, as noted during the Roundtable discussion CSA held with the Australian Securities and Investments Commission (ASIC) on 16 November 2012, CSA has concerns that the language used to set out aspect of the guidance could be interpreted to cover very broad areas which will require significant additional details, beyond that contemplated by the legislation or by ASIC.

CSA commends ASIC for consulting openly and constructively with CSA Members and other stakeholders on the draft Regulatory Guide. We were heartened to hear at the Roundtable that ASIC:

- is not seeking prospectus-style disclosure
- is keen for each entity to 'tell its own story' and tailor the OFR to its circumstances
- is not seeking the disclosure of commercially sensitive information
- is keen to ensure that the interaction of other disclosures with the OFR can be highlighted in the final guidance
- is keen to receive feedback on the call for disclosure of material business risks.

Our comments are therefore addressed to those aspects of the guidance where we are of the view that the guidance can be modified to clarify the intent and objectives of the guidance.

The main issues discussed with ASIC at the Roundtable were:

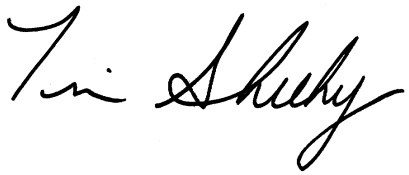
- While the guidance refers to other forms of disclosure, such as other aspects of the directors' report including the corporate governance statement, market announcements made under Listing Rule 3.1, analysts' briefings and investor presentations, the guidance nonetheless implies that all such disclosures are secondary to the disclosure in the OFR. At present, the guidance can be interpreted as requiring companies to distil and re-present all such disclosures, which would add considerably to the length and complexity of the annual report. CSA is of the view that any development in financial reporting should be focused on reducing the length and complexity of the annual report and strongly believes that the proposed guidance as currently drafted runs counter to this. CSA recommends that the guidance clarify that ASIC does not expect companies to summarise past disclosures, including ASX announcements, in any detail, but to refer to key events that have been disclosed to the market in the previous 12 months in the context of explaining business drivers that contributed to movement in the financial position and performance during the year. After all, investors who are interested in that level of detail about a company will have been following market announcements in real time.
- The cross-reference in the guidance to Regulatory Guide 228 Prospectuses: Effective disclosure for retail investors (RG 228) is very confusing, as the current drafting appears to suggest that ASIC is seeking prospectus-style disclosure in the OFR. CSA recommends that it would be more useful for the guidance to refer only to the aspects of guidance contained in RG 228 relating to the *presentation* of information, rather than asking companies to refer to RG 228, which implies it provides guidance as to the *content* of the OFR. This would remove the current confusion as to whether prospectus-style disclosure is required.
- The annual report is historical information, not a prospectus for investors on expected future performance. While at present entities verify facts and ensure that forward-looking statements are underpinned by appropriately robust assumptions and analysis, the process is still much less rigid and formal than is undertaken for a prospectus. The guidance refers to disclosures of the business strategies and prospects for future financial years, which is more than the forward 12-months period. As discussed at the Roundtable, current practice within companies is that no board would release an OFR without auditor approval, but auditors will be extremely uncomfortable signing off on forward-looking information. The ASIC guidance needs to clarify that the OFR is not expected to be audited, while noting it will be subject to some level of verification.
- The guidance states that a significant amount of detail on the underlying drivers of performance should be provided in the OFR. CSA is of the view that, as currently worded, the guidance will require commercially sensitive information to be included in the OFR, to the advantage of third parties such as competitors and suppliers, but to the disadvantage of investors. The drafting should clarify that commercially sensitive information is not expected to be disclosed.
- Clarification on what level of detail is required can also be assisted by greater clarification of the 'reasonableness' of the information required. CSA recommends that the guidance could be redrafted to not only clarify what is exempt from disclosure, but also what can be exempted and what is unreasonably prejudicial to the entity if disclosed.
- CSA is of the view that auditors will undertake their responsibilities in auditing annual reports (including the OFR) against the ASIC Guide, given that the proposed Regulatory Guide states that it is ASIC's interpretation of the law. Yet much of the reporting contemplated in the guidance is forward-looking, and therefore constantly changing. It is

not static and cannot be audited in the same manner or with the same confidence as financial reporting. CSA cautions that any guidance on the OFR dealing with disclosures that cannot be easily measured or audited needs to be realistic in terms of what can be achieved.

