Updating ASX's admission requirements for listed entities

CONSULTATION PAPER 12 MAY 2016

ATTACHMENT D: PROPOSED CHANGES TO GUIDANCE NOTE 12

ASX

SIGNIFICANT CHANGES TO ACTIVITIES

The purpose of this Guidance Note	• To assist listed entities and their advisers to understand how ASX applies Listing Rules 11.1 to 11.3 to transactions that may result in a significant change to the nature or scale of a listed entity's activities
The main points it covers	• The obligation of a listed entity to notify ASX of a proposed significant change to the nature or scale of its activities under Listing Rules 11.1 and 11.1.1 • When ASX will exercise its discretions under Listing Rule 11.1.2 to require a significant change to the nature or scale of a listed entity's activities to be approved by security holders and under Listing Rule 11.1.3 to require a listed entity proposing a significant change to the nature or scale of its activities to re-comply with ASX's admission and quotation requirements • The requirement for the disposal of an entity's main undertaking to be subject to security holder approval under Listing Rule 11.2 • When ASX will exercise its discretion to suspend the quotation of an entity's securities under Listing Rule 11.3 • How "back-door listings" are regulated under Listing Rules 11.1 to 11.3 • The provisions that should be included in an agreement effecting a significant change to the nature or scale of a listed entity's activities or a disposal of its main undertaking • The requirements for a notice of meeting proposing a resolution of security holders to approve a significant change to the nature or scale of a listed entity's activities or a disposal of its main undertaking • The steps involving in re-complying with ASX's admission and quotation requirements
Related materials you should read	• Guidance Note 1 *Applying for Admission – ASX Listings* • Guidance Note 4 *Foreign Entities Listing on ASX* • Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B* • Guidance Note 11 *Restricted Securities and Voluntary Escrow* • Guidance Note 16 *Trading Halts and Voluntary Suspensions* • Guidance Note 17 *Waivers and In-Principle Advice*

History: Guidance Note 12 amended 01/09/16. Previous versions of this Guidance Note were issued on 07/00, 12/00, 09/01, 03/02, 06/02, 01/03, 03/03, 09/08, 01/12, 05/13, 12/13 and 09/14.

Important notice: ASX has published this Guidance Note to assist listed entities to understand and comply with their obligations under the Listing Rules. Nothing in this Guidance Note necessarily binds ASX in the application of the Listing Rules in a particular case. In issuing this Guidance Note, ASX is not providing legal advice and listed entities should obtain their own advice from a qualified professional person in respect of their obligations. ASX may withdraw or replace this Guidance Note at any time without further notice to any person.

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Table of contents

Deleted: 1. Introduction . 3¶
1.1 Back door listings . 4¶
1.2 The significance of an entity's main undertaking . 5¶
1.3 The meaning of "main undertaking" . 6¶
2. Listing Rules 11.1 and 11.1.1: notification of significant transactions . 6¶
2.1 The policy objectives of the notification requirement . 6¶
2.2 The meaning of "activities" . 7¶
2.3 What constitutes a significant change in the nature of an entity's activities? . 7¶
2.4 What constitutes a significant change in the scale of an entity's activities? . 8¶
2.5 Guidelines for notification of transactions . 8¶
2.6 Interaction with other disclosure obligations . 9¶
2.7 Initial discussions in advance of notification . 13¶
2.8 Form and timing of notification . 13¶
2.9 Requests for further information . 13¶
3. Listing Rules 11.1.2 and 11.1.3: ASX's discretionary powers . 14¶
3.1 The policy objectives of Listing Rules 11.1.2 and 11.1.3 . 14¶
3.2 The main circumstances in which ASX will apply Listing Rules 11.1.2 and 11.1.3 . 15¶
3.3 The effect of ASX exercising its discretion under Listing Rule 11.1.2 and/or 11.1.3 . 17¶
3.4 The steps involved in re-compliance with the admission requirements . 31¶
3.5 Prospectus / PDS / information memorandum . 33¶
3.6 Meeting the minimum spread test . 35¶
3.7 Meeting the profit test or assets test . 36¶
3.8 Escrow requirements for restricted securities . 38¶
3.9 The 20 cent rule . 39¶
3.10 Minimum option exercise price . 41¶
3.11 Directors must be of good fame and character . 42¶
3.12 Requirements for additional information . 43¶
3.13 Pre-emptive capital raisings . 43¶
4. Listing Rule 11.2: disposal of an entity's main undertaking . 43¶
4.1 The policy objective of Listing Rule 11.2 . 43¶
4.2 The application of Listing Rule 11.2 . 43¶
4.3 What constitutes a "disposal" of a main undertaking? . 43¶
4.4 Partial disposals of an entity's main undertaking . 43¶
4.5 Agreement to dispose of main undertaking must be conditional on security holder approval . 43¶
4.6 Disposals by a receiver, administrator or liquidator . 43¶
4.7 Other Listing Rule issues . 43¶
5. Requirements for agreements . 43¶
5.1 Conditionality of agreements . 43¶
5.2 Break fees . 43¶
5.3 Option arrangements . 43¶
6. Requirements for notices of meeting . 43¶
6.1 The contents of the notice . 43¶
6.2 Draft notice to be given to ASX . 43¶
6.3 Voting exclusion statement . 43¶
6.4 The form of resolution required . 43¶
6.5 Supplemental or revised notices . 43¶
7. Listing Rule 11.3: suspension of quotation . 43¶
7.1 The policy objectives of Listing Rule 11.1.3 . 43¶
7.2 The circumstances in which ASX will exercise its discretion under Listing Rule 11.3 . 43¶

