



# **Proposed Governance-Related Listing Rule Amendments**

## **Supplementary Consultation Response**

**6 May 2014**

## Introduction

On 16 August 2013 ASX released for public comment:

- a consultation paper entitled [Proposed Changes to ASX Listing Rules and Guidance Note 9: Corporate Governance Disclosures](#);
- a document entitled [Proposed Governance-Related Amendments to the ASX Listing Rules](#), which set out in mark-up proposed governance-related amendments to ASX's Listing Rules and described in detail the purpose of the amendments; and
- a marked-up version of [proposed changes to Guidance Note 9](#).

Most of the changes proposed to the Listing Rules and to Guidance Note 9 were intended to complement and give effect to the reforms proposed by the ASX Corporate Governance Council in a [separate consultation paper](#) relating to a proposed new edition of its *Corporate Governance Principles and Recommendations*. However, ASX also took the opportunity to seek feedback on some other proposed governance-related changes to its Listing Rules. These included the introduction of a new Listing Rule 3.19B, requiring the disclosure of on-market purchases of securities on behalf of employees or directors or their related parties under an employee incentive scheme. They also included amendments to a number of Listing Rules that currently apply to "associates", extending their reach to "related parties".

ASX invited written comments from interested stakeholders on the consultation materials. Submissions were due by Friday, 15 November 2013.

In response to the substantial feedback received in the initial consultation, ASX decided it was appropriate to modify a number of the proposed Listing Rule changes and to conduct a supplementary consultation on the modified changes.

On 21 February 2014, ASX released for public comment:

- a [supplementary consultation paper](#) inviting comments from listed entities, their advisers and other stakeholders on modifications to the governance-related Listing Rule amendments that it consulted upon in August-November 2013;
- a document with the [modified changes](#) to the ASX Listing Rules proposed by ASX; and
- a [mark-up](#) identifying how the modified rule changes varied from those originally consulted upon.

## Supplementary consultation feedback

ASX received 7 non-confidential and 2 confidential submissions in response to its supplementary consultation paper. Copies of the non-confidential submissions are available on the [public consultations page on the ASX website](#) (in the cell to the right of the date entry "21/02/14").

ASX would like to express its gratitude to each respondent who took the time and trouble to send written submissions to ASX. ASX has found the feedback provided by respondents most helpful in formulating the final version of the changes to its Listing Rules.

Generally speaking, with a few exceptions, the submissions supported the rule changes proposed by ASX in its supplementary consultation, although a number suggested some drafting changes to clarify the meaning or operation of some of the rules.

## Modifications proposed to governance-related Listing Rule changes

In response to feedback provided in the supplementary consultation process, ASX has made the following changes to the proposed Listing Rule amendments circulated with its supplementary consultation paper:

- **Listing Rule 1.1 condition 13** – a note has been added to confirm that material can be incorporated by reference into a corporate governance statement lodged with ASX to satisfy that condition (this aligns the condition with the changes being made to Listing Rule 4.10.3, which will permit material to be incorporated by reference into a corporate governance statement lodged with ASX under that rule).
- **Listing Rule 3.19A** – some minor changes have been made to the note to the rule to improve its drafting and to clarify how the rule operates vis-à-vis section 205G of the Corporations Act.
- **Listing Rules 4.7 and 4.10.3** – the notes to these rules have been modified to clarify what an entity must do if it wishes to early-adopt the reforms in those rules. The notes confirm that an entity must adopt the changes to both rules and also report against the third edition of the ASX Corporate Governance Council's recommendations. It cannot early-adopt one rule without the other, nor can it early-adopt the changes in those rules if it reports against the second edition of the ASX Corporate Governance Council's recommendations. This is because the changes to these rules were designed to operate as a package in conjunction with third edition of the ASX Corporate Governance Council's recommendations.
- **Listing Rule 4.10.22** – the drafting of paragraphs (a) and (b) has been simplified and amended to align it with the changes mentioned below to Listing Rule 10.15B.

Paragraph (c) has been removed. That paragraph would have required an entity to disclose in its annual report various information if any securities purchased on-market in connection with an employee incentive scheme were purchased on behalf of, or allocated to, a director or a related party of a director. This requirement has been removed in recognition of the fact that such information should already have been disclosed to the market under Listing Rule 3.19A in an Appendix 3Y. In most cases, it should also be included in the entity's annual remuneration report.

ASX intends to review Appendices 3X, 3Y and 3Z in the near term with a view to making them clearer and more user-friendly (for both authors and readers) and ensuring that information about a director's security holdings in a listed entity is disclosed in an appropriate level of detail.

- **Listing Rule 7.2 Exception 14** – currently provides an exception to the need for security holder approval to placements that exceed the 15% limit prescribed in Listing Rule 7.1 for issues made with the approval of holders of ordinary securities under Listing Rule 10.11. The exception exists because requiring a second security holder approval would be redundant. For the same reason, the exception has been amended and extended to also cover issues made with the approval of holders of ordinary securities under Listing Rule 10.14.
- **Listing Rule 10.12 Exception 4** – the drafting of this exception has been simplified to make it consistent with the drafting in Listing Rule 7.2 Exception 14.

A new Exception 4A has been added to cover a grant of options or other rights to acquire securities under an employee incentive scheme, where the securities to be acquired on the exercise of the options or in satisfaction of the rights are required by the terms of the scheme to be purchased on-market (as referred to in Listing Rule 10.15B). The grant of such options or rights is excluded from the requirement to receive security holder approval under Listing Rule 10.14 by Listing Rule 10.15B. This new exception ensures that they are also excluded from the requirement to receive security holder approval under Listing Rule 10.11.

