NORTON ROSE FULBRIGHT

Submission in response to ASX Consultation Paper of 12 May 2016 - Updating ASX's admission requirements for listed entities

Norton Rose Fulbright is largely supportive of the proposed amendments to the ASX admission requirements for listed entities since it considers that the broad package of amendments will help to support the quality of the companies listing on ASX and will promote the integrity of ASX as a market on which to list. We note that a number of the financial thresholds relating to admission have been fixed at the same amount for a number of years and that an update to those thresholds is due.

Notwithstanding our general view above, we hold the view that some of the proposed amendments could raise the bar for listing on ASX too far too quickly. In addition we consider that some of the proposed amendments need further detail and clarification to assist entities and their advisers who must interpret the rules in a practical and meaningful way.

Set out below are our submissions on some of the specific consultation questions raised by ASX. We have not made submissions on all of the questions raised and where we have not, we generally support the amendment being proposed by ASX.

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Proposal to require a minimum free float of 20% To introduce a rules-based 20% minimum free float requirement for ASX listings at the time of admission. "Free float" will be defined by ASX as the percentage of the entity's main class of securities that are not restricted securities or subject to voluntary escrow, and that are held by non-affiliated security holders. A "non-affiliated security holder" will in turn be defined as a security holder who is not a related party of the entity, an associate of a related party of the entity, or a person whose relationship to the entity or to a	**Consultation Question 1:** Do you support the introduction of a 20% minimum free float requirement? If not, why not and would you support a different minimum free float requirement? ***NRF response:*** Yes. We support the concept of ensuring a minimum amount of shares being held by non-affiliated security holders to allow the possibility of some liquidity in the securities once listed. This will deter listings that are aimed at merely a 'branding' exercise. In our view, 20% is an appropriate threshold for a minimum free float requirement. **Consultation Question 2:** Do you have any comments on the

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related party of the entity or their associates is such that, in ASX's opinion, they should be treated as affiliated with the entity.	proposed definitions of "free float" and "non-affiliated security holder" for the purpose of the proposed minimum free float requirement? Do you see any issues with excluding shares that are subject to voluntary escrow from the definition of "free float"? ***NRF response:*** We have some concerns with the proposed definition of "free float". In our view securities which are voluntarily escrowed should not be one of the exclusions from the definition of free float, despite those securities potentially not being able to be traded. Appendix 9B of the Listing Rules is already designed to capture insiders of all kinds. Voluntary escrow can be used by entities and lead managers for a number of different commercial reasons and for varying periods of time, some reasonably short and others similar to the 12-24 month periods imposed by ASX under Appendix 9B. We consider that it is inappropriate to penalise or dis-incentivise admission applicants from using the recognised tool of voluntary escrow for commercial purposes and to protect shareholders in circumstances outside the scope of Appendix 9B. We note that voluntary escrow is currently not part of the exclusions for other thresholds in the Listing Rules, such as the spread requirements. In addition, given the proposal to require a free float of 20% (an increase of 10% from the current policy adopted by ASX), in certain circumstances it could be difficult for companies to satisfy the free float requirement if voluntary escrowed securities are included in the definition, as well as restricted securities. In our view the definition of "non-affiliated security holder" needs to

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	be known with certainty in advance of applying for admission in order to provide sufficient confidence in the outcome of the admission process to justify the preliminary work required in a float. In our view, providing ASX with a discretion to determine a "non-affiliated securityholder" provides ASX with too much latitude and means that in almost every circumstance clarification may need to be sought from ASX with respect to who may fall within this category of securityholder to ensure that the entity is ultimately able to satisfy the minimum free float requirement. This could result in additional administrative burden for ASX that could be avoided. Even the amount of work required to progress to the stage of applying to ASX for in-principle advice regarding the ability of the entity to satisfy the minimum free float requirement may not be justifiable, given the costs and time involved in advancing a listing proposal to the stage where the capital structure and allocation of securities are ascertainable in their entirety at an early stage in the process. Consequently, we suggest that the ASX discretion be removed from the proposed definition on "non-affiliated securityholder". The admission process already carries significant uncertainty for applicants and ASX's objective of applying a free float requirement can be achieved without adding additional uncertainty in the form of that ASX discretion. We suggest that the definition of "free float" (and the corresponding definition of "non-affiliated securityholder" should be clear and unambiguous in the Listing Rules. We don't see any problem with