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1. Introduction

This Guidance Note is published to assist listed entities and their advisers to understand how ASX Limited (ASX) applies Listing Rules 11.1 to 11.3 to transactions that may result in a significant change to the nature or scale of a listed entity's activities.[1]

Listing Rules 11.1 to 11.3 provide:

> *11.1 If an entity proposes to make a significant change, either directly or indirectly, to the nature or scale of its activities, it must provide full details to ASX as soon as practicable. It must do so in any event before making the change. The following rules apply in relation to the proposed change.*
>
> *11.1.1 The entity must give ASX information regarding the change and its effect on future potential earnings, and any information that ASX asks for.*
>
> *11.1.2 If ASX requires, the entity must get the approval of holders of its ordinary securities and must comply with any requirements of ASX in relation to the notice of meeting. The notice of meeting must include a voting exclusion statement.*
>
> *11.1.3 If ASX requires, the entity must meet the requirements in Chapters 1 and 2 as if the entity were applying for admission to the official list.*
>
> *11.2 If the significant change involves the entity disposing of its main undertaking, the entity must get the approval of holders of its ordinary securities and must comply with any requirements of ASX in relation to the notice of meeting. The notice of meeting must include a voting exclusion statement. The entity must not enter into an agreement to dispose of its main undertaking unless the agreement is conditional on the entity getting that approval. Rules 11.1.1 and 11.1.3 apply.*
>
> *11.3 ASX may suspend quotation of the entity's securities until the entity has satisfied the requirements of rules 11.1 or 11.2.*

Listing Rule 11.1 was originally inserted into the Listing Rules primarily to regulate "back door listings", although ASX can and does apply its discretions under Listing Rules 11.1.2 and 11.1.3 in other circumstances that do not involve a back door listing.[2] One of the defining characteristics of a back door listing transaction is a significant change to the nature and/or scale of the activities of the listed entity facilitating the transaction. It is the proposal to make such a change which attracts the notification requirements in Listing Rule 11.1 and 11.1.1, and which enlivens ASX discretions under Listing Rule 11.1.2 and 11.1.3. Listing Rule 11.1.2 empowers ASX to require the transaction to be approved by the entity's security holders before it is consummated to ensure their interests are safeguarded, while Listing Rule 11.1.3 empowers ASX to require the entity to meet ASX's requirements for admission and

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[1] In addressing whether a transaction that may result in a significant change to the nature or scale of a listed entity's activities should be subject to security holder approval, this Guidance Note does so solely from the perspective of the Listing Rules. A transaction of this type may require security holder approval under the Corporations Act, the entity's constitution or the general law governing the duties of directors. The board of a listed entity may also determine that it is appropriate, as a matter of good corporate governance, to submit such a transaction to security holders for approval even where there is no Listing Rule or other legal requirement to do so.

[2] See '3.2 The main circumstances in which ASX will apply Listing Rules 11.1.2 and 11.1.3' on page 15.

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quotation as if the entity were applying for admission to the official list for the first time[3] so that the important controls and protections built into those requirements are not circumvented.

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Listing Rule 11.2 addresses one particular type of transaction involving a significant change to the nature and/or scale of a listed entity's activities – a disposal of its main undertaking – where, for policy reasons, the Listing Rules specifically require security holder approval.

1.1 Back door listings

The term "back door listing" refers to a process where someone seeking to have an undertaking[4] listed does so by injecting the undertaking into an existing listed entity rather than the more conventional process of applying to be admitted to the official list under Listing Rule 1.1 (a "front door listing").

A back door listing can take a number of forms. In Australia, it usually involves a listed entity purchasing an undertaking in return for either:

- an issue of securities[5] to the vendor(s) of the undertaking (perhaps with a cash payment[6] and/or other consideration as well); or
- a payment of cash[7] to the vendor(s) of the undertaking with the cash raised through an offer of securities by the listed entity. In this case, it is common for the vendor(s) or their associates to participate to some extent in the offering so that they receive an equity interest in the listed entity.[8]

Occasionally, a back door listing may be effected via a scheme of arrangement under which a listed entity merges or amalgamates with a non-ASX listed entity, with the scheme providing for an issue of securities by the listed entity to the owner(s) of the non-ASX listed entity.[9]

As mentioned previously, one of the defining characteristics of a back door listing transaction is that it involves a significant change to the nature and/or scale of the listed entity facilitating the transaction.

A back door listing is typically undertaken with a listed entity which has comparatively small scale operations relative to the size of the undertaking being back door listed. Sometimes this situation may have come about because the entity has dissipated assets through ongoing losses or unsuccessful exploration activities. Sometimes it may be because the entity has run into financial difficulties and has undergone an administration or receivership or has had to downsize the scale of its operations to reduce debt. Sometimes it may simply be that the entity started off with relatively small scale operations and has not achieved the growth that it had hoped for. Consequently, being party

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3 For convenience, referred to in this Guidance Note as ASX requiring "re-compliance" with its admission and quotation requirements.

