HERBERT SMITH FREEHILLS

Comparative analysis of international corporate disclosure and liability regimes

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Introduction

Listing Rules 3.1 and 3.1A of the Australian Securities Exchange (**ASX**) require listed entities to continuously disclose material price-sensitive information to the market, subject to certain exceptions. On their own, these rules create a sensible and balanced continuous disclosure regime that protects investors and ensures the operation of a fair and informed market. The regulatory burden created by these rules is similar to that imposed by the relevant securities exchanges in other comparable jurisdictions.

However, the Australian regulatory environment includes an additional element beyond those found in major capital markets such as the UK and the US. Section 674A(2) of the *Corporations Act 2001* (Cth) (**Corporations Act**), in conjunction with the civil penalties regime in the Corporations Act, provides for a right for any person who suffers loss as a result of a contravention of ASX Listing Rule 3.1 to seek compensation from the relevant listed company and any person involved in the contravention where information is withheld from disclosure with knowledge that it would, or recklessness or negligence as to whether it would, have a material effect on the price or value of the entity's securities. The exposure of directors to civil liability for a breach of the continuous disclosure rule (as opposed to the separate misleading and deceptive conduct provisions) is not a feature of the securities laws in major comparable jurisdictions.

Permanent amendments were made to the Australian continuous disclosure regime in 2021 with the intention that in the absence of a lack of care or wilful neglect by the company, it ought not to be exposed to civil compensation claims where there is a delay or inaccuracy in disclosure. While these amendments have helped to balance the risk appropriately, it should be recognised that it is still very difficult, if not impossible, to ensure ongoing comprehensive compliance with the continuous disclosure regime. Combined with Australia's relatively facilitative class action law, this creates a constant risk for listed companies that a class action can be brought by plaintiff lawyers representing a class of shareholders whenever there is a significant decline in share price. The relatively easy allegation is that the class has suffered loss as a result of a delay in disclosure of a material development in breach of the continuous disclosure rule.

Shareholders are rarely significant beneficiaries of shareholder class actions. Any settlement reached will be reduced by substantial legal fees involved and to the extent the settlement funds erode the assets of the company, continuing shareholders will indirectly wear the cost. The cost-benefit equation associated with Australia's current continuous disclosure law requires further monitoring and reconsideration but in the interim, the introduction of the mental fault element has helped to provide a level of comfort to directors that, provided they have acted with due care and good faith, they ought not to be exposed to personal liability.

Furthermore, the emerging environmental, social and governance (**ESG**) landscape in Australia has introduced a new layer of disclosure risk for companies and their officers. Since the release of the International Sustainability Standards Board's Sustainability Disclosure Standards, there has been steady development in the adoption of mandatory sustainability disclosure regimes globally. In Australia, the Government conducted consultations in December 2022 and June 2023 on the proposed reporting regime on climate-related financial disclosure. One aspect of the proposed Australian regime that has caused some concern is the limited protection available to companies in relation to forward-looking statements made in accordance with the expected mandatory reporting on climate transition planning and target setting.

The Government's second consultation paper stated that the operation of the existing continuous disclosure laws provided sufficient protections for companies on the basis that the "additional fault element that requires knowledge, recklessness or negligence…. results in a requirement for a higher threshold to be proven before liability can be attached and should raise the threshold for class action cases." In this respect, any decision relating to amending or repealing the 2021 amendments may be at-odds with this position and accordingly, the Government would need to re-consider its position on liability for companies required to comply with the proposed climate reporting regime.

Cyber risk is another front-of-mind issue particularly in the wake of recent cyber-attacks against prominent Australian companies. Given a cyberattack often involves complex, fast-moving and protracted disclosure issues, any amendment or repeal of the 2021 amendments would similarly need to consider the impact on disclosure in this evolving area.

Key comparative analysis findings

Under ASX Listing Rule 3.1 and s 674(2) of the Corporations Act, once an entity listed on the ASX is or becomes aware of any information concerning itself that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information through an announcement to the market. Breach of this obligation is an offence by the company and may result in ASIC enforcement action.

Since the amendments made in 2021, the continuous disclosure regime under the Corporations Act can be summarised as follows:

- if the listed entity fails to comply with its continuous disclosure obligations:
  - ASIC may prosecute the entity for criminal offences or issue administrative penalties under s 674(2);
  - Under a new s 674A(2):
    - ASIC may pursue civil penalties against the entity, if the entity withheld information from disclosure with knowledge that it would, or with recklessness or negligence as to whether it would, have a material effect on the price or value of the entity's securities; and/or
    - private actions (such as shareholder class actions) may be brought against the entity, if the entity withheld from disclosure with knowledge that it would, or with recklessness or negligence as to whether it would, have a material effect on the price or value of the entity's securities;
- any person "involved in" a contravention of s 674A(2) may be liable to a civil penalty (subject to the reasonable steps test) under s 674A(3); and
- listed entities and officers are not liable for misleading and deceptive conduct (pursuant to section 1041H of the Corporations Act 2001 (Cth) or section 12DA of the Australian Securities and Investments Commission Act 2001 (Cth)) for failing to disclose material information, unless the entity or officer knowingly, recklessly or negligently failed to disclose material information.

In the leading capital markets, while the exchange continuous disclosure rule is consistent with Australia's, the link to director liability under legislation for corporate disclosure is more remote, requiring an element of misleading conduct or behaviour on the part of the company and its officers. In some of the other smaller jurisdictions, where the legislative framework is closer to the Australian provisions, the disclosure requirements are not linked with class action laws analogous to the Australian provisions which facilitate the commencement of class actions on behalf of broad classes of shareholders.

In Australia, companies and their officers cannot avail themselves of any 'safe harbour' exemption for forward looking statements. By way of comparison, in the US, a safe harbour exemption may be secured through identifying a statement as forward-looking and using meaningful cautionary statements which identify important factors that could cause the actual results to differ materially from those in the forward-looking statement. The safe harbour applies to private civil suits but not to enforcement actions brought by the SEC or other regulatory agencies.

Similarly in Canada, a person or company is not liable for a misrepresentation if the document or public oral statement containing the forward-looking information contained, proximate to that information:

- reasonable cautionary language identifying the forward-looking information as such, and identifying material factors that could cause actual results to differ materially from a conclusion, forecast or projection in the forward-looking information; and
- a statement of the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection set out in the forward-looking information.

In our view, the suggestions that have been made by various interested parties that Australia's disclosure laws (and the exposure of directors to civil liability in relation to corporate disclosure) are consistent with the laws and risks in the global capital markets lack merit.

Attachment 1 – Australian position

Question	Answer	Source
Are listed companies subject to a continuous disclosure obligation?	Yes.	
	<u>Criminal liability</u>	ASX Listing Rule 3.1
	The core continuous disclosure obligation for listed entities is found under s 674 of the *Corporations Act 2001* (Cth). Subject to some exceptions, once an entity listed on the Australian Securities Exchanges (**ASX**) is or becomes aware of any information concerning itself that is not generally available, and that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information through an announcement to the market.	Corporations Act (**CA**), s 674(2)
	Breach of s 674(2) is an offence by the company. It is not a civil penalty provision.	CA, ss 674, 1311(1)
	If an entity breaches s 674(2), the Australian Securities and Investments Commission (**ASIC**) may issue an infringement notice to the company, which carries a financial penalty.	CA, s 1317DAC
	<u>Civil liability</u>	CA, s 674A(2)
	A listed entity may also be subject to civil liability under s 674A.	
	If an entity listed on the ASX is or becomes aware of any information concerning itself that is not generally available, and that entity knows, or is reckless or negligent with respect to whether, the information would, if it were generally available, have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information through an announcement to the market.	
	A breach of s 674A(2) attracts a civil penalty.	CA, ss 674A(2), 1317E
	For actions brought under s 674A(2), a court may order the company to pay compensation to any person who suffers damage as a result of a breach. This may be used as a basis for bringing a shareholder class action.	CA, ss 1317E, 1317G, 1317HA and 1317J.
	Following a declaration of contravention of s 674A(2) by a court, ASIC may also seek a pecuniary penalty order.	