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	expanding ASX's current definition (in Guidance Note 1) to include related parties and their associates (using the "associates" definition already found in Listing Rule 19.12).
Proposal to change the minimum spread requirement To change the minimum spread requirement for ASX listings to require: • 200 security holders if the entity has a free float of less than A$50 million, or 100 security holders if the entity has a free float of A$50 million or more; and • each security holder counted towards spread must hold a parcel of securities with a value of at least A$5,000. ASX will not impose a rules-based residency requirement for spread but will retain its existing discretion to impose such a requirement in an appropriate case. Guidance Note 1 will be amended to give more specific examples of when ASX is likely to exercise that discretion. Specifically, Guidance Note 1 will state that ASX will generally exercise its discretion to require a minimum number of Australian resident security holders for spread purposes: "where an applicant is incorporated in, has its main business operations in, or has a majority of its board or a controlling security holder resident in, an emerging or developing market. In ASX's experience, these types of entities tend to target or attract investors from the emerging or developing market, making it less likely that they will trade on ASX and more difficult for ASX to conduct its usual checks to verify that minimum spread has been obtained without using	**Consultation Question 3:** Do you support the proposed changes to the spread test? If not, what element or elements of the changes do you not support, and what are your reasons? ***NRF response:*** In our view the proposed spread requirements should be amended. The proposed increase from A$2,000 minimum holding to A$5,000 minimum holding is too onerous particularly for floats which contain a genuine public offer. This increase could have a detrimental effect on some offers that rely upon smaller investors willing to invest a reasonable sum of money. We would suggest a modest increase in the minimum holding amount to A$3,000 but as a consequence make a corresponding change to the number of securityholders required for spread such that those are 250 securityholders if the entity has a free float of less than A$50 million or 150 securityholders if the entity has a free float of A$50 million or more. Further, we suggest that the 75% Australian investor requirement for emerging or developing market floats is overly restrictive. In our view, a 50% threshold would be more appropriate, given the 'open for business' message of Australia's foreign investment regime and given the ASX's desire to seek the listing of more foreign companies on ASX, a move that we fully support. A 75% Australian investor requirement could be a negative factor for a number of

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artificial means. Typically, in such a case, ASX will require at least 75% of the minimum spread to come from investors resident in Australia."	foreign companies looking to list, particularly where they are a well-known brand or company in their home jurisdiction but not as well known in Australia. We remain unconvinced that an increase in Australian shareholders over foreign shareholders will necessarily relate to a higher amount of liquidity in an entity's securities. We also consider that it is important for ASX to publish a definitive list of jurisdictions deemed to be 'emerging or developing markets' for admission purposes.
Proposal to increase the assets test thresholds To increase the assets test thresholds to an NTA of at least $5 million or a market capitalisation of at least $20 million.	**Consultation Question 5:** Do you support the increase in the net tangible assets and market capitalisation elements of the assets test? If not, please provide your reasons. ***NRF response:*** We consider that the $2 million increase in the NTA amount to $5 million is onerous, given that the amount was only recently increased to $3 million in 2012. We suggest that a modest increase in the amount to $4 million may be more appropriate. We are not aware of any basis for considering that an increase to NTA of $5 million is necessary or that it would necessarily improve the quality of ASX listed entities. We anticipate that an increase in NTO to $5 million could significantly impact floats originating in states and territories other than NSW, Victoria and Queensland.
Proposal to apply the same working capital requirements to all assets test entities	**Consultation Question 7:** Do you think it is appropriate to maintain a fixed minimum $1.5 million working capital requirement in addition to a requirement for the entity admitted under the assets test to

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An entity admitted under the assets test must have at least $1.5 million in working capital available after: • taking into account the entity's budgeted revenue for the first full financial year that ends after listing; and • allowing for the first full financial year's budgeted administration costs and the cost of acquiring any assets referred to in the prospectus, PDS or information memorandum (to the extent that those costs will be met out of working capital)	make a statement that it has sufficient working capital to meet its stated objectives? If you think the fixed working capital requirement should be a different amount, please tell us the amount and explain why. ***NRF response:*** In our view it is appropriate to retain the minimum working capital amount at A$1.5 million. However, we suggest that guidance is provided by ASX as to the definition of "budgeted administration costs" since this term could be construed very differently from entity to entity, and it may not be a figure that is expressly set out in the prospectus or other disclosure document. Entities will need to fully understand how the working capital amount is to be calculated so that appropriate funds can be raised as required.
Proposal to require entities to produce 3 years audited accounts To introduce a new requirement for entities seeking admission under the assets test to produce audited accounts for the last 3 full financial years. If the accounts for the last full financial year are more than 8 months old, it is proposed that the entity also be required to produce audited or reviewed accounts for the last half year. ASX is further proposing that an entity seeking admission under the assets test be required, unless ASX agrees otherwise, to produce 3 full financial years of audited accounts for any entity or business to be acquired by the entity at or ahead of listing. This change will have particular application to backdoor listings.	**Consultation Question 8:** Do you support the proposed requirement for entities admitted under the assets test to provide 3 full financial years of audited accounts, unless ASX approves otherwise? If not, please provide your reasons and describe what, if any, alternative approach you consider should be taken by ASX in order to meet the objectives of the proposed change. **Consultation Question 9:** ASX has proposed that it will generally accept less than 3 years of audited accounts for an assets test entity (or an entity or business to be acquired by the entity) only in the circumstances where ASIC will accept less than 3 full years of accounts in a disclosure document, as explained in Part F of ASIC Regulatory Guide 228 (RG 228).