4 Listing Rule 19.12 defines the expression "undertaking" to include both assets and businesses.

5 ASX will typically apply escrow requirements to these securities (see Chapter 9 of the Listing Rules and '8.7. Escrow requirements for restricted securities' on page 38).

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6 Note, however, that an entity which has in the preceding two years acquired, or proposes to acquire, a "classified asset" and which ASX requires under Listing Rule 11.1.3 to re-comply with ASX's admission and quotation requirements will need to satisfy Listing Rule 1.1 condition 10. That condition explicitly requires the entity to have issued restricted securities as the consideration for the acquisition, and therefore prohibits cash payments as part of the consideration, unless the consideration was reimbursement of expenditure incurred in developing the classified asset or, under Listing Rule 9.1.3, the entity is not required to apply the restrictions in Appendix 9B. For these purposes, a "classified asset" is defined in listing rule 19.12 as:

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(a) an interest in a mining exploration area or an oil and gas exploration area or similar tenement or interest;

(b) an interest in intangible property that is substantially speculative or unproven, or has not been profitably exploited for at least 3 years, and which entitles the entity to develop, manufacture, market or distribute the property;

(c) an interest in an asset which, in ASX's opinion, cannot readily be valued; or

(d) an interest in an entity the substantial proportion of whose assets (held directly, or through a controlled entity) is property of the type referred to in paragraphs (a), (b) and (c) above.

7 See note 6 above.

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8 Again, ASX will typically apply escrow requirements to these securities (see note 5 above).

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9 In other jurisdictions that have friendlier merger statutes than Australia, a back door listing will often involve a "reverse merger" between a listed entity and the entity seeking the back door listing.

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to a back door listing will usually involve a significant change to the scale of a listed entity's activities and any accompanying issue of securities will often be significantly dilutive to existing security holders. Where this is the case, ASX will generally impose a requirement under Listing Rule 11.1.2 that the back door listing transaction is approved by security holders.

Sometimes (but not always), a back door listing will involve a significant change to the nature of the listed entity's activities and/or result in a significant change to the make-up of the listed entity's board of directors, with representatives of the vendor(s) being appointed to the board. Again, where this is the case, ASX will generally impose a requirement under Listing Rule 11.1.2 that the back door listing transaction is approved by security holders.[10]

ASX will invariably exercise its discretion under Listing Rule 11.1.3 to require a listed entity that facilitates a back door listing to re-comply with ASX's admission and quotation requirements. This is on the principle that someone seeking to have an undertaking listed should not be able to achieve by the back door what they cannot achieve by the front door.

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ASX does not treat a transaction between two ASX listed entities, such as:

- a takeover offer by one listed entity for another listed entity under Chapter 6 of the Corporations Act;
- a scheme of arrangement involving a merger or amalgamation of two listed entities or an acquisition by one listed entity of another listed entity; or
- a sale of assets from one listed entity to another listed entity,

as a back door listing for these purposes. These transactions may still need to be notified to ASX under Listing Rule 11.1 if they involve a significant change to the nature or scale of the activities of either listed entity. Further, while they are not regarded as a back door listing and therefore will not attract the application of ASX's discretions under Listing Rules 11.1.2 or 11.1.3 on that score, they may still do so if they fit within one of the other cases mentioned below where ASX will generally exercise those discretions.[11]

1.2 The significance of an entity's main undertaking

The concept of a listed entity's main undertaking is an important one under the Listing Rules. Listing Rule 11.2 requires security holder approval to a disposal by a listed entity of its main undertaking. In addition, whether a proposed transaction will lead to a change in the nature of a listed entity's main undertaking is an important consideration in ASX's decision as to whether it ought to exercise its discretion under Listing Rule 11.1.2 to require security holder approval.[12]

This reflects the fact that security holders in an entity which has a clearly identifiable main undertaking will often have made their decision to invest in the entity having regard to the nature of its main undertaking and their assessment of its value. A proposed transaction that will lead to a significant change in the nature of its main undertaking is therefore a highly material one that, at the very least, ought to be notified to security holders as soon as practicable. In some cases, mentioned below, it may also be appropriate for the transaction to be subject to the approval of security holders.

[10] A back door listing that does result in a significant change to the nature of a listed entity's main undertaking raises similar sorts of policy considerations to a disposal by an entity of its main undertaking and, by analogy with Listing Rule 11.2, therefore warrants security holder approval.

[11] That is, cases (2), (3) or (4) mentioned under '3.2 The main circumstances in which ASX will apply Listing Rules 11.1.2 and 11.1.3' on page 15.

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[12] As mentioned above, it is also not uncommon for a back door listing to involve a significant change to the nature of a listed entity's main undertaking and, where it does, ASX will generally impose a requirement under Listing Rule 11.1.2 that the back door listing transaction is approved by security holders. However, ASX will generally exercise its discretion to require security holder approval to a back door listing even where it does not involve a significant change to the nature of a listed entity's main undertaking.

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1.3 The meaning of "main undertaking"

While Listing Rule 19.12 defines the expression "undertaking" to include both assets and businesses, the addition of the descriptor "main" carries with it a particular connotation. ASX considers the term "main undertaking" means something different to, and is to be distinguished from, "main asset" or "main investment" and is essentially synonymous with "main business activity".[13]

In many cases, identifying an entity's main undertaking will be relatively straightforward. If an entity only conducts one business, as many smaller entities do, then plainly that business will be its main undertaking. Similarly, if an entity conducts a number of businesses but one business so obviously and significantly outweighs all of the others that it is clearly identifiable as its main business, then that business will be its main undertaking.