Question	Answer	Source
To establish a contravention, does the failure to disclose relevant information to the market need to be intentional, reckless or negligent?	Criminal liability To succeed in establishing a criminal offence under s 674(2), the prosecution must prove that the entity intended to engage in the prohibited conduct. Where an entity's failure to disclose is merely negligent, there is no offence under s 674(2). However, regardless of any fault element, ASIC may still issue an infringement notice under s 1317DAC. Civil liability Yes, in relation to a civil penalty proceeding. For ASIC or private litigants (such as shareholder class actions) to succeed in establishing a civil penalty under s 674A(2), it must be proved that the entity withheld from disclosure with knowledge that it would, or with recklessness or negligence as to whether it would, have a material effect on the price or value of the entity's securities.	CA, ss 674(2), 678, 1317DAC Cth Criminal Code CA, 674A
Are any defences available to a breach of continuous disclosure requirements?	Criminal liability No. Civil liability For a breach of a civil penalty provision under s 674A(2), a statutory defence is available if the person acted honestly and, having regard to all the circumstances of the case (including, where applicable, those connected with the person's appointment as an officer, or employment as an employee of the company), the person ought fairly to be excused for the contravention.	CA, ss 674A, 1317S
Can directors be liable if the company breaches this obligation? Please provide	Criminal liability A director who is prosecuted under s 674(2) may be subject to imprisonment of 5 years. Civil liability Yes.	CA, Schedule 3.

Question	Answer	Source
details of the extent of the liability.	Any person "involved in" a contravention of s 674A(2) may be liable to a civil penalty . A person will not be in breach if that person took all steps (if any) that were reasonable in the circumstances to ensure that the listed entity complied with its obligations under s 674A(2), and after doing so, believed on reasonable grounds that the listed disclosing entity was complying with its obligations under that subsection.	CA, s 674A(3)
	For actions brought under s 674A(2), a court may order the person involved to pay compensation to any person who suffers damage as a result of a breach. This may be used as a basis for bringing a shareholder class action.	CA, ss 1317E, 1317HA and 1317J.
	From 1 July 2023, the maximum civil pecuniary penalty for individuals involved in a contravention of s 674A(2) is the greater of: • up to 5,000 penalty units (around $1.5 million); or • if the Court can determine the benefit derived and detriment avoided because of the contravention, that amount multiplied by 3.	CA, s 1317G.
	<u>Breach of directors' duties</u> Directors can be personally liable for breach of their directors' duties, including the duty of due care and diligence. The company's breach of the continuous disclosure obligation (and a director's involvement in it) could be used as evidence of an alleged breach of directors' duties. A finding that there has been a breach of the continuous disclosure rule by the company does not automatically mean that a director has breached their duties.	CA, s 180
	A breach of directors' duties carries the same maximum civil pecuniary penalty for individuals (as set out above). If the breach of duty is done recklessly or dishonestly, a criminal offence may occur resulting in: • a jail term of up to 15 years; and/or • up to 4,500 (around $1.4 million).	CA, ss 184, 1317E
Are there significant company / corporations law penalties for false	Yes. Subject to some qualifications, a court may order a person to pay compensation to any person who suffers damage for the reasons outlined in 1 to 3 below. This may be used as a basis for bringing a shareholder class action.	CA, s 1041I

Question	Answer	Source
or misleading statements in corporate reports?	However, listed entities and officers are not liable for misleading and deceptive conduct (pursuant to section 1041H of the CA or section 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth)) for failing to disclose material information, unless the entity or officer knowingly, recklessly or negligently failed to disclose material information.	CA, s 1041H
	1. the person engages in conduct that is misleading or deceptive or is likely to mislead or deceive;	CA, s 1041H
	2. the person makes a statement or disseminates information that is false in a material particular or is materially misleading and does not care whether it was true or false or knew or ought reasonably to have known that it was materially false or misleading; or	CA, s 1041E
	3. the person makes or publishes a statement, promise or forecast that the person knows, or is reckless as to whether, the statement is misleading, false or deceptive.	CA, s 1041F
	Breach of 2 and 3 above is also an offence.	CA, ss 1041E and 1041F
	For the purposes of 1 to 3 above, representations about future matters are deemed to be misleading if the person who makes the representations does not have reasonable grounds for making the statement.	CA, s 769C
	In addition, the Corporations Act creates some specific offences relating to false and misleading statements that are made or authorised by a person who does not take reasonable steps to ensure that the statement is not false or misleading.	CA, ss 1308 and 1309
Are there any specific requirements imposed by law in relation to forward-looking statements?	Under various provisions of the Corporations Act, a statement about future matters must be based on reasonable grounds at the date the statement is made or it will be misleading.	CA, ss 670A(2), 728(2) and 769C, ASIC Act s 12BB(1).
Can directors be personally liable for these statements? Please provide details of the extent of the liability.	Yes.	
	In addition to the exposure for civil liability under the continuous disclosure provisions referred to above, a court may also order any person involved in a contravention of 1 to 3 in the section above to pay compensation to any person who suffers damage. This may be used as a basis for bringing a shareholder class action.	CA, s 1041I
	It is possible for a director to be directly liable for the offences listed in 2 and 3 in the section above and for offences under ss 1308 and 1309, or through principles of accessorial liability (i.e. aiding and abetting etc) for someone else's breach.	CA, Schedule 3.

Question	Answer	Source
	The penalty for an individual who is liable under 2 and 3 in the section above is imprisonment for 15 years or a fine the greater of the following: • 4,500 penalty units (currently $313 per unit); • if the court can determine the total value of the benefits that have been obtained that are reasonably attributable to the commission of the offence - 3 times that total value; or both. The maximum penalty for an individual who is liable under ss 1308 and 1309 depends on the type of breach but is between 100 and 200 penalty units or 2 – 5 years imprisonment, or both.	
	Directors can be personally liable for breach of their directors' duties, including the duty of due care and diligence. The company's breach of false or misleading statement rules (and a director's involvement in it) could be used as evidence of an alleged breach of directors' duties. A finding that there has been a breach of false or misleading statement rules by the company does not automatically mean that a director has breached their duties.	CA, s 180
Is there a "safe harbour" exemption from liability for forward looking statements in corporate reports?	No.	N/A
In a shareholder claim, what must the claimant prove to establish that the company's contravention caused their loss?	In shareholder claims based upon causes of action under the Corporations Act 2001 (Cth), shareholders must establish that they have suffered loss or damage "as a result of" (in the case of continuous disclosure) or "by" (in the case of misleading conduct) the contravening conduct. This requires a sufficient causal connection to be established between the contravening conduct and the loss or damage suffered. A sufficient causal connection: (i) is established if shareholders can prove direct reliance on the contravening conduct; and (ii) may be established through indirect reliance is sufficient, for example, market-based causation theories. There is some judicial support for indirect reliance, but there is continued uncertainty as no intermediate court has determined the issue.	*HIH Insurance Limited (in liquidation) & Ors [2016] NSWSC 482,*