- The guidance calls for entities to detail all 'main' risks. It is unclear what is meant by 'main' risks and how an entity should assess what is to be included or excluded. The descriptions on page 38 of risks for disclosure are very detailed. CSA Members are of the view that the result will be the disclosure of a long list of risks, as is currently found in any prospectus. Boards of directors may form the view that they cannot leave out any possible risk, as they will be vulnerable to class actions should any risk not listed later arise. It should also be noted that the UK's Financial Reporting Council (FRC) has recently found that, where it list risks in its guidance, companies tend to focus on those risks as listed for their reporting, rather than the ones that are critical to their business. As a result the UK's FRC has moved away from detailed guidance of this nature. Greater clarity is required in the guidance in relation to the discussion of risk, given that risk is fluid and forward-looking. CSA recommends that ASIC align the guidance with the disclosures required under Principle 7 of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* and align the language with *AS/NZS ISO 31000:2009 Risk management — Principles and guidelines*. CSA also recommends that ASIC clarify that it does not expect entities to disclose material business risks, but rather disclose the prospects of the entity and some commentary on what may happen financially to affect those prospects.

Our detailed comment on the guidance is set out on the following pages and relates to the matters discussed at the Roundtable as well as providing responses to the questions set out in the consultation paper.

Yours sincerely



Tim Sheehy
CHIEF EXECUTIVE

Detailed comments

Access to information about the entity

CSA Members noted at the Roundtable that the starting point of any disclosure under s 299 is to ascertain what investors 'reasonably require'. In turn, this will ensure that entities can ascertain what would be unreasonably prejudicial to disclose.

The first question then is: What does the reasonable investor already know? Continuous disclosure regulation is designed to ensure that investors have timely and equal access to price-sensitive information in relation to traded securities. Webcasting of public and private analysts' briefings and investor presentations is also best practice for large companies with large shareholder bases — such companies are able to sustain the costs attached to webcasting, whereas this may not be possible for smaller companies. (CSA notes that it can be easier for an investor to locate the webcast of such a briefing on an entity's website than locate the five pages devoted to the OFR in the 200-page annual report on the same site. Indeed, many entities register more hits on the webcasts of analysts' briefings than on the annual report.)

ASIC noted at the Roundtable that it can be difficult for an investor to 'plough through' all market announcements in a previous 12-month period to understand where a particular issue started, how it progressed and where it now stands, in order to make an assessment of strategic decisions and future prospects. ASIC's guidance is intended to assist entities to provide insight in short form as to the main drivers of the business. However, the current draft of the guidance suggests that entities should digest and reissue all market announcements in the previous year.

CSA recommends that the guidance clarify that ASIC does not expect companies to summarise past ASX announcements in any detail, but to refer to key events that have been disclosed to the market in the previous 12 months in the context of explaining business drivers that contributed to movement in the financial position and performance during the year. CSA also recommends that ASIC include an example of this type of disclosure to clarify what is being sought.

Prospectus-style information is not required

The current draft of the guidance states that: '...while s 299A contains similar wording to the prospectus disclosure requirements in s 710, an OFR would very rarely contain the scope or detail of a full prospectus'.

However, as noted in our discussions at the Roundtable, CSA is of the view that, as currently drafted, the guidance can only be interpreted as requiring companies to subject the OFR to the same degree of due diligence and verification to which a prospectus is subject. The draft guidance states that, 'while the guidance in Regulatory Guide 228 *Prospectuses: Effective disclosure for retail investors* (RG 228) is for disclosure in a prospectus, which is more extensive than the disclosure typically required in an OFR, RG 228 may also be useful for preparing disclosure about an entity's business model in the OFR'. This would see the OFR greatly expand in length and complexity.

The cross-reference in the guidance to Regulatory Guide 228*: Prospectuses: Effective disclosure for retail investors* (RG 228) is very confusing, as the current drafting appears to suggest that ASIC is seeking prospectus-style disclosure in the OFR.

CSA recommends that it would be more useful for the guidance to refer only to the aspects of guidance contained in RG 228 relating to the *presentation* of information, rather than asking companies to refer to RG 228, which implies it provides guidance as to the *content* of the OFR.

This would remove the current confusion as to whether prospectus-style disclosure is required.