In the case of a conglomerate entity that conducts a number of different businesses, it is quite possible that no one of its businesses will be separately identifiable as its main business. In that case, the main undertaking of the entity will effectively be conducting conglomerate businesses.

ASX generally applies a 50% "rule of thumb" in assessing whether a business constitutes the main undertaking of a listed entity. If a business accounts for less than 50% of a listed entity's:

- consolidated total assets;
- consolidated annual revenue or, in the case of a mining exploration entity, oil and gas exploration entity or other entity that is not earning material revenue from operations, consolidated annual expenditure; and
- consolidated annual profit before tax and extraordinary items,

then ASX considers that to be reasonably compelling evidence that the business is not the entity's main undertaking. If a business accounts for more than 50% of all three of the above measures, then ASX considers that to be reasonably compelling evidence that the business is its main undertaking. If a business accounts for more than 50% of one or two of these measures but not the other(s), then ASX will examine the situation more closely to determine whether or not the business should be regarded as the entity's main undertaking.

In applying this rule of thumb, it is important to ensure that the rule is being applied to the main undertaking itself rather than to a component part of the main undertaking. The fact that the component parts of an entity's main undertaking may be conducted by different child entities or divisions or in different jurisdictions, or may be treated as different segments for the purposes of preparing its financial statements,[14] does not make them different undertakings for these purposes. An entity can dispose of part of its main undertaking (for example, by disposing of a particular child entity or division or its business activities in a particular jurisdiction), including a part that accounts for more than 50% of all three of the above measures, without that constituting a disposal of its main undertaking. This point is elaborated further in the discussion below of how ASX treats partial disposals of an entity's main undertaking under Listing Rule 11.2.

2. Listing Rules 11.1 and 11.1.1: notification of significant transactions

2.1 The policy objectives of the notification requirement

The notification requirements in the introductory words to Listing Rule 11.1 and in Listing Rule 11.1.1 seek to ensure that ASX is made aware of, and given sufficient information about, a proposed transaction that may result in a significant change to the nature or scale of a listed entity's activities so that it can give proper consideration to:

[13] This position is consistent with judicial authority: see *ASC v Cracow Resources Ltd*, unreported, NSW Supreme Court, Windeyer J, 12 August 1993 BC9305041.

[14] It depends on the basis for segmentation. Sometimes, for example, segmentation may occur by reference to different regions or different divisions without regard to the nature of the business activities in question.

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- whether the transaction involves a back door listing in respect of which it should exercise its discretion under Listing Rules 11.1.2 and 11.1.3 to require security holder approval and re-compliance with ASX's admission and quotation requirements;

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- whether the transaction raises other concerns that warrant ASX exercising its discretion under Listing Rules 11.1.2 and/or 11.1.3 in relation to the transaction; and
- in the case of a disposal, whether Listing Rule 11.2 applies to the transaction,

in each case before the transaction is consummated.

2.2 The meaning of "activities"

Given the context in which it is used, the reference to "activities" in Listing Rule 11.1 clearly is intended to mean the business activities of a listed entity. Changes to an entity's non-business activities (such as its community activities) are not relevant for the purposes of Listing Rule 11.1.

A listed entity's activities need to be looked at in their totality to determine whether a proposed transaction will involve a significant change to the nature or scale of those activities. For example, where a listed entity conducts business operations through child entities, the entire group needs to be looked at on a consolidated basis to make this determination.

2.3 What constitutes a significant change in the nature of an entity's activities?

One of the two grounds on which a proposed transaction has to be notified to ASX under Listing Rule 11.1 is if it will involve a significant change to the *nature* of an entity's activities. ASX considers this to mean a major change in the character of an entity's business activities. In the case of an entity that has a clearly identifiable main undertaking, this requires there to be a major change in the character of its main undertaking. In the case of a conglomerate entity that conducts a number of different businesses, no one of which is separately identifiable as its main undertaking, this requires there to be a major change to the conglomerate character of its business activities.

To illustrate, at one end of the spectrum, ASX would regard the following examples as a significant change to the nature of an entity's activities:

- an entity whose main business activity is mining exploration deciding to switch its main business activity to manufacturing consumer goods (or vice versa);
- an entity whose main business activity is exploring for minerals deciding to switch its main business activity to exploring for oil and gas (or vice versa);[15]
- an entity whose main business activity is trading in financial products deciding to switch its main business activity to making strategic long term investments in a particular sector;
- a conglomerate entity that conducts a number of different businesses deciding to dispose of all of those businesses and to acquire a new business (its main undertaking changes from conducting conglomerate businesses to conducting the new business).

At the other end of the spectrum, ASX would not regard the following examples as a significant change to the nature of an entity's activities:[16]

- a manufacturing entity whose main business activity is manufacturing one type of consumer good reconfiguring its manufacturing facility to manufacture a different type of consumer good (its main undertaking is, and remains, manufacturing consumer goods);

[15] ASX considers that exploring for minerals is a fundamentally different business activity to exploring for oil and gas.