Attachment 2 – Advices received from international jurisdictions

Canada[1]

Question	Answer	Source
General Overview	Canada does not have a national securities regulator. Canada's provinces have enacted securities laws and regulations and provincial securities regulators are tasked with the enforcement of those laws and regulations. While there is a good degree of harmonisation among the provinces, there can be important differences. Securities regulation in Canada therefore consists of a patchwork of legislation, regulations, rules, instruments and policies. Capital markets are also regulated by stock exchanges, the most notable of which is the Toronto Stock Exchange (TSX), and self-regulatory organisations such as the Investment Industry Regulatory Organization of Canada (IIROC), all of which are subject to the oversight of the provincial securities commissions. These stock exchanges and self-regulatory organisations typically have by-laws, procedures and other rules that regulate the capital markets activity that falls within the scope of their jurisdiction. The Criminal Code of Canada contains a few offences that relate to securities and capital market matters, including general offences such as fraud that can apply in the securities context, and offences particular to securities, such as manipulation of a stock exchange and insider trading. However, provincial securities legislation also contains quasi-criminal provisions. Business corporation statutes also have a bearing on securities regulation. For example, this legislation addresses aspects of corporate governance and the exercise of shareholder rights such as voting and proxy solicitation, and also includes robust statutory protections of minority shareholders in the form of the oppression remedy. The common law also plays a role in the private enforcement of breaches of applicable securities law – for example, the common law tort of negligent misrepresentation is often relied on in proceedings concerning the adequacy of an issuer's public disclosure. In light of the above description, we have attempted to answer the questions below in a general, non-exhaustive manner and with reference to National Instrument 51-102 –Continuous Disclosure Obligations, which applies in all jurisdictions of Canada, and the Ontario Securities Act (the "Securities Act"), which applies only in the province of Ontario. We have focussed on Ontario because a large majority of the large cap listed issuers are headquartered in Toronto, Canada's business centre. There are a variety of different procedures pursuant to which a reporting issuer, or an officer or director thereof, may be subject to liability for failure to fulfil its continuous disclosure obligations. Each applicable procedure may	Article: The Securities Litigation Review, 1st Edition, 2015

[1] We note that this section has not been reviewed since it was updated in 2018. However, we are not aware of any material changes that would impact the advice since this date.

Question	Answer	Source
	afford defendants and plaintiffs alike with varying burdens of proof and limitations of liability and the answers that follow cite examples but do not purport to specifically address all such matters for all such available procedures. Moreover, these procedures vary from jurisdiction to jurisdiction and not all the procedures set forth herein are available in all jurisdictions in Canada. Finally, the information contained herein does not constitute a legal opinion and may not be held out by any person as being legal advice provided by Davies Ward Phillips & Vineberg LLP. Any specific legal advice would need to be tailored to the specific facts at hand and to the laws and regulations governing the specific jurisdiction and procedure in question.	
Are listed companies subject to a continuous disclosure obligation?	Immediately after the occurrence of a "material change" in the affairs of a reporting issuer, the issuer must issue and file with the securities regulatory authority in each jurisdiction in which it is a reporting issuer (the "Applicable Regulators") a press release authorized by an executive officer disclosing the nature and substance of the material change. As soon as practicable thereafter, and in any event within 10 days of the date on which the change occurs, the issuer must file with the Applicable Regulators a Form 51-102F3 – Material Change Report with respect to the material change. The timely disclosure policy of the TSX requires the timely public disclosure of “material information”, defined as information relating to the business and affairs of a reporting issuer that results in, or would reasonably be expected to result in, a significant change in the market price or value of any of its listed securities. This requirement supplements the provisions of National Instrument 51-102. Material information consists of both material facts and material changes relating to the business and affairs of an issuer and is a broader term than “material change” since it encompasses material facts that may not meet the definition of material change in National Instrument 51-102.	National Instrument 51-102 Securities Act Section 51 Toronto Stock Exchange Company Manual
To establish a contravention, does the failure to disclose relevant information to the market need to be intentional, reckless or negligent?	In general, no, subject to certain prescribed statutory burdens of proof discussed below and subject to the availability of certain defences described below and available at common law.	Ontario Securities Act Section 1(1), definition of misrepresentation relating to omissions does not include intentional, reckless or negligence elements.

Question	Answer	Source
Are any defences available to a breach of continuous disclosure requirements?	Yes, depending on the type of action being taken. In respect of any offences generally, the Securities Act provides that no person or company is guilty of an offence if the person or company did not know and in the exercise of reasonable diligence could not have known that the statement was misleading or untrue or that it omitted to state a fact that was required to be stated or that was necessary to make the statement not misleading in light of the circumstances in which it was made In respect of civil actions for primary and secondary liability, the Securities Act sets out a defence relating to reasonable inquiries. For example, a person will not be liable for secondary market liability if that person or company proves that, (i) before the failure to make timely disclosure first occurred, the person or company conducted or caused to be conducted a reasonable investigation, and (ii) the person or company had no reasonable grounds to believe that the failure to make timely disclosure would occur.	Section 122 of the Securities Act. Section 130(2) and following of the Securities Act Section 131(4) and following of the Securities Act. Part XXIII.1 of the Securities Act
Can directors be liable if the company breaches this obligation? Please provide details of the extent of the liability.	Yes. Applicable securities legislation provides for various ways in which directors liability may be invoked, including, administrative enforcement proceedings, primary market claims, secondary market claims and quasi criminal proceedings (the "**Various Enforcement Proceedings**"). Primary and secondary market claims are subject to particular rules regarding the calculation of damages. In respect of quasi criminal proceedings, the issuer and every director and officer of the issuer who authorizes, permits or acquiesces in the contravention of the Securities Act may be liable for a fine or imprisonment.	Section 122 of the Securities Act. Part XXIII of the Securities Act Part XXIII.1 of the Securities Act
Are there significant company / corporations law penalties for false or misleading statements in corporate reports?	A failure by the issuer to make timely disclosure of material changes will constitute a contravention of the Securities Act. Similarly, the making of a statement in a press release or material change report that, at the time and in light of the circumstances under which it was made, is a misrepresentation also constitutes a contravention of the Securities Act. In either event, the issuer and every director and officer of the issuer who authorizes, permits or acquiesces in the contravention may be liable for a fine of up to $5,000,000 or to imprisonment for a term of not more than five years less a day, or to both	S.122 of the Securities Act.