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The proposed rules will require that the audit reports or review must not contain a modified opinion, emphasis of matter or other matter paragraph that ASX considers unacceptable.	Simultaneously with the release of this consultation paper, ASIC has released a consultation paper seeking comments on proposed changes to RG 228 setting out these circumstances. Are there additional circumstances where you consider ASX should be prepared to accept less than 3 years of audited accounts to those outlined in ASIC's consultation paper on RG 228? **Consultation Question 10:** ASX has also proposed that it will only accept the types of modified opinion, emphasis of matter or other matter paragraph in accounts lodged with a listing application that ASIC will accept in a disclosure document, as explained in Part F of RG 228. Are there additional types of modified opinion, emphasis of matter or other matter paragraph that you consider ASX should be prepared to accept to those outlined in ASIC's consultation paper on RG 228? ***NRF response to all questions:*** We support the position to be adopted by ASX in aligning itself with ASIC's guidance, whilst reserving the right to apply a lesser requirement in appropriate circumstances. As a point of clarity, we suggest ASX state that it will not at any time impose a more onerous standard than that required by ASIC. In our view ASX should clarify that only two and a half years of audited/reviewed accounts will be needed where the latest financial accounts are for a half year. This would be consistent with ASIC's current position set out at RG 228.88. We agree that ASX should accept that historical financial accounts

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	should not be required for recently incorporated entities and start-up businesses. We also agree with the proposal to adopt ASIC's approach of not requiring historical financial accounts for start-up entities without an operating history. ASX routinely permits its listed entities to remain quoted and trading despite audit reports featuring findings such as an emphasis of matter and material uncertainty as to going concern. It is important for ASX to provide certainty in its admission guidance as to exactly which types of audit opinion will be deemed acceptable or unacceptable for admission. We believe that listing applicants should be provided with a reasonable level of certainty on this point, particularly given the time and cost commitments inherent in applying for admission. We do not think it is sufficient for ASX to refer only to the circumstances outlined in Part F of ASIC Regulatory Guide 228 since the examples provided by ASIC are limited.
Proposed transition date The proposed transition date for the rule changes to become effective is 1 September 2016.	**Consultation Question 14:** Do you believe the transition date of 1 September 2016 that ASX proposes for the introduction of the new admission rules is appropriate? If you think it should be sooner or later, please explain why? ***NRF response:*** The changes being proposed by ASX are expected to have a profound effect on the admission process, particularly for smaller capitalised entities, which may already be planning, or have commenced a process to seek a listing. We do not consider a transition period of two months (probably shorter once ASX and

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	ASIC review submissions and finalise their position on each proposal) to be sufficient to allow companies and market participants to adapt, particularly where a process may already have commenced. Given the long preparation phase involved in a float and the significant costs involved in that phase, we suggest that 1 January 2017 would be a more appropriate commencement date for the amendments.
Other comments	**Consultation Question 15:** Do you have any other comments on the issues discussed in ASX's consultation paper or the proposed listing rule and Guidance Note changes? ***NRF response:*** We would like to emphasise our desire that ASX continue to be a transparent regulator that provides entities and advisers with a high degree of predictability. This breeds a high level of confidence among market participants. Any increase in ASX discretion around particular rules which have previously been clear and unambiguous may reduce the confidence of market participants in the transparency and reliability of the admission process. It may also elevate the regulatory risk involved in seeking to raise equity capital in Australia. As noted in a number of comments above, we also encourage ASX to provide as much guidance as possible in the application of its rules once they are amended, which will hopefully assist to reduce the burden on ASX and listing applicants to deal with case-by-case applications for confirmations and waivers from ASX.

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