[16] Depending on the circumstances, some of these examples could involve a significant change to the scale (as distinct from the nature) of the entity's activities and therefore may need to be notified to ASX on that score under Listing Rule 11.1.

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- a mining exploration entity whose main business activity is exploring for one type of mineral on particular tenements deciding to explore for a different type of mineral on the same tenements (its main undertaking is, and remains, exploring for minerals on those tenements);
- a mining exploration entity that is successful in its exploration endeavours consequently becoming a mining producing entity (this is a natural extension of, rather than a major change to, its main business activity);
- an entity whose main business activity is trading in financial products and whose investment portfolio is invested wholly in equity products making a trading decision to sell all of those investments and to invest the proceeds in fixed interest products (its main undertaking is, and remains, trading in financial products);
- a conglomerate entity that conducts a number of different businesses deciding to dispose of some of those businesses or to acquire new businesses (its main undertaking is, and remains, conducting conglomerate businesses).

In between these two ends of the spectrum, ASX will examine the situation carefully and in its totality to determine whether what is proposed is a significant change to the nature of an entity's activities.[17]

2.4 What constitutes a significant change in the scale of an entity's activities?

The second of the two grounds on which a proposed transaction has to be notified to ASX under Listing Rule 11.1 is if it will involve a significant change to the *scale* of an entity's activities. ASX considers this to mean a substantial or sizeable change (upwards or downwards) to the size of an entity's business operations.

ASX notes that under former Australian accounting standards an amount which is equal to or greater than 10% of the applicable base amount has generally been presumed to be material unless there is evidence or convincing argument to the contrary.[18] The word "significant" has a different connotation to the word "material" and imports something substantially larger. This would suggest that for something to be significant it would need to involve a change of substantially more than 10%.

For clarity and ease of application by listed entities, ASX has adopted 25% as an appropriate benchmark for determining whether or not a transaction involves a significant change to the scale of an entity's activities that requires notification to ASX under Listing Rule 11.1. This is also helpful to ASX in ensuring that transactions of a certain size that might also lead to a significant change in the nature of an entity's activities are notified to ASX under Listing Rule 11.1.

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This 25% benchmark is solely for the purposes of giving clear and easily applied guidance to listed entities as to what transactions ought to be notified to ASX under Listing Rule 11.1. The fact that a transaction may result in a change of scale of that magnitude does not mean that ASX regards the transaction as one that would warrant the exercise of its discretion to require security holder approval under Listing Rule 11.1.2 or to require re-compliance with ASX's admission and quotation requirements under Listing Rule 11.1.3.

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2.5 Guidelines for notification of transactions

Applying the guidance above, ASX considers that the following transactions involve a significant change to the nature or scale of an entity's activities and therefore ought to be notified to ASX under Listing Rule 11.1:

[17] In making this determination, ASX may have regard to whether the transaction is likely to lead to a change in the industry or sub-industry group into which the entity has been classified under Standard & Poor's Global Industry Classification Standard.

[18] See paragraph 15 of Accounting Standard AASB 1031 *Materiality* (July 2004). This Standard was effectively withdrawn on 1 January 2014 as being "unnecessary local guidance on matters covered by IFRSs", although the Australian Accounting Standards Board did expressly note that "it would not expect the withdrawal to change practice regarding the application of materiality in financial reporting" (see Interim Accounting Standard AASB 1031 *Materiality* (December 2013)).

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- an entity is proposing to embark on a transaction,[19] or a series of transactions,[20] that will result in a change to the nature of its main undertaking;
- an entity is proposing to dispose of, or to embark on a series of disposals that together will result in a disposal of, its main undertaking;
- an entity is proposing:
  - to acquire a business and the acquisition is likely to result in an increase of 25% or more in; or
  - to dispose of or abandon an existing business, if the business in question accounts for 25% or more[21] of,

  any of the following measures:
  - consolidated total assets;
  - consolidated total equity interests;
  - consolidated annual revenue or, in the case of a mining exploration entity, oil and gas exploration entity or other entity that is not earning material revenue from operations, consolidated annual expenditure; or
  - consolidated annual profit before tax and extraordinary items.

These notification guidelines apply regardless of:

- the level at which the transaction is proposed to take place (that is, whether the transaction involves the listed entity itself or a child entity);
- the form the transaction is proposed to take (for example, whether it involves a direct acquisition or disposal of the business assets concerned or the acquisition or disposal of ownership interests in an entity that directly or indirectly owns the business assets concerned);
- the legal mechanism through which the transaction will be effected (for example, whether it is happening as part of a negotiated sale and purchase, takeover offer, scheme of arrangement or other legal mechanism); and
- the consideration received for the transaction.

2.6 Initial discussions with ASX ahead of notifying a transaction under Listing Rule 11.1

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ASX recommends that listed entities which are contemplating a transaction that will lead to a significant change to the nature or scale of their activities discuss[22] the matter with ASX Listings Compliance at the earliest opportunity, given the potential complexities involved.

ASX Listings Compliance will be able to provide general advice on the application of Listing Rules 11.1-11.3 and a preliminary view on the likelihood of ASX exercising its discretion under Listing Rules 11.1.2 or 11.1.3 in relation to

[19] This applies whether the transaction involves an acquisition or a disposal.

[20] This applies whether the series of transactions involve acquisitions, disposals or a mixture of acquisitions and disposals and regardless of the size of each individual transaction in the series.