Question	Answer	Source
Are there any specific requirements imposed by law in relation to forward-looking statements?	In general, market practice in Canada is to include robust cautionary language regarding forward looking statements. Such statements may, in certain circumstances provide a defence to claim for misrepresentation.	
Can directors be personally liable for these statements? Please provide details of the extent of the liability.	Yes directors may be liable in all of the Various Enforcement Proceedings, as discussed in more detail above.	
Is there a "safe harbour" exemption from liability for forward-looking statements in corporate reports?	Yes, for primary and secondary shareholder liability, a person or Company is not liable for a misrepresentation if the document or public oral statement containing the forward-looking information contained, proximate to that information, 1. i. reasonable cautionary language identifying the forward-looking information as such, and identifying material factors that could cause actual results to differ materially from a conclusion, forecast or projection in the forward-looking information, and ii. a statement of the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection set out in the forward-looking information. 2. The person or company had a reasonable basis for drawing the conclusions or making the forecasts and projections set out in the forward-looking information.	Part XXIII of the Securities Act Part XXIII.1 of the Securities Act
In a shareholder claim, what must the claimant prove to establish that the company's contravention caused their loss?	In respect of primary market liability, the defendant is not liable for such portion of damages that the defendant proves do not represent the depreciation in value of the security as a result of the misrepresentation relied upon. In respect of secondary market liability, the plaintiff must prove in relation to a failure to make timely disclosure, that the person or company, (a) knew, at the time that the failure to make timely disclosure first occurred, of the change and that the change was a material change;	Part XXIII of the Securities Act. Part XXIII.1 of the Securities Act

Question	Answer	Source
	(b) at the time or before the failure to make timely disclosure first occurred, deliberately avoided acquiring knowledge of the change or that the change was a material change; or (c) was, through action or failure to act, guilty of gross misconduct in connection with the failure to make timely disclosure. In respect of the above provisions, the Securities Act is not more specific regarding causation, and general principles of common law are applicable to establishing causation.	

Additional comments on shareholder class actions: Both in theory and in practice, shareholders can and do bring class actions for breach of a reporting issuers disclosure obligations. As a matter of practice, the threshold for certification for such a class action tends to be higher than a standard civil class action.

Hong Kong

Question	Answer	Source
Are listed companies subject to a continuous disclosure obligation?*	Yes. Under Part XIVA of the Securities and Futures Ordinance (**SFO**), a listed company is obliged to disclose "inside information" to the public as soon as reasonably practicable after such information has come to its knowledge, unless one of the prescribed safe harbours applies. Inside information is specific information about a listed company, its shareholders, officers or securities which is not generally known to those accustomed or likely to deal in its listed securities, but if known, would be likely to materially affect the price of the listed securities.	SFO, s 307A,
	In addition to the failure to disclose, a listed company will also be in breach of the disclosure obligation if the information disclosed is false or misleading as to a material fact (including through omission where an officer of the company knows (or ought reasonably to have known) that, or is reckless or negligent as to whether, the information disclosed is false or misleading).	SFO, s 307B
	Under the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (**Main Board Listing Rules**), a listed company must as soon as reasonably practicable after consultation with the Hong Kong Stock Exchange (**SEHK**), announce the information necessary to avoid a false market in its securities. Where a company is required to disclose inside information under Part XIVA of the SFO, it must also simultaneously announce the information under the Main Board Listing Rules.	Main Board Listing Rules, 13.09
	The Securities and Futures Commission (**SFC**) may institute disclosure proceedings in the Market Misconduct Tribunal (**MMT**) if it appears to the SFC that a breach of a disclosure requirement has or may have taken place. Such proceedings are inquisitorial in nature and there is no place for the requirement of burden of proof on the SFC. The SFC is only required to present evidence to the MMT to enable it to form a decision on the matter. This requirement does not mean that the SFC carries a 'legal burden' in the traditional sense.[2]	FO, Schedule 9, s 21A

[2] *Securities and Futures Commission v Cheng Chak Ngok and Another* [2018] 4 HKLRD 612, paragraph 9.9, as subsequently affirmed in *Cheng Chak Ngok v Securities and Futures Commission* [2019] HKCFA 17, paragraph 10

Question	Answer	Source
To establish a contravention, does the failure to disclose relevant information to the market need to be intentional, reckless or negligent?	In respect of a listed company, no. Please see below in respect of directors.	
Are any defences available to a breach of continuous disclosure requirements?	There are no available defences under the SFO for breaches by the listed company. However, the SFO provides safe harbours which permit a listed company to withhold disclosure of inside information under certain circumstances. These include where: (a) disclosure is prohibited under, or would constitute a breach of, a Hong Kong court order or a Hong Kong statute; (b) the information concerns an incomplete proposal or negotiation; (c) the information is a trade secret; (d) the information is related to the provision of liquidity support to the listed company or its group by the exchange fund of the Hong Kong government or by an institution which performs the functions of a central bank (whether in Hong Kong or elsewhere); or (e) the SFC has waived disclosure (eg, where disclosure would contravene foreign legislation or a foreign court order). Safe harbours (b) to (e) above are only available if the listed company has taken reasonable precautions to preserve the confidentiality of the inside information, and confidentiality is in fact preserved. Please see below in respect of directors.	SFO, s 307D
Can directors be liable if the company breaches this obligation? Please provide details of the extent of the liability.	If a listed company is in breach of the disclosure obligation under the SFO, its directors are also in breach if their intentional, reckless or negligent conduct resulted in the breach or they failed to take all reasonable measures to ensure that proper safeguards exist to prevent the breach.	SFO, 307G

Question	Answer	Source
	The MMT may impose a wide range of civil sanctions and orders on a person in breach (which may include a director), including: - a disqualification order, prohibiting the person from being a director, liquidator, or receiver or manager of the property or business of a company, or from being involved (directly or indirectly) in its management, for up to five years except with the leave of the court; - a cold shoulder order, prohibiting the person from acquiring, disposing of or dealing (directly or indirectly) in Hong Kong in securities and other financial products for up to five years except with the leave of the court; - a cease and desist order, prohibiting conduct in breach of a disclosure requirement; - a regulatory fine (for listed companies, directors and chief executives only) to the Hong Kong government of up to HKD8 million; - a cost order to pay the SFC's and Hong Kong government's reasonable costs and expenses for the MMT proceedings and any investigation; - a disciplinary action referral order to any body recommending disciplinary action be taken; and - any other necessary order to prevent future breaches, including that the company appoint an SFC-approved independent professional adviser to review its compliance procedure or that its directors undergo an SFC-approved compliance training program.	SFO, 307N
	Directors of listed companies who are in breach of a disclosure requirement as mentioned above may also face civil claims for compensation from parties who have sustained pecuniary loss as a result of the breach. Liability to pay compensation (by way of damages) may arise regardless of whether such person also incurs any other liability (under Part XIVA of the SFO or otherwise).	SFO, s 307Z
	In addition to the failure to disclose, if the information disclosed is materially false or misleading, this may also give rise to separate civil or criminal offences under the SFO relating to disclosure of false or misleading information (see further below).	SFO, s277, s298
	Where disciplinary proceedings are conducted in relation to a breach of the Main Board Listing Rules, the SEHK may impose a number of disciplinary sanctions against directors, including: - a private reprimand, public criticism or public censure;	Main Board Listing Rules, 2A.10

