



27 April 2015

Ms Diane Lewis – Senior Manager  
Regulatory & Public Policy  
ASX Limited  
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SYDNEY NSW 2000

By email: [regulatorypolicy@asx.com.au](mailto:regulatorypolicy@asx.com.au)

Dear Ms Lewis,

### **Facilitating Dual Listings by New Zealand Companies**

Asia Pacific Stock Exchange Limited ("APX") is the holder of an Australian Market Operator's licence. APX has noted the recent publication of the ASX's proposal to amend its listing rules relating to 'Foreign Exempt Listings', and wishes to take the opportunity to provide ASX with the following comments.

#### Registered Foreign Company

One of the amendments relates to ASX listing rule 1.11 condition 9, which is proposed to be amended as follows:

*'If the entity is a foreign company, ~~it must be~~ and it is not registered as a foreign company carrying on business in Australia under the Corporations Act, it must appoint and maintain an agent for service of process in Australia.'*

APX appreciates what the proposed amendment is intending to do, but wishes to draw ASX's attention to the fact that the term 'registered as a foreign company' does not exist within the Corporations Act (the "Act"). APX understands that it is usual ASIC practice to have terms used within the Act correctly referenced within Market Operators' Operating Rules.

The Act (in s9) has definitions for both a "registered foreign company" and a "foreign company". For the purposes of s601CK of the Act (prescribing the need for financial statements to be lodged with ASIC), "registered foreign company" is the relevant term that is used. Our concern is that the meaning of the terms used in ASX's listing rules are not currently clear.

The term "registered as a foreign company" could be taken to mean a company that is registered under Division 2 of Part 5B.2 of the Act - which would mean that the financial reporting requirements in s601CK would apply (unless a class order or other form of ASIC exemption applied). However, s601CK would not apply to a "foreign company" seeking admission to an official list of securities that is also not required by the Act to be registered under Division 2 of Part 5B.2 (because it is not carrying on a business in this jurisdiction).

For completeness, APX suggests that any amendment instead refer to the term 'registered foreign company', as defined in section 9 of the Act (and as used in Part 5B Division 2 of the Act, particularly sections 601CD and 601CK).

This proposed amendment, however, has the effect of reversing the current policy position set out in within rule 1.1 condition 9. That is, whereas this rule currently requires an applicant to be "*registered as a foreign company*" (or, more correctly "*a registered foreign company*"), the amended rule would permit an applicant to not be "*registered as a foreign company*" (or, more correctly "*a registered foreign company*").

Our understanding of ASIC's position on these matters is that all listed foreign companies must be "*a registered foreign company*". This is as currently reflected in APX Listing Rules 4.24(c) and 4.31(l). The effect of ASIC's policy is to ensure that listed foreign entities are obligated to lodge documents with ASIC pursuant to s601CK of the Act. This was set out in the purpose of amendments to the APX Listing Rules which came into effect in January 2013<sup>1</sup>.

Hence, the proposed drafting would be contrary to the apparent ASIC position as it would facilitate the listing of foreign companies which are not "*registered as a foreign company*" (or, more correctly "*a registered foreign company*").

In addition, APX notes that ASX listing rule 1.1 condition 4 is currently worded as follows:

*"Condition 4 If the entity is a foreign entity the following rules apply.*

- (a) If the entity has a certificated subregister for quoted +securities, it must establish in Australia an Australian +securities register (or subregister).*
- (b) It must appoint an agent for service of process in Australia.*
- (c) It must be registered as a foreign company under the Corporations Act."*

ASX does not appear to be proposing any amendment to its listing rule 1.1 condition 4, which requires a standard ASX listing to be "*registered as a foreign company*" (or, more correctly "*a registered foreign company*") and have appointed an agent for service in Australia. Whilst there may indeed be a rationale for this position, it is not clear why it is acceptable for ASX to relax the requirement to be "*registered as a foreign company*" (or, more correctly "*a registered foreign company*") for 'ASX Foreign Exempt Listings' but maintain it for 'Standard ASX Listings'. This is particularly important as several periodic reporting requirements in chapter 4 of the ASX listing rules may be impacted by this treatment. Further, the ASIC