[21] An entity should generally use its most recent published financial statements as the reference point for these particular measures to determine whether any of the specified 25% thresholds will be exceeded.

[22] Before having these discussions, it would be helpful for the entity and its advisers to familiarise themselves with this Guidance Note and Guidance Note 1 *Applying for Admission – ASX Listings*.

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the transaction or, in the case of a disposal, of ASX taking the view that the transaction requires security holder approval under Listing Rule 11.2.

Where there is a likelihood of ASX exercising its discretion under Listing Rule 11.1.3, ASX Listings Compliance will also be able to provide preliminary advice on:

- the steps involved in re-complying with the Chapters 1 and 2;
- the potential application of escrow conditions[23] and the "20 cent rule"[24] in relation to any securities that are proposed to be issued, or other consideration that is proposed to be paid, as part of the transaction; and
- the expected timeframe for re-compliance, given its current workloads and the nature and complexity of the transaction.[25]

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In any discussions involving re-compliance under Listing Rule 11.1.3, the entity should bring to the attention of ASX Listings Compliance:

- any unusual features of the entity's proposed structure and operations that could raise issues under Listing Rule 1.1 condition 1 (an entity's structure and operations must be appropriate for a listed entity);[26]
- any unusual terms applying to its securities that could raise issues under Listing Rule 6.1 (the terms that apply to each class of an entity's securities must, in ASX's opinion, be appropriate and equitable);
- if the entity is proposing to have "performance shares", the proposed milestones for those shares;[27]
- any doubts or queries the applicant may have about how ASX is likely to apply Chapter 9 and Appendix 9B of the Listing Rules in relation to any "restricted securities";[28]
- any unusual waivers from, or rulings in respect of, the Listing Rules that the entity may be proposing to request in conjunction with its re-admission;
- any issues the entity may have in providing 3 full years of audited accounts with its admission application;[29]
- any circumstances that could give rise to concerns that a director or proposed director of the entity may not meet ASX's good fame and character requirements;[30] and
- any other circumstances that could lead to ASX exercising its discretion not to re-admit an entity to the official list.[31]

The applicant should provide to ASX Listings Compliance all material information in its possession relevant to the matter being discussed so that the discussions are informed and meaningful.

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[23] Listing Rule 1.1 conditions 9 and 10, Chapter 9 and Appendices 9A and 9B. See also '8.7 Escrow requirements for restricted securities' on page 38.

[24] Listing Rule 2.1 condition 2. See also '8.8 The 20 cent rule' on page 39.

[25] Where the transaction involves the entity changing its name and seeking to have a new trading code, ASX Listings Compliance will also be able to provide information about available ASX trading codes and arrange the reservation of a suitable code for the entity. On the reservation of trading codes, see Guidance Note 18 *Market Codes and Status Notes*.

[26] See section 3.1 of Guidance Note 1 *Applying for Admission – ASX Listings*.

[27] See Guidance Note 19 *Performance Shares*.

[28] See section 3.10 of Guidance Note 1 *Applying for Admission – ASX Listings* and '8.7 Escrow requirements for restricted securities' on page 38 below.

[29] See section 3.9 of Guidance Note 1 *Applying for Admission – ASX Listings*.

[30] See section 3.18 of Guidance Note 1 *Applying for Admission – ASX Listings* and '8.10 Directors must be of good fame and character on page 42 below.

[31] See section 2.8 of Guidance Note 1 *Applying for Admission – ASX Listings* and '8.1 The steps involved in re-compliance with ASX's admission and quotation requirements' on page 31 below.

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An entity that chooses not to have discussions with ASX ahead of announcing a transaction under Listing Rule 11.1 should note that there is a substantially higher likelihood of ASX suspending trading in its securities while any issues with its announcement are resolved to ASX's satisfaction than is the case for entities that choose to discuss the transaction with ASX before announcing it.

2.7 Seeking in-principle advice from ASX ahead of notifying a transaction under Listing Rule 11.1

In the discussions mentioned in the previous section, ASX Listings Compliance may suggest to the applicant that it seek in-principle advice[32] from ASX about the application of Listing Rules 11.1.2, 11.1.3 or 11.2 to a proposed transaction or about any of the other issues mentioned in that section. Alternatively, an entity may choose to apply for such advice of its own volition.

By obtaining in-principle advice from ASX, the entity can have a high degree of certainty about ASX's position and can reflect that position in the contractual documentation for the transaction and in any announcement it makes of its intention to proceed with the transaction.

An application for in-principle advice should be in writing, addressed to the entity's home branch and clearly marked "Not for public release".[33] The application should include any submissions that the entity may wish to make on whether or not ASX should exercise its discretion under Listing Rules 11.1.2 and/or 11.1.3 in relation to the transaction and, where relevant, whether or not the transaction involves a disposal of the entity's main undertaking to which Listing Rule 11.2 applies.

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An application for in-principle advice should include detailed information about the proposed transaction, including all of the information mentioned below that ASX would be expect to be included in the announcement of the transaction to the market under Listing Rule 11.1.[34]

Guidance Note 17 *Waivers and In-Principle Advice* has further guidance on how to apply for in-principle advice.