Question	Answer	Source
	- requiring rectification or other remedial action to be taken in relation to the breach within a specified period; - reporting the conduct to the SFC, another regulatory authority (including a professional body) or an overseas regulatory authority; - state publicly that, in its opinion, the occupying of the position of director of a named listed issuer or any of its subsidiaries by an individual may cause prejudice to the interest of investors; - in the case of serious or repeated failure by a director to discharge his responsibilities under the Main Board Listing Rules, state publicly that, in its opinion, the director is unsuitable to occupy a position as director of a named listed issuer or any of its subsidiaries; and - take, or refrain from taking, such other action as it thinks fit, including making public any action taken.	
Are there significant company / corporations law penalties for false or misleading statements in corporate reports?^	Yes. Subject to certain statutory defences, a person must not, in Hong Kong or elsewhere, disclose, circulate or disseminate (or authorise or be concerned in the disclosure, circulation or dissemination of) information which is likely to induce the sale, purchase or subscription of securities or dealing in futures contracts in Hong Kong, or is likely to affect the price of securities or futures contracts in Hong Kong, where the person knows that (or is reckless/negligent as to whether) the information is false or misleading as to a material fact, or through the omission of a material fact.	SFO, s277, s 298
	Breach of this prohibition can be pursued in the MMT (civil regime) or the criminal courts. The maximum criminal penalties upon conviction are a fine of HKD10 million and ten years imprisonment on indictment, or HKD1 million and imprisonment for three years on summary conviction.	SFO, s 303
	In relation to Hong Kong incorporated companies, a director is liable to compensate the company for any loss suffered by the company as a result of any untrue or misleading statement in the report or for the omission of any required information where the director knew the statement was untrue or misleading or was reckless as to whether it was, or knew the omission to be dishonest concealment of a material fact.	Companies Ordinance, s 448
	Additionally, a person commits an offence if they knowingly or recklessly make statements in any return, report, financial statement, certificate or other document required by the Companies Ordinance which are misleading, false or deceptive in	Companies Ordinance, s 895

Question	Answer	Source
	any material particular. The maximum penalties are a fine of HK$300,000 and imprisonment of up to two years if convicted on indictment, or a fine of up to HK$100,000 and imprisonment of up to six months on summary conviction.	
Are there any specific requirements imposed by law in relation to forward-looking statements?**	No.	
Can directors be personally liable for these statements? Please provide details of the extent of the liability.	Yes. Please see above in respect of liability for false or misleading statements.	
Is there a "safe harbour" exemption from liability for forward-looking statements in corporate reports?~	No.	
In a shareholder claim, what must the claimant prove to establish that the company's	In a civil claim for compensation for breach of a disclosure requirement under the SFO, the claimant will need to show on the balance of probabilities that they have sustained pecuniary loss and that such loss was sustained as a result of the relevant breach by the defendant. The SFO expressly provides that it is not necessary for the claimant to prove that the loss arises from the claimant having entered into a transaction or dealing at a price affected by the relevant breach. Damages may only be awarded if the court decides that it is fair, just and reasonable to do so in the circumstances of the	SFO, s 307Z

Question	Answer	Source
contravention caused their loss?***	case. There is no judicial authority on a civil claim under the SFO. When adjudicating such civil claim, it is expected that the court will likely apply common law principles like breach of duty, causation, remoteness, measure of damages, etc. The court may also grant an injunction in addition to, or in substitution for, damages. Findings of breach by the MMT are *prima facie* evidence of the breach of a disclosure requirement for the purpose of a civil claim, but are not a prerequisite to an award of damages. It should be noted that Hong Kong does not have class action laws. The above statutory right to a civil claim does not limit or diminish any rights conferred on a claimant under the common law or any other enactment.	

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^ Please confine your answer to general ongoing corporations law requirements that apply to annual reports and other “business as usual” public reporting/disclosure by corporations. You do not need to cover special requirements for prospectuses, disclosures to consumers/customers etc.

** For example, is a person taken to make a misleading statement about a future matter if they do not have reasonable grounds for making the statement?

~ For example, can a company exclude liability by identifying a statement as a forward-looking statement and including a proximate cautionary statement in the corporate report?

*** For example, whether a claimant is required to prove actual reliance on the contravening conduct (director causation), or whether indirect causation is sufficient for claimants to establish causation.

South Africa

Question	Answer	Source
Are listed companies subject to a continuous disclosure obligation?	Yes.	JSE LR 3.4
	The Listings Requirements (LR) of the Johannesburg Stock Exchange (the JSE) place a general obligation of disclosure on listed companies (Issuers). Issuers must, without delay, unless the information is kept confidential for a limited period of time, release an announcement providing details relating, directly or indirectly, to such Issuer that constitutes price sensitive information. Price sensitive information is defined as unpublished information that is specific or precise which if it were made public, would have a material effect on the price of the Issuer's securities.	JSE Practice Note 2/2015
	In terms of the Financial Markets Act, 2012 (the FMA) an exchange (the JSE is a licensed exchange in terms of the FMA) may require an issuer of listed securities to disclose to it any information at the Issuer's disposal about those securities, or about the affairs of that Issuer, if such disclosure is necessary to achieve one or more objects of the FMA. The objects of the FMA include the aim of ensuring that the South African financial markets are fair, efficient and transparent.	Section 14 of the FMA
	Breaches of these obligations could result in reprimand, financial penalty or ultimately suspension or termination of listing.	JSE LR 1.6 – 1.10; 1.21
	In terms of the FMA an exchange in formulating listings requirements must make provision for the above penalties if there is a contravention or failure to comply with the listings requirements. If a person fails to pay a fine the exchange may file with a competent court a statement certified by it as correct, stating the amount of the fine imposed and such statement thereupon has all the effects of a civil judgment against the person in favour of the exchange for a liquid debt in the amount specified in the statement.	Section 11(1)(g) and (3) of the FMA
To establish a contravention, does the failure to disclose relevant information to the market need to be intentional,	A contravention under the FMA could be established irrespective of the intention, recklessness or negligence of the relevant person. The sanction, however, may be influenced by the conduct of the person.	
	A contravention of the LR would generally be constituted whether it is intentional, reckless or negligent, but the sanction may be influenced by the intention, recklessness or negligence of the Issuer.	

Question	Answer	Source
reckless or negligent?		
Are any defences available to a breach of continuous disclosure requirements?	No specific defences are set out in the LR or the FMA.	
Can directors be liable if the company breaches this obligation? Please provide details of the extent of the liability.	Yes. The LR provides that all directors of issuers are bound by and must comply with the LR in their capacities as directors and in their personal capacities. The FMA also provides that the LR would bind the company, its directors, officers, employees and agents. The penalties above could equally apply to directors. In addition, directors could be disqualified from holding the office of director for any period of time.	LR 3.62 Section 11(5) of the FMA
Are there significant company / corporations law penalties for false or misleading statements in corporate reports?	Yes. The South African Companies Act, 2008 (the Companies Act) provides for the inclusion of a report by the directors with respect to the state of affairs, the business and profit or loss of the company including any matter material for the shareholders to appreciate the company's state of affairs and any prescribed information. The Companies Act provides that a person is guilty of an offence if the person is a party to the falsification of any accounting records of a company, with a fraudulent purpose, knowingly provided false or misleading information in any circumstances in which the Companies Act requires the person to provide information or was knowingly a party to any act	Section 30, 214, 216 and 218(2) of the Companies Act

Question	Answer	Source
	or omission by a company calculated to defraud a creditor or employee of the company, or a holder of the company's securities, or with another fraudulent purpose. Any person convicted of an offence in terms of the Companies Act is liable in the case of a contravention of the above section to a fine or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment. In addition any person who contravenes a provision of the Companies Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.	
Are there any specific requirements imposed by law in relation to forward-looking statements?	Yes. The LR specifically deals with profit forecasts and estimates. There are detailed requirements applicable to forecasts or estimates and statements or information relating to the future prospects of an Issuer. The FMA provides that no person may, directly or indirectly, make or publish in respect of securities traded on a regulated market, or in respect of the past or future performance of a company whose securities are listed on a regulated market: • any statement, promise or forecast which is, at the time and in the light of the circumstances in which it is made, false or misleading or deceptive in respect of any material fact and which the person knows, or ought reasonably to know, is false, misleading or deceptive; or • any statement, promise or forecast which is, by reason of the omission of the material fact, rendered false, misleading or deceptive and which the person knows, or ought reasonably to know, is rendered false, misleading or deceptive by reason of the omission of the fact. A person who contravenes the above section commits an offence. A person who commits this offence is liable on conviction to a fine not exceeding R50 million or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.	LR 8.35 and further Section 81 of the FMA Section 81(3) and 109 of the FMA
Can directors be personally liable for these	Yes, the provisions apply to "any person". For the extent of the liability see above.	