Disclosure of risks

The section of the guidance dealing with the disclosure of risks ('Prospects for future financial years' pp 37-38) creates new, conflicting and unclear requirements and needs substantial revision. As presently drafted, it will be impossible to achieve the intention of guidance to avoid increasing the length or complexity of the information accompanying the annual report. The revision of this section should consider the interplay with existing ASX requirements, specifically:

- Principle 7 ('Recognise and manage risk') of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations*
- the ASX Corporate Governance Council's *Revised Supplementary Guidance to Principle 7*
- ASX Listing Rules *Guidance Note 9: Disclosure of Corporate Governance Practices* (which should be read together with Listing Rule 4.10.3).

As well, the revision should use language consistent with the Australian/New Zealand Standard, *Risk management – Principles and guidelines* (AS/NZS ISO 31000:2009).

The section creates new and conflicting requirements as it reaches much further than Principle 7. Without restating Principle 7 here, its key elements include:

- the company should have a sound framework to identify and manage its material business risks and explicitly points to the disclosure requirements under s2 99A of the Act
- when developing its risk management approach, an entity should consider the reasonable expectations of all its stakeholders, including shareholders (investors)
- the board should disclose that management has reported to it on the effectiveness of the company's management of its material business risks
- further, the board should disclose receipt of assurance that the CEO/CFO declaration under s 295A is founded on a sound system of risk management and control. This specifically addresses financial reporting risks, being the risk of a material error in the financial statements.

ASX Listing Rules Guidance Note 9, at page 6, expressly permits the inclusion of Principle 7 disclosures in the OFR, if not otherwise in the entity's corporate governance statement of the annual report.

The section of the draft regulatory guide is also directly inconsistent with the supplementary guidance to Principle 7, which states:

> The following disclosures are NOT required by Principle 7:
>
> - commercially sensitive information
> - details of the company's material business risks.

The breadth of the language concerning the requirement to disclose risks needs revision. Currently the guidance requires entities to disclose its material business risks. From a board's perspective, if they disclose some risks and not others, or if one risk is detailed and another is not, the disclosure becomes actionable if an undisclosed risk arises or the less detailed risk becomes the one posing a difficulty for the investment. Liability attaches to such disclosures, and at present there is no safe harbour provision in Australia.

The ASX Corporate Governance Council consulted widely on Principle 7. The Council recognised that there are limitations to what any entity or board can know — all risk management operates on part knowledge, as an entity cannot know everything that may affect the achievement of organisational objectives. Risk is fundamentally about the sources or drivers of uncertainty around the achievement of an entity's objectives. In other words, it is uncertainty

that generates risk and so risk management will not be perfectly predictive, but a snapshot in time of the risk profile of the entity.

ASIC is currently seeking the disclosure of the entity's 'main risks'. The term 'key risks' is used elsewhere, as are 'internal risks' and 'external risks'. Terms such as 'main' risks and 'key' risks are not defined, and there is no alignment of the language in the guidance with the use of language in the international standard on risk management that has been adopted in Australia and New Zealand. Further, the references to 'risk aversion' and 'risk appetite' are used loosely and are loaded words that do not have settled meaning. If retained, CSA recommends adopting the definitions used in ISO Guide 73: *Risk management – Vocabulary.*

To those reading the current draft of the guidance, it is impossible to understand that ASIC is seeking a disclosure of prospects and some commentary on what may happen financially to affect those prospects. From our discussion at the Roundtable, CSA understands that this is the intent of the guidance.

CSA recommends that the drafting be revised to clarify that it is this narrower scope of disclosure which is required. This is a very different disclosure than disclosing the material business risks of an entity.

Forward-looking information

The annual report is a snapshot in time, covering the financial performance of the company in a retrospective period. Financial information is backward-looking and static and can be audited. By the time the annual general meeting (AGM) takes place, the information contained in the annual report is already out-of-date.

In the majority of entities, current practice for the process of verification of a directors' report would be for it to be approved by the General Counsel, the CFO and, depending on the organisation, other senior executives such as the head of investment. In the majority of entities, notwithstanding that the OFR is not subject to audit, directors will not release the OFR unless it is audited.

However, much of the reporting contemplated in the guidance is forward-looking, and therefore constantly changing. It is not static and cannot be audited in the same manner or with the same confidence as financial reporting. CSA cautions that any guidance on the OFR dealing with disclosures that cannot be easily measured or audited needs to be realistic in terms of what can be achieved.