2.8 The form and contents of a notification under Listing Rule 11.1

A notification under Listing Rule 11.1 must be in writing[35] and given to the ASX Market Announcements office for release to the market.[36] The notification should include all material information about the proposed transaction, including:

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- the parties to, and material terms of, the transaction;
- information about the likely effect of the transaction on the entity's total assets, total equity interests, annual revenue (or, in the case of a mining exploration entity, oil and gas exploration entity or other entity that is not earning material revenue from operations, annual expenditure) and annual profit before tax and extraordinary items;[37]
- if the entity is proposing to issue securities as part of, or in conjunction with, the transaction, detailed information about the issue, including its effect on the total issued capital of the entity and the purposes for which any funds raised by the issue will be used;

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[32] An in-principle advice is a non-binding expression of ASX's intent based on the facts known at the time. It may be given subject to conditions and will usually be expressed to apply for a limited time only.

[33] Listing Rule 15.6.

[34] See '2.8 The form and contents of a notification under Listing Rule 11.1' below.

[35] Listing Rule 19.10.

[36] Listing Rule 15.2.1.

[37] An entity may choose to provide this information by way of comparison to those measures as at the end of, or for, the previous reporting period (as applicable). If the entity has only been admitted to the official list for a short period and has not yet filed financial statements with ASX pursuant to Chapter 4 of the Listing Rules, the comparison should be made to the pro forma financial information included in the prospectus, PDS or information memorandum provided to ASX in connection with the entity's admission pursuant to Listing Rule 1.1 condition 3. If the entity has filed financial statements with ASX pursuant to Chapter 4 of the Listing Rules but they are for a period of less than a full financial year, the comparison should be made to annualised revenue, expenditure and profit.

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- if there are any changes to the board or senior management proposed as part of, or in conjunction with, the transaction, details of those changes; and
- the timetable for implementing the transaction.

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If the transaction is one of a series of proposed transactions, detailed information should be given about all of the proposed transactions, including their cumulative effect on the measures mentioned in the second bullet point above.

If at the time of announcing a transaction under Listing Rule 11.1 the entity is aware that:

- the approval of security holders will be required – whether under Listing Rule 11.1.2[38] or 11.2[39] or for some other reason[40] – the announcement should state that fact and outline the process and timetable for seeking that approval; and/or
- the entity will be required to re-comply with the requirements for admission and quotation under Listing Rule 11.1.3,[41] the announcement should state that fact and include information about the process and timetable for meeting those requirements. The announcement should also specifically state that the entity's securities will be suspended from trading from the date of the announcement until those requirements have been met or are no longer applicable.[42]

If at the time of announcing a transaction under Listing Rule 11.1 an entity is unsure whether the approval of security holders will be required under Listing Rule 11.1.2 or 11.2, or whether the entity will be required to re-comply with the requirements for admission and quotation under Listing Rule 11.1.3, it should state that fact in its announcement and mention that it is applying to ASX for a determination on the matter.[43] If its securities are not already in a trading halt, the announcement should be accompanied by a written request to ASX for its securities to be to be placed into a trading halt, effective immediately and to last until an announcement is made to the market of ASX's determination.[44]

After ASX makes its determination in respect of the application, ASX will expect the entity promptly to make a further announcement to the market about the determination and, where ASX determines that:

[38] Because, for example, the entity has been told in initial discussions with ASX, or received in-principle advice from ASX, that ASX will exercise its discretion to require security holder approval under Listing Rule 11.1.2.

[39] Because, for example, the entity has been told in initial discussions with ASX, or received in-principle advice from ASX, that ASX considers the transaction to be a disposal of its main undertaking requiring security holder approval under Listing Rule 11.2 or the entity acknowledges that this is the case and it intends to seek security holder approval without approaching ASX for a formal determination on the matter.

[40] For example, because:

- the proposed transaction will take a form (such as a scheme of arrangement or reduction of capital) that requires security holder approval under the Corporations Act;
- the proposed transaction requires approval under another Listing Rule (such as Listing Rule 7.1, 10.1 or 10.11); or
- the entity, for its own reasons, is intending to submit the proposed transaction to security holders for approval even though it may not be legally required (for example, because it considers that an appropriate step to take as a matter of good corporate governance).

[41] Because, for example, the entity has been told in initial discussions with ASX, or received in-principle advice from ASX, that ASX will exercise its discretion to require the entity to re-comply with the requirements for admission and quotation under Listing Rule 11.1.3.

[42] See '5.4 ASX's approach to situations requiring re-compliance' on page 23.

[43] The entity should make a written application to ASX for a determination on whether Listing Rules 11.1.2, 11.1.3 and/or 11.2 apply at the same time as, or as soon as practicable after, its announcement. The application should be addressed to the entity's home branch and clearly marked "Not for public release" (Listing Rule 15.6). It should include any submissions that the entity may wish to make on the issues.

[44] Guidance Note 16 *Trading Halts and Voluntary Suspensions* has guidance on how to apply for a trading halt.

Note that a trading halt can last for a maximum of 2 trading days. If ASX is not able to make a determination on the entity's application within that period, the entity may need to apply for a voluntary suspension to operate from the end of the trading halt until ASX has made a decision on the application and the decision has been announced to the market.