Question	Answer	Source
statements? Please provide details of the extent of the liability.		
Is there a “safe harbour” exemption from liability for forward-looking statements in corporate reports?	No, not specifically.	
In a shareholder claim, what must the claimant prove to establish that the company’s contravention caused their loss?	A shareholder would have to prove a loss and that the loss was caused by the company's contravention.	

Additional comments on shareholder class actions: Class actions are fairly new in South Africa, but a class action would be possible in these circumstances if it there are questions of law and fact common to the class (i.e. the shareholders). A class action in South Africa requires certification by a court.

United Kingdom

Question	Answer	Source
Are listed companies subject to a continuous disclosure obligation?*	Yes. Inside information Listed companies are required to notify a Regulatory Information Service (**RIS**) as soon as possible of any inside information which directly concerns the company (subject to a limited ability to delay disclosure if specific conditions are met). Companies are required to have adequate procedures, systems and controls in place to ensure that the information is escalated to the board to enable it to decide whether any information is inside information which should be disclosed. Periodical financial information A listed company is required to publish annual reports as soon as possible and in any event within four months after the end of each financial year. The annual financial report must include the audited financial statements, a management report and responsibility statements. A listed company is also required to publish half-yearly financial reports as soon as possible and in any event no later than three months after the end of the period to which it relates. The half-yearly reports must include a condensed set of financial statements, an interim management report and responsibility statements.	Article 17, UK Market Abuse Regulation (**MAR**) Listing Rules (**LR**) 7.2 Transparency Rules (**DTR**) DTR 4.1.3 DTR 4.2.
To establish a contravention, does the failure to disclose relevant information to the market need to be intentional, reckless or negligent?	Inside information The Financial Conduct Authority (**FCA**) can impose a financial penalty and/or a censure and/or a restitution order for a failure to comply with the requirements under MAR including a failure to satisfy the requirement to disclose inside information to an RIS. To establish a contravention for a failure to satisfy the continuous disclosure obligation under MAR, it must be shown that the person has contravened the requirement or has been knowingly concerned in the contravention of that obligation. Therefore, there is no requirement for fault or intention in relation to the contravention by the company itself. The applicable standard of proof in market abuse proceedings is the ordinary civil standard of proof (the balance of probabilities).	Section 123, Section 382, Financial Services and Markets Act 2000 (**FSMA**)

Question	Answer	Source
	<u>Periodical financial information</u> The FCA can impose a financial penalty and/or a restitution order for a breach of the obligations under DTR 4 in relation to periodic financial reports. To establish a contravention for a failure to comply with the requirements in relation to periodic financial reports, it must be shown that the person has contravened the requirement or has been knowingly concerned in the contravention. Again, therefore there is no requirement for fault or intention in relation to the contravention by the company itself.	Section 91, Section 382 FSMA
Are any defences available to a breach of continuous disclosure requirements?	No	N/A
Can directors be liable if the company breaches this obligation? Please provide details of the extent of the liability.	<u>Inside information</u> Yes. A director can be liable for a breach of the continuous disclosure requirement in MAR if he/she has been knowingly concerned in the contravention. Under section 123 FSMA, the FCA can impose a financial penalty of such amount as it considers appropriate and/or issue a censure and/or impose a restitution order (although a restitution order has not been imposed on a director to date). <u>Periodical financial information</u>	Section 123 Section 382, FMSA

Question	Answer	Source
	Yes. A director can be liable if he/she was knowingly concerned in the failure to comply with the obligation to publish periodic financial information under DTR 4. The FCA may impose a financial penalty of such amount as it considers appropriate and/or issue a censure and/or impose a restitution order (although a restitution order has not been imposed on a director to date).	Section 91 Section 382, FMSA
Are there significant company / corporations law penalties for false or misleading statements in corporate reports?^	Yes, under both civil and criminal law. <u>Civil liability</u> A company that issues false or misleading statements in a periodic financial report may be liable to a financial penalty and/or censure or restitution order from the FCA . Under section 90A FSMA, a company (but not an individual) is liable to pay compensation to a person who acquires, continues to hold or disposes of the securities and has suffered a loss as a result of: 1. any untrue or misleading statement in information published via an RIS, which includes annual and half yearly reports; or 2. the omission from that published information of any information required to be included in it. A company will only be liable under section 90A FSMA if a director knew that the statement was untrue or misleading, or was reckless as to whether it was, or knew the omission was a dishonest concealment of a material fact. There is no express requirement for an untrue or misleading statement to be material, however the information will likely need to be material to demonstrate reasonable reliance by a claimant, and for loss to follow. The applicable standard of proof is the ordinary civil standard of proof (the balance of probabilities). <u>Criminal liability</u> It is a criminal offence for a person: 1. to make a statement which they know to be materially false or misleading;	Section 91 Section 382 FSMA Section 90A and Sch 10A, FSMA

Question	Answer	Source
	2. to dishonestly conceal any material facts; or 3. recklessly make (dishonestly or otherwise) a statement which is materially false or misleading, for the purpose of inducing (or being reckless as to whether it may induce) a person to make an investment decision or exercise any rights relating to investments. The offence is punishable with imprisonment for up to seven years or an unlimited fine, or both. A body corporate can be convicted of the offence as well as an individual. The applicable standard of proof is the ordinary criminal standard of proof (beyond reasonable doubt).	Section 89, Financial Services Act 2012 (**FS Act 2012**)
Are there any specific requirements imposed by law in relation to forward-looking statements?**	No. There are currently no special additional requirements that relate to forward-looking statements. There are live proposals to establish a recklessness/dishonesty liability standard, with the burden of proof on investors, for certain categories of forward-looking statements contained in prospectuses (but not in relation to continuous disclosure).	N/A
Can directors be personally liable for these statements? Please provide details of the extent of the liability.	<u>Civil liability</u> Apart from the regulatory liability of directors described above for being knowingly concerned in a regulatory breach, the basic rule is that a director of a listed company cannot be liable to investors in respect of an untrue or misleading statement in published information. This is, however, subject to certain limited exceptions, that is: liability under section 90 FSMA (in respect of a misleading prospectus), civil liability for breach of contract, civil liability under the Misrepresentation Act 1967, criminal liability or liability arising from a person having assumed responsibility for the accuracy of the information. A director can be liable to compensate the company (but not any third party) for any loss suffered as a result of any untrue or misleading statement in an annual report but only if he/she knew it was misleading or was reckless as to whether it was, or knew it was a dishonest concealment of a material fact.	Paragraph 7 (2), Sch 10A FSMA Section 463, Companies Act 2006 (**CA**)