We note that the Financial Reporting Council (FRC) recently released the findings drawn from the submissions received in response to its *Managing Complexity in Financial Reporting* report.[1] The report and results of submissions were prepared by the FRC's Managing Complexity Task Force, which was established to examine complexities in financial reporting in light of widespread concern. While the Task Force has recommended that the FRC support ASIC's proposal to foster more meaningful OFR in annual reports, it also noted those submissions which suggest the use of the business judgement rule, or a safe harbour for decisions made by directors, to address the issue of over-disclosure in financial reports.

If companies are required to detail strategy and also the risks attached to achieving that strategy, they are moving to disclosure of outlook. If directors are releasing prospective information, issues of personal liability arise. Directors are subject to statutory and common law

[1] On 3 October 2012, the FRC released the findings drawn from the submissions received in response to its Managing Complexity in Financial Reporting report. The report and results of submissions were prepared by the FRC's Managing Complexity Task Force, which was established to examine complexities in financial reporting in light of widespread concern.

duties which require them to act with reasonable care and diligence and in good faith in the best interests of the company and for a proper purpose. A defence may apply to decisions taken by directors in relation to breaches of care and diligence but it is not available where the process leading up to the decision is defective (such as where the decision is made on the basis of clearly inadequate information). Providing forward-looking reporting means that the information provided could well be based on inadequate information, given that circumstances can change rapidly. This is turn exposes directors to actions against them, including class actions, which are becoming increasingly prevalent. At present, a 'safe harbour' from liability for directors and executives has not been adopted in Australia. CSA understands that other jurisdictions that have detailed OFR requirements, such as the UK, have specific safe harbours from liability in place for disclosures made in OFRs.

CSA notes that some entities currently include unaudited sections in their remuneration reports which are intended purely to be of assistance to the shareholder. The fact that such sections are unaudited are made clear in the report.

CSA recommends that it would be useful for ASIC to clarify in the guidance that:

- the OFR is intended as a major source of information about an entity's business at a point in time, but the information is a snapshot only, as there will be change
- the investor is therefore expected to take responsibility to monitor the entity (for example, through the market announcements made under the continuous disclosure regime and on the entity's website), as the entity will continue to issue information as change occurs.

Finally, CSA also notes that the guidance needs to align with the revised Guidance Note 8 on Listing Rule 3.1, which is currently open for public consultation. The revised Guidance Note points to the disadvantage of entities releasing guidance to the market, which conflicts with the current drafting of ASIC's Regulatory Guide which points to entities needing to release more guidance. CSA recommends that ASIC's regulatory guide align with the final version of the revised Guidance Note 8 on this matter.

CSA also recommends that the ASIC guidance could clarify the level of detail that is required through greater clarification of the 'reasonableness' of the information required. CSA recommends that the guidance be redrafted to not only clarify what is exempt from disclosure, but also what can be exempted and what is unreasonably prejudicial to the entity if disclosed.

Responses to questions set out in discussion paper

B1Q1: Do you agree with our view what an OFR is, and broadly what it should contain? If not, please explain why not.

Following the discussion at the Roundtable, CSA agrees with ASIC's view that an OFR is:

- intended as a major source of information about an entity's business at a point in time, but the information is a snapshot only, as there will be change, and
- seeking a disclosure of prospects and some commentary on what may happen financially to affect those prospects.

However, the current draft is explicit that the OFR should be 'the' major source of information about the entity, rather than 'a' major source. The current drafting of the guidance also suggests that ASIC has an expectation that an OFR should function as a prospectus. It calls for the disclosure of forward-looking statements about the company's future performance, including against its material business risks — this is prospectus-style disclosure.

B1Q2: Do you agree with our view that an OFR should be a major source of information about an entity's business to meet the information needs of investors? If not, please explain why not.

CSA agrees that the OFR should be a major source of information about an entity's business to meet the information needs of investors, subject to ASIC clarifying in the guidance that:

- the OFR is intended as a major source of information about an entity's business at a point in time, but the information is a snapshot only, as there will be change
- the investor is therefore expected to take responsibility to monitor the entity (for example, through the market announcements made under the continuous disclosure regime and on the entity's website), as the entity will continue to issue information as change occurs. CSA reiterates that the OFR is 'a' major source of information, but is not 'the' major source of information, and the OFR does not need to be a report that brings all other disclosures together.

B2Q1: Is there any other additional guidance that would be useful about the relationship between disclosures in other documents and the disclosures made in the OFR?