- **Listing Rule 10.15B** – has been modified:
  - to simplify and clarify the drafting;
  - to remove the references to “employees” so as to be consistent with the drafting of Listing Rule 10.14 (the latter rule, to which Listing Rule 10.15B operates as an exception, requires security holder approval for directors and their associates to participate in an issue of securities under an employee incentive scheme – it does not require approval for issues to employees who are not directors or associates of directors);

- to replace the references to “related parties” with “associates” so that the rule again is consistent with the drafting of Listing Rule 10.14 (again, the latter rule, to which Listing Rule 10.15B operates as an exception, requires security holder approval for directors and their associates to participate in an issue of securities under an employee incentive scheme – it does not require approval for issues to related parties who are not directors or associates of directors); and
- to add an explanatory note explaining the reason for the exceptions in that rule.

ASX would note that it received a number of submissions to the effect that the exception in the second bullet point in Listing Rule 10.15B should be further extended by removing the requirement in that exception that the securities purchased to satisfy entitlements under options or other rights to acquire securities granted under an employee incentive scheme in satisfaction of rights must be “*required by the terms of the scheme*” to be purchased on-market. It was argued that the exception should apply whenever securities are purchased on-market to satisfy entitlements under options or rights granted under an employee incentive scheme and that this should be the case, whether or not the terms on an employee incentive scheme required this to occur.

ASX does not agree with this extension and therefore has not made this change. If an option or other right to acquire securities granted to a director or an associate of a director under an employee incentive scheme is able to be satisfied by the issue of new securities, then ASX considers that it should be subject to security holder approval at the time of grant of the option or right. ASX does not consider it appropriate to defer security holder approval until the entity has made a decision that it will satisfy the holder’s entitlement by issuing new securities, rather than acquiring them on-market.

- **Listing Rule 10.17** – has been modified:
  - to simplify the drafting, particularly in the third of the four bullet points setting out the required contents for a notice of meeting seeking security holder approval for an increase in the pool of non-executive director fees under that rule. The third bullet point previously had referred to a requirement to disclose “details of any payments or other benefits that have been paid or provided by the entity or any child entity, with the approval of the holders of the entity’s ordinary securities, to the entity’s non-executive directors over and above their directors’ fees at any time within the preceding 3 years” and then gave as an example in a note “securities issued to a non-executive director under rule 10.11 or 10.14 with the approval of the holders of the entity’s ordinary securities”. These examples are in fact the only relevant matters requiring security holder approval under the Listing Rules and so the third bullet point has been modified so that it now simply refers to “details of any securities issued to a non-executive director under rule 10.11 or 10.14 with the approval of the holders of the entity’s ordinary securities at any time within the preceding 3 years”. A corresponding change has been made to the final paragraph of the rule referring to benefits that do not fall within directors’ fees;
  - to add the word “genuine” as a precursor to the references to reimbursement of out-of-pocket expenses and “special exertion” fees;
  - to remove the limitation that reimbursement of out-of-pocket expenses should relate to attending board or committee meetings; and
  - to modify the note stating that ASX does not regard attending and participating in board committee meetings as a “special exertion” so that it only applies to “normal” board committee meetings (such as an audit, nomination, remuneration or risk committee).
- **Listing Rule 14.2.1** – has been updated to make it clear that a proxy form may include a general statement that, in the absence of a direction to vote for or against or to abstain from voting on a resolution, the proxy is authorised to vote or abstain from voting in their discretion and that it is not necessary to include this as a “tick the box” option on each and every resolution.
- **Listing Rule 14.2.2** – a note has been added that:

“An entity may wish to include in a proxy form an acknowledgement to the effect that the statement as to how the Chair of the meeting intends to vote undirected proxies necessarily expresses the Chair’s intention at a particular point in time and that, in exceptional circumstances, the Chair’s intention may change subsequently. If there is a change to how the Chair intends to vote undirected proxies, ASX would expect the entity to make an immediate announcement to the market stating that fact and explaining the reasons for the change.”

- **Listing Rule 19.12** – the note to the definition of “associate” has been modified to add the words “or some other form of certification” to make it absolutely clear (if it wasn’t already) that the provision of a statutory declaration is not the only way in which it can be established that an officer or director and a related party are not associates of each other for the purposes of the Listing Rules.

Some minor modifications to the definition of “employee incentive scheme” have been added to the package of rule amendments. The modifications align the definition with the changes being made to Listing Rules 4.10.22, 10.14 and 10.15B and also add a note confirming that the fact that an employee incentive scheme may also provide for the participation of consultants and contractors, as well as employees and non-executive directors, does not prevent it from being an employee incentive scheme for the purposes of the Listing Rules.

Finally, the definition of “security purchase plan” has been amended to move the reference to Class Order [CO 09/425] *Share and interest purchase plans* from the definition into a note to the definition. This is to cater for the possibility that ASIC may change that class order at some point.

## Final Listing Rule changes

Accompanying this supplementary consultation response are the [final changes to the ASX Listing Rules](#) now proposed by ASX, together with a [mark-up](#) identifying (in green) how the modified rule changes vary from the proposed rule changes circulated with the supplementary consultation paper.

This includes the final version of Appendix 4G, which has been updated to reflect the changes made in the third edition of the Corporate Governance Council’s *Corporate Governance Principles and Recommendations* released on 27 March 2014.

## Effective date of Listing Rule changes

The final changes to the ASX Listing Rules released with this supplementary consultation response are intended to come into effect on 1 July 2014, subject to receipt of the necessary regulatory approvals under the Corporations Act.

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