Question	Answer	Source
	Criminal liability Under the CA, directors must not approve the annual accounts unless they give a true and fair view of the company. Directors must approve the annual report and accounts and ensure that they are prepared in accordance with the requirements of CA. If a director fails to ensure that the annual report and accounts are prepared in accordance with these requirements, he/she will be guilty of an offence and liable to a fine unless he/she took reasonable steps to secure compliance.	Section 414, CA Section 414D, CA Section 419 CA
	If a director deliberately or recklessly makes a false or misleading statement in order to induce another person to make an investment decision he/she will be guilty of an offence and liable to a fine or imprisonment	Sections 89 and 92, FS Act 2012
Is there a "safe harbour" exemption from liability for forward-looking statements in corporate reports?~	Yes. Section 463 CA provides a "safe harbour" for directors from liability for misleading statements in the narrative parts of the annual report and accounts. Under section 463, a director will not be liable to any third party who has placed reliance on statements contained in the narrative parts of the annual report and a director is only liable to the company for those statements if he/she knew the statement was misleading or was reckless as to whether it was misleading or he/she dishonestly omitted material information. This does not apply to any other corporate reports, but there is no direct liability of a director for those other reports unless the director is knowingly concerned in a breach of the regulatory requirements in relation to the content of the report.	Section 463, CA
In a shareholder claim, what must the claimant prove to establish that the company's	There is no civil statutory liability of directors to shareholders. In relation to the statutory liability of a company to shareholders, in order to establish a claim for loss against the company for a misleading statement or omission to make a disclosure, a shareholder must show that a director knew that the statement was materially misleading or was reckless as to whether it was, or that a director dishonestly concealed a material fact, and that he acquired, continued to hold or disposed of the relevant securities in reliance on the misleading statement or omission, that the reliance was reasonable	Paragraph 3(4),Sch 10A FSMA

Question	Answer	Source
contravention caused their loss?***	and that he suffered a loss as a result. There is no express requirement for an untrue or misleading statement to be material, however the information will likely need to be material to demonstrate reasonable reliance by a claimant, and for loss to follow. The FCA can also make a restitution order against the company under section 382 FSMA if the company has contravened a requirement under FSMA, including in relation to the continuous disclosure obligation or publication of periodic financial information (and could make a restitution order against a director who was knowingly concerned in the contravention). In order for a shareholder to claim for restitution if such an order is made, it must show that it has suffered a loss or been adversely affected as a result of the contravention.	Section 382, FMSA

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** For example, is a person taken to make a misleading statement about a future matter if they do not have reasonable grounds for making the statement?

~ For example, can a company exclude liability by identifying a statement as a forward-looking statement and including a proximate cautionary statement in the corporate report?

*** For example, whether a claimant is required to prove actual reliance on the contravening conduct (director causation), or whether indirect causation is sufficient for claimants to establish causation.

United States

Question	Answer	Source
Are listed companies subject to a continuous disclosure obligation?*	Yes. <u>Securities Exchange Commission</u> Listed companies are required to file periodic reports with the Securities Exchange Commission (**SEC**) which provide information about the company's financial position, and update information included in previous reports. Reports are electronically filed with the SEC at the end of the applicable fiscal reporting period, and also after certain material events have occurred (such as entering into material agreements, acquisitions of businesses or assets, and changes in management). Additionally, continuous disclosure requirements are imposed on listed companies to correct prior inaccurate disclosures, to avoid or attempt to remediate insider trading, and if the company is purchasing its own securities or offering its securities. Further, Regulation FD (Fair Disclosure) requires any "reporting company"[3] to make public any material, non-public information (oral or written) disclosed by a senior official or officer of the company to the financial community or security holders, to avoid a disparity of access to information between market participants.	Section 13(a) and Section 15(d), the Securities Exchange Act of 1934 (**Exchange Act**) Regulation FD, 17 C.F.R. § 243.100, *et seq.*
	<u>US securities exchanges</u> SEC periodic reports and filings must also be filed with securities exchanges on which the companies' securities are listed. The NYSE and the NASDAQ, the two primary US securities exchanges, accept SEC reports and filings through the SEC's electronic filing platform (EDGAR) as being simultaneously filed with the securities exchange. In addition to the SEC filing requirements, the NYSE and the NASDAQ require companies to promptly and publicly disclose any material information which might affect the market, such as important developments with customers or suppliers, financial disclosures, or any event requiring the filing of a Form 8-K.[4]	Section 202.5 and 202.6 of the NYSE Listed Company Manual Section 5250 of the NASDAQ Rules

[3] A reporting company under the Exchange Act includes companies which fall under the scope of the Exchange Act due to: (i) a US securities exchange listing, (ii) the company's total assets exceed US$10 million and has a class of equity securities held by 2,000 or more persons, or 500 or more person who are not accredited investors (such as banks, the senior management of the issuer, or high net worth individuals), or (iii) issuance to the public of equity or debt securities not listed on any US exchange.

[4] A Form 8-K is a specific form required to be filed pursuant to certain material events such as entering into material agreements, acquisitions of businesses or assets, and changes in management.

Question	Answer	Source
	An exception to the NASDAQ and NYSE disclosure requirement exists for information which the relevant company needs to maintain confidential, provided that the company ensures that it does not lead to any unfair trading advantage as a result.	
To establish a contravention, does the failure to disclose relevant information to the market need to be intentional, reckless or negligent?	Under US securities laws, in order to establish a contravention, a failure to disclose relevant information, or the disclosure of misleading or false information, must be wilful. If an issuer becomes aware of the falsehood or misleading nature of statements it has made, it must correct such statements pursuant to Rule 10b-5 of the Exchange Act. In the event of a contravention of the NYSE / NASDAQ rules, the markets generally issue a letter of deficiency and a Public Reprimand Letter, and if the company fails to correct the breach, they may be delisted.	15 U.S.C.A. § 78ff
Are any defences available to a breach of continuous disclosure requirements?	Yes. Under US securities laws, in addition to the usually asserted defences, such as lack of reliance or causation, a defendant may assert an affirmative defence under Section 18[5] if he/ she can show that he/ she acted in good faith and had no knowledge that the statement at issue was false or misleading. In addition, a person may not be imprisoned if he/ she can prove that he/ she had no knowledge of such rule or regulation which was violated. An exception applies to the NASDAQ and NYSE continuous disclosure requirements in relation to information which listed companies are required to maintain confidential, provided that they ensure that it does not lead to any unfair trading advantage.	15 U.S.C. §78r(a) 15 U.S.C.A. §78ff(a) Section 202.01 of the NYSE Listed Company Manual Section IM-5250-1 of the NASDAQ Rules

[5] Section 18(a) of the Exchange Act provides an express civil remedy for false or misleading statements or omissions in Exchange Act filings (15 U.S.C. § 78r(a)).