CSA recommends that ASIC align the language on risk with the language in the international standard, *AS/NZS ISO 31000:2009 Risk management — Principles and guidelines*, and also align with and be cross-referenced to 'Principle 7: Recognise and manage risk' in the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations*.

B3Q1: Do you agree with our view on the level of disclosure required? If not, please explain why not and suggest alternatives.

CSA does not agree with the current drafting relating to the level of disclosure required. In proposing that entities should provide forward-looking information in the annual report, which has always been a document reviewing the financial year just completed, CSA is of the view that the draft guidance sets an expectation that ASIC views the OFR to be of the same nature of document as a prospectus, albeit it limited in scope.

As noted earlier, this could be ameliorated by ASIC clarifying that it is seeking a disclosure of prospects and some commentary on what may happen financially to affect those prospects, but not the disclosure of material business risks or a restatement of all market announcements in the previous 12 months.

C1Q1: Do you consider that the proposed guidelines on the specified content of an OFR (as set out in the draft regulatory guide) are appropriate? If not, please explain why not and suggest alternatives.

The draft regulatory guide requires the disclosure of business objectives, how they are to be achieved and any significant factors on which the achievement of these objectives depends. CSA Members are concerned that the current drafting will be interpreted as requiring disclosure of commercially sensitive information. For example, on page 37, the draft regulatory guide refers to disclosure of an 'entity's intention to develop or discontinue products or services, plans to enter new markets or to expand production capacity and market share in existing markets, or plans to raise funds for the acquisition of a new asset'. These matters are confidential to a company and commercially sensitive and it is not appropriate to disclose these in detail. These matters are also often the subject of the continuous disclosure regime. CSA notes that the revised draft Guidance Note 8, currently subject to public consultation, does not require such matters to be disclosed until either a board resolution has been passed or an agreement signed. Many of these decisions are also dependent on other factors, which if disclosed, could artificially influence outcomes and remove choices and options from the entity.

These concerns are exacerbated by the requirement in the current draft to disclose all material business risks. Our previous recommendations in relation to these matters should ameliorate these concerns.

C1Q2: Do you agree with the examples of disclosure set out in Tables 1 and 2 of the draft guide? If not, please explain why not. If you think that there is a preferable way of illustrating our guidance, please suggest alternatives.

Examples provide a very helpful mechanism to interpret the draft regulatory guide. Indeed, CSA is of the view that the examples clarify the level of disclosure that ASIC expects, and that if the language is revised to more closely approximate the examples, the ASIC guidance will prove useful to many entities.

CSA is of the view that the examples in Table 1 are fair representations of an appropriate level of disclosure of an entity's operations and financial positions and that the first example in Table 2 is an appropriate level of disclosure.

However, CSA does not agree that the second, third and fourth examples in Table 2 are an appropriate level of disclosure. In the second example each risk is described with an excessive level of detail, and there are likely to be significantly more risks that affect the entity's ability to achieve its future prospects, which are not included. The third and fourth examples of Table 2 include information that is significantly detailed and is likely to unreasonably prejudice an entity. The third example includes forward-looking statements that would require significant verification to ensure the assumptions underpinning those statements are sound.

C1Q3: Do you think that there is any other key information that should be included in an OFR that has not been referred to in our draft guidance?

No

C2Q1: Do you consider that our proposed guidance on disclosure about an entity's operations (as set out in the draft regulatory guide) is appropriate? If not, please explain why not and suggest alternatives.

Page 33 of the draft regulatory guide refers to 'an informed assessment of an entity's operations will often require information about past results, or the performance of other businesses in the same sector…'. CSA notes that one entity is not in a position to comment on another entity's performance. The entity can only obtain publicly available information and comment on that basis, which may not necessarily reflect the true circumstances of that other entity, or of the sector in general. While it may be possible to provide general, readily observable comments about the industry or economic circumstances in which the entity operates, it is neither desirable nor feasible to require entities to refer to other entities or provide more detailed commentary about exogenous factors. This concern is heightened given the expectation of verification that the draft regulatory guide assumes.

C3Q1: Do you agree that reference to RG 228 in relation to business models is useful? If not, please explain why not and suggest alternatives.

The proposed guidance states that companies should provide the business model for the company. This is most commonly a complex, detailed multi-page spreadsheet and it is required in a prospectus. This reference will need revising to clarify ASIC's intent in relation to expectations.