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<sup>1</sup> Available at [http://www.apx.com.au/Assets/Pages/files/Purpose\\_of\\_LR\\_Procedure\\_amendments\\_effective\\_20130107.pdf](http://www.apx.com.au/Assets/Pages/files/Purpose_of_LR_Procedure_amendments_effective_20130107.pdf)

position regarding obligations to lodge documents with ASIC pursuant to s601CK of the Act equally apply to this rule.

Pending further ASX consideration of this point, APX suggests, in the interim, that ASX amend its listing rule 1.1 condition 4, such that it is in keeping with the terminology of the Act:

*“Condition 4 If the entity is a foreign entity the following rules apply.*

*(a) If the entity has a certificated subregister for quoted +securities, it must establish in Australia an Australian +securities register (or subregister).*

*(b) It must appoint an agent for service of process in Australia.*

*(c) It must be a registered ~~as a~~ foreign company under the Corporations Act.”*

#### Operation of ASX listing rule 1.1 condition 9 & listing rule 1.15.1

ASX proposes to amend its listing rule 1.1 condition 9 such that an entity both appoint and ‘maintain’ an agent for service of process in Australia. Chapter 1 of the ASX listing rules generally operate as ‘Admission requirements’ only, unless otherwise specified (such as ASX listing rule 1.15.1, which specifies the continuing obligations of an ASX Foreign Exempt Listing).

ASX listing rule 1.15 states that after it is admitted, an entity admitted as an ASX Foreign Exempt Listing must comply with a number listing rules and individual chapters (and need not comply with other listing rules and chapters). This rule does not, however, require compliance with either individual rules within chapter 1 or chapter 1 itself.

As ASX listing rule 1.15.1 does not require ‘ongoing’ compliance with listing rule 1.1 condition 9, APX submits that ASX listing rule 1.15.1 should be amended as follows (if a Foreign Exempt Listing is required to ‘maintain’ an agent for service of process in Australia, in place of being a ‘registered foreign company’):

*“1.15.1 Rules **1.1 condition 9**, 2.2, 2.16, 8.2, 8.10, 8.15, ~~8.18, Appendix 8A 8.21~~, 15.2 to 15.6, 15.8, 15.9, Chapters 16, 17, 18 and 19 and any listing rules that ASX specifies, either before or after it is admitted. ....”*

Without this amendment, it is possible that ASX may admit Foreign Exempt Listings that are not registered foreign companies (under the Act), and who simply appoint and not maintain an agent for service (as ASX listing rule 1.15.1 would not require it to do so, without amendment). APX submits that this regulatory gap should be closed.

However, if the terminology “registered foreign company” is used in Chapter 1, then it may be the case that the obligation to appoint an agent for service of process in Australia may not be required in the Listing Rules as it would be captured as an obligation under the Act.

#### Other relevant matters

It is our understanding that it is the current ASIC position to require listed foreign companies to better inform investors of jurisdictional differences between Australia and their home jurisdiction and to provide enhanced disclosure in relation to the quality of audits. These requirements are reflected in APX Listing

Rules 4.24(e) and (f), and 4.31(m) and (n) (which were only made effective in January 2013). The ASX rules or proposed amendments do not appear to reflect this ASIC position.

We acknowledge that ASIC may have changed its position on one or more of the abovementioned issues since January 2013, and that the proposed ASX amendments may now reflect a new position taken by ASIC.

APX would be happy to discuss any aspect of this submission with you.

Yours sincerely,  
Asia Pacific Stock Exchange Limited

A handwritten signature in blue ink, appearing to read 'D. Lawrence', is positioned above the typed name.

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