Question	Answer	Source
Can directors be liable if the company breaches this obligation? Please provide details of the extent of the liability.	Yes. Directors can face civil and criminal liability based on violations of state and federal securities laws for fraudulent misrepresentation or material omissions in documents that are filed with the SEC. Any director who makes or causes the making of a false or misleading statement in a document filed with the SEC (including those in relation to the company's accounts), or fails to ensure that the Company complies with its continuous disclosure obligations can be personally held liable for the misrepresentation. This excludes directors who can prove that they acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. Where the SEC, brings an enforcement action under this provision they need to show that the person acted with scienter, meaning that they acted with an intent to defraud. This standard can be satisfied by demonstrating that the defendant intentionally or recklessly made false statements. Mere negligence does not satisfy that standard. Directors can also face liability under Rule 13b2-2 if they: • Make a materially false statement to an accountant in connection with an audit or the preparation of an SEC filing. • Fraudulently influence, coerce, manipulate or mislead an accounting firm during an audit, with the intention of rendering the financial statements materially misleading. Further, directors can be personally liable (to the company, and consequently, to shareholders via derivative action) for breach of their directors' duties, including the duty of due care and the duty of loyalty. A company's breach of the continuous disclosure obligation and/ or fraudulent misrepresentations (and a director's involvement in it) could be used as evidence of an alleged breach of directors' duties. Note that companies can eliminate director (and in some states officer) liability to the corporation for damages through its incorporation documents, but liability generally cannot be limited for a director's intentional misconduct. A finding that there has been a breach of the continuous disclosure rule by the company does not automatically mean that a director has breached their duties.	15 U.S.C.A. § 78r and § 78t 17 C.F.R. § 240.13b2-2 *E.g.*, N.Y. Bus. Corp. Law § 717[6]
Are there significant company /	Yes.	15 U.S.C.A. § 78ff(a)

[6] Statutory law of the state in which the corporation is incorporated will define directors duties (most states' statutes are based on the Model Business Corporations Act), in addition to common law rules and the corporation's articles or certificate of incorporation and by-laws.

Question	Answer	Source
corporations law penalties for false or misleading statements in corporate reports?^	Under US Securities law, a natural person can be fined up to US$5,000,000 or imprisoned up to 20 years, or both, and corporations can be fined up to US$25,000,000 for wilfully making or causing a false or misleading statement to be made.	
Are there any specific requirements imposed by law in relation to forward-looking statements?**	Yes. To be considered a forward-looking statement, the statement must fall within one of the following categories: (a) a statement containing a projection of revenues, income (including income loss), earnings (including earnings loss) per share, capital expenditures, dividends, capital structure, or other financial items; (b) a statement of the plans and objectives of management for future operations, including plans or objectives relating to the products or services of the issuer; (c) a statement of future economic performance, including any such statement contained in a discussion and analysis of financial condition by the management or in the results of operations included pursuant to the rules and regulations of the Commission; (d) any statement of the assumptions underlying or relating to any statement described in subparagraph (A), (B), or (C); (e) any report issued by an outside reviewer retained by an issuer, to the extent that the report assesses a forward-looking statement made by the issuer; or (f) a statement containing a projection or estimate of such other items as may be specified by rule or regulation of the Commission. Additionally, forward-looking statements which fall within certain exclusions may not benefit from the safe harbor, for instance if the issuer has previously violated any securities law or if the statement is made in connection with a tender offer or an initial public offering. Finally, any private action must be based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading.	15 U.S.C. § 77z-2(i)(1)

Question	Answer	Source
Can directors be personally liable for these statements? Please provide details of the extent of the liability.	Yes. As explained above, directors may face liability for any false or misleading they make, including within forward-looking statements. Note that if a director is making an oral or written forward-looking statement, he/ she may shield himself/ herself from liability by including certain disclaimers (i.e., identifying the statement as forward-looking and including a meaningful cautionary statement) in their oral statements.	15 U.S.C. § 77z–2
Is there a "safe harbour" exemption from liability for forward-looking statements in corporate reports?~	Yes. A safe harbor may be secured through one of the three methods: 1. Identifying the statement as forward-looking and using meaningful cautionary statements which identify important factors that could cause the actual results to differ materially from those in the forward-looking statement. 2. The forward-looking statement is immaterial. 3. A plaintiff fails to prove that the forward looking statement was made with actual knowledge of the falsity or misleading nature of the statement. However, the safe harbor only applies to private civil suits and does not apply to civil and criminal enforcement actions brought by the SEC or other regulatory agencies, among other specific exceptions that apply. The safe harbor is also unavailable for forward-looking statements in connection with an initial public offering, with a tender offer or contained in a registration statement issued by an investment company.	15 U.S.C. § 77z–2
In a shareholder claim, what must the claimant prove to establish that the company's contravention caused their loss?***	In order to bring a claim under Section 18 of the Exchange Act based on a false or misleading statement filed with the SEC, a private litigant (a shareholder) must prove actual reliance on the allegedly false statement and that the shareholder suffered a loss as a result.	15 U.S.C. §78(a) *In re MDC Holdings Sec. Litig.*, 754 F. Supp. 785, 806 (S.D. Cal. 1990)

Question	Answer	Source
	In a private action for fraud pursuant to Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, a plaintiff must prove the following elements: 1. A material misrepresentation or omission by the defendant. 2. Scienter. 3. A connection between the misrepresentation or omission and the purchase or sale of a security. 4. Reliance upon the misrepresentation or omission (which may be presumed under a "fraud-on-the-market" theory). 5. Economic loss. 6. Loss causation. Note that the SEC, in a civil enforcement action under Section 10(b) or Rule 10b-5, need not prove investor reliance, loss causation, or damages.	*Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 810 (2011) *S.E.C. v. Credit Bancorp, Ltd.*, 195 F. Supp. 2d 475, 490-91 (S.D.N.Y. 2002)

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** For example, is a person taken to make a misleading statement about a future matter if they do not have reasonable grounds for making the statement?

~ For example, can a company exclude liability by identifying a statement as a forward-looking statement and including a proximate cautionary statement in the corporate report?

*** For example, whether a claimant is required to prove actual reliance on the contravening conduct (director causation), or whether indirect causation is sufficient for claimants to establish causation.

Attachment 3 – Template provided to international counsel

Question	Answer	Source
Are listed companies subject to a continuous disclosure obligation?*		
To establish a contravention, does the failure to disclose relevant information to the market need to be intentional, reckless or negligent?		
Are any defences available to a breach of continuous disclosure requirements?		
Can directors be liable if the company breaches this obligation? Please provide details of the extent of the liability.		
Are there significant company / corporations law penalties for false		

or misleading statements in corporate reports?^	
Are there any specific requirements imposed by law in relation to forward-looking statements?**	
Can directors be personally liable for these statements? Please provide details of the extent of the liability.	
Is there a “safe harbour” exemption from liability for forward-looking statements in corporate reports?~	
In a shareholder claim, what must the claimant prove to establish that the company’s contravention caused their loss?***	

* A “continuous disclosure obligation” is an obligation under law, regulation or the rules of a stock exchange to immediately publish new material price sensitive information about the company (in a manner that will bring it to the attention of the market) as soon as the company or its officers become aware of it.

^ Please confine your answer to general ongoing corporations law requirements that apply to annual reports and other “business as usual” public reporting/disclosure by corporations. You do not need to cover special requirements for prospectuses, disclosures to consumers/customers etc.

** For example, is a person taken to make a misleading statement about a future matter if they do not have reasonable grounds for making the statement?

~ For example, can a company exclude liability by identifying a statement as a forward-looking statement and including a proximate cautionary statement in the corporate report?

*** For example, whether a claimant is required to prove actual reliance on the contravening conduct (director causation), or whether indirect causation is sufficient for claimants to establish causation.

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