C4Q1: Do you consider that our proposed guidance on disclosure about an entity's financial position (as set out in the draft regulatory guide) is appropriate? If not, please explain why not and suggest alternatives.

The draft regulatory guide refers to profit increase as 'in line with expectations'. It is not clear whose expectations ASIC is referring to. If an entity has previously provided guidance on its likely profit movement, the expectations could refer to the entity's expectations. However, if it relates to another measure on which the entity has not provided forward guidance, it is impossible for an entity to issue a comparative statement with past expectations that have not been disclosed. The draft guidance is unclear as to whether the comparison is to be with the budget or the strategic plan, or if the requirement is to disclose retrospectively an indication of past expectations. CSA Members are also uncertain how it could be possible to measure and disclose changes in assumptions. Some factors that may have a direct impact on the entity's financial position or performance can be easily measured, but not all can. Underpinning our uncertainty as to how these disclosures are to operate in any practical manner is the concern about the level of verification that will be required to support the analysis, as currently required in the draft Regulatory Guide.

C5Q1: Do you consider that our proposed guidance on disclosure about an entity's business strategies and prospects (as set out in the draft regulatory guide) is appropriate? If not, please explain why not and suggest alternatives.

The draft regulatory guide specifically includes a requirement for the disclosure of the directors' appetite for risk, any changes in the risk appetite and any current or planned risk management practices. CSA notes that the terms 'risk appetite' and other terms such as 'risk aversion' are loaded terms, with no settled agreed meaning.

CSA recommends that the guidance align with the language used in the international standard, *AS/NZS ISO 31000:2009 Risk management — Principles and guidelines*, and also align with and be cross-referenced to 'Principle 7: Recognise and manage risk' in the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations*.

Indeed, CSA notes that the ASX Corporate Governance Council, comprising all market participants, including investors, deliberately refrained from including a reporting trigger requiring the disclosure of directors' risk appetite in the Corporate *Governance Principles and Recommendations*, as the Council was aware that such a disclosure goes to the heart of commercially sensitive information and it would not be in the interests of investors to make it public. The Council decided that risk appetite is communicated *within* the organisation so that organisational units can manage their risks consistently in alignment with organisational objectives, but not communicated *externally* so that competitors can develop strategies to pressure the entity accordingly.

C7Q1: Do you agree with our interpretation of the exemption requirement? If not, please explain why not.

CSA agrees with ASIC's statement that:

> a useful approach to considering whether the publication of information would result in unreasonable prejudice is to identify the adverse consequences likely to occur (i.e. the prejudice), and then consider whether these consequences are unreasonable. The consequences would be unreasonable if disclosing the information is likely to give third parties (such as competitors, suppliers and buyers) a commercial advantage, resulting in a material disadvantage to the entity.

However, when assessing the use of the 'unreasonable prejudice exemption', it is not clear whether entities will need to make an assessment of each factor or whether they are to be aggregated. CSA queries how an entity is provide evidence that the unreasonable prejudice is 'more probable than not'. The guidance also requires entities to assess the information that competitors may already have, from both public and non-public documents, as well as the ability of competitors to act on the information. These assessments would need to be documented in some form, such as file notes or board papers, which will create a significant compliance burden for entities.

CSA also recommends that the guidance could be redrafted to not only clarify what is exempt from disclosure, but also what can be exempted and what is unreasonably prejudicial to the entity if disclosed. In particular, the draft regulatory guide contemplates (at RG000.74) that it may be reasonable to rely on the unreasonable prejudice exemption in respect of matters currently not disclosed in accordance with the carve-outs in the Listing Rules. CSA recommends that this be made explicit, that is, it is reasonable not to disclose a matter in the OFR if the entity is currently properly relying on a Listing Rule carve-out to continuous disclosure.

C7Q2: Do you agree that, when information has been omitted in reliance on the exemption, a summary of the type of information omitted and the reasons for the omission should be disclosed, where possible? If not, please explain why not.

CSA does not agree with this proposal. If the information is omitted in reliance on the exemption (for the reasons set out above), any summary of it will result in the disclosure of the information the entity wished to maintain as confidential. That is, as it would disclose information to third parties it is likely to give such parties a commercial advantage, resulting in a material disadvantage to the entity — the summary defeats the purpose of the omission. Providing reasons for the exemption simply exacerbates the problem, as the reasons clarify why the information is commercially sensitive and therefore of value to competitors and other third parties. CSA cannot see any benefit to investors in providing such a summary and reasons. Alternatively, if the summary of information omitted is so 'high level' that confidentiality is protected, it serves no useful purpose and becomes mere 'boilerplate' disclosure.