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- the approval of security holders is required under Listing Rule 11.1.2 or 11.2, about the process and timetable for seeking that approval; and/or
- the entity must re-comply with the requirements for admission and quotation under Listing Rule 11.1.3, about the process and timetable for meeting those requirements. The announcement again should specifically state that the entity's securities will be suspended from trading until those requirements have been met or are no longer applicable.[45]

If an entity announces a transaction under Listing Rule 11.1 and its announcement does not address the application or possible application of Listing Rules 11.1.2, 11.1.3 and 11.2, ASX may suspend trading in its securities until that issue has been resolved.[46]

2.9 The timing of a notification under Listing Rule 11.1

Listing Rule 11.1 requires the notification under that rule to be given "as soon as practicable". ASX interprets this phrase as meaning "as soon as reasonably practicable after the entity commits to proceeding with the proposal".

In the case of unilateral action by the entity (such as a decision to call for tenders to purchase the entity's main undertaking), this will usually happen at the point when the board of directors of the entity[47] formally approves the proposed action and resolves to proceed with it. In the case of a transaction between the entity and another party or parties (such as a transaction to facilitate a back door listing), this will usually happen at the point when the transaction agreements have been signed with the relevant party or parties.

The obligation of a listed entity to notify ASX of a significant change to the nature or scale of its activities is separate to, but operates in tandem with, its continuous disclosure obligations under Listing Rule 3.1.

A proposal to make a significant change to the nature or scale of a listed entity's activities will usually require notification to ASX under Listing Rule 3.1, as well as under Listing Rule 11.1. In many cases, these disclosure requirements will arise at the same time – that is, once there is a firm proposal that is no longer incomplete or subject to negotiation.[49] For that reason, the announcement an entity makes about a market-sensitive proposal to make a significant change to the nature or scale of its activities under Listing Rule 3.1, and the formal notification it gives to ASX about that proposal under Listing Rule 11.1, will often be one and the same.

It should be noted, however, that information about a proposed transaction may need to be disclosed to ASX at an earlier point under Listing Rule 3.1 than is required under Listing Rule 11.1 if it ceases to be confidential.[56] It may also be required to be disclosed at an earlier point under Listing Rule 3.1B than is required under either Listing Rule 3.1 or 11.1 if ASX considers that there is a need for information about the proposal to be disclosed to prevent or correct a false market in the entity's securities.

2.10 Requests for further information

ASX may request an entity to provide further information about a proposed transaction that has been notified to ASX under Listing Rule 11.1.[62] Depending on the nature of the information requested, ASX may or may not require that information to be released to the market. ASX's request for the information will make it clear whether ASX is intending to release, or reserves the right to release, the information to the market so that the entity will have the opportunity to respond in a suitable form.[63]

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45 Again, see '5.4 ASX's approach to situations requiring re-compliance' on page 23.

46 Under Listing Rule 11.3 or 17.3.

47 In the case of a listed trust, references to the board of directors of the listed entity should be read as references to the board of directors of the responsible entity of the trust.

49 See generally Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1-3.1B.*

56 This is by virtue of Listing Rule 3.1A.2 ceasing to apply once the information is no longer confidential.

62 Listing Rule 11.1.1.

63 Listing Rule 18.7A.

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ASX recommends that listed entities which are contemplating a transaction that will lead to a significant change to the nature or scale of their activities discuss the matter with ASX Listings Compliance at the earliest opportunity, given the potential complexities involved. ASX Listings Compliance will be able to provide general advice on the application of Listing Rules 11.1-11.3 and a preliminary view on:¶
the likelihood of ASX exercising its discretion under Listing Rules 11.1.2 or 11.1.3 in relation to, or applying Listing Rule 11.2 to, the transaction;¶
where applicable, what steps the entity will need to take to re-comply with the admission requirements under Listing Rule 11.1.3; and¶
the potential application of escrow conditions[50] and the "20 cent rule"[51] in relation to any securities that are proposed to be issued, or other consideration that is proposed to be paid, as part of the transaction.¶
Form and timing of notification¶

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Listing Rule 11.1 requires the notification to be given "as soon as practicable".

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If ASX becomes aware of an actual or proposed transaction that has not been formally notified to it under Listing Rule 11.1 which ASX considers may involve a significant change to the nature or scale of a listed entity's activities, ASX may require the entity to provide it with information about the transaction to enable ASX to be satisfied that the entity has complied with its obligations under the Listing Rules.[64]

3. Listing Rules 11.1.2 and 11.1.3: ASX's discretionary powers

3.1 The policy objectives of Listing Rules 11.1.2 and 11.1.3

Listing Rule 11.1.2 confers on ASX the discretion[65] to require a significant change to the nature or scale of a listed entity's activities to be approved by the holders of its ordinary securities. As mentioned previously, the rule was primarily designed to allow ASX to regulate "back door listings". While ASX can exercise its discretion in other circumstances, it is generally reluctant to do so, unless there are clear and compelling reasons to justify that course of action. This reflects the following considerations:

- The Corporations Act and the Listing Rules already specify an extensive range of transactions that are deemed to be so significant that they warrant the approval of security holders. In the case of the Corporations Act, these include name changes, changes to company type, constitutional changes, alteration of class rights; schemes of arrangement, reductions of capital, a voluntary winding up, capital reconstructions, most buybacks, the giving of some financial assistance in relation to an acquisition of shares, some acquisitions and partial takeovers, some retirement benefits and some related party transactions.[66] To this catalogue, the Listing Rules add a disposal of a main undertaking, various transactions with persons in a position of