C7Q3: Do you agree with the final example of disclosure (relating to the use of unreasonable prejudice exemption), which is set out in Table 2 of the draft regulatory guide? If not, please explain why not.

CSA does not agree with the final example of disclosure set out in Table 2. This example includes information that is too detailed and likely to prejudice an entity, specifically the third example which includes forward-looking statements that would require significant verification to ensure the assumptions underpinning those statements are sound.

C7Q4: Are there other matters of practical guidance that should be included? If so, please describe these matters and explain why you think they should be included.

See our recommendations on earlier pages.

C7Q5: Do you agree with our suggestion for internal record keeping? If not, please explain why not.

CSA does not agree with ASIC's suggestion for internal record keeping. There would be a considerable number of matters relating to the business that are commercially sensitive, and it would be unrealistic to keep an ongoing record of every item that is not disclosed. In this context, CSA is of the view that the suggestion would cause an unreasonable administrative burden.

C8Q1: Do you consider that the proposed good disclosure practices in Table 3 of the draft regulatory guide are appropriate? If not, please explain why not and suggest alternatives.

CSA supports the inclusion of the examples and disclosure practices in the guidance, subject to some redrafting to take account of areas where too much detail is required, as set out above. In particular, we consider that the suggestion that the OFR has to be a single, self-contained section of the annual report is unhelpful. Many companies currently effectively fulfil the requirements of s 299A of the Corporations Act without a single self-contained section of the annual report and the regulatory guide should reflect that this approach remains open to companies.

C9Q1: Do you agree that it is not appropriate to include guidance on integrated reporting at this stage? If you think guidance should be included, please explain why.

CSA Members strongly support effective disclosure as a foundation principle of good governance. The aims of integrated reporting align with these principles and are to be commended.

While CSA supports the intent of integrated reporting, it does not support ASIC including any reference to integrated reporting in the Regulatory Guide. CSA is very strongly of the view that it is both premature and unhelpful for ASIC to include guidance on integrated reporting at this stage. It is premature because the framework is as yet unknown — ASIC would be steering Australian companies to an interpretation of integrated reporting before the IIRC itself has issued its framework and before we have the results of the pilot program to review.

The IIRC has a schedule for progressing its integrated reporting framework as follows:

- A Prototype Framework will be released in December 2012/January 2013 for comment. This will not be a formal framework or consultation, but comments will be reviewed.
- The Consultation Draft of the International Integrated Reporting Framework will be issued for comment in April 2013. The consultation will be open for 90 days, closing in July 2013.
- The aim is to release Version 1 of the International Integrated Reporting Framework in December 2013.

A number of Australian companies are participating in the pilot program, which will provide a great deal of useful feedback for both the IIRC and other companies to consider. That information will not be known until the end of this year.

Given that the government has asked the FRC to ‘monitor’ integrated reporting but has deliberately refrained from imposing it on Australian entities in any manner, CSA believes it would be unhelpful for ASIC to include any reference to integrated reporting. It would mean that the corporate regulator would be providing guidance on a form of reporting that is not included in the legislation and that the government itself has confirmed is still a work in progress.

Finally, not only has the integrated reporting framework not yet been released by the IIRC, but there is also considerable discussion as to whether integrated reporting is a change management process, involving the integration of the business, rather than a reporting mechanism. In other words, there is a question as to whether to report the outcome of a process rather than the report itself being the process.

CSA can see no role for ASIC in integrated reporting other than to monitor developments on an ongoing basis. CSA is firmly of the view that it is beyond ASIC’s remit to provide guidance on a form of reporting that does not exist other than as an ongoing experiment, being undertaken in good faith by a number of companies, but with no regulatory basis attached to it.

CSA also notes that not only is there disquiet about the challenges posed by integrated reporting, but also disquiet as to the motives for the accounting profession's support of integrated reporting. Part of the ongoing discussion as to the value of integrated reporting has revealed a view that the accounting profession's support is due to the opening of a new revenue stream. CSA is of the view that the corporate regulator should not be seen to be supporting new business models for the accounting profession when integrated reporting is still in its infancy. This could pose a reputational risk to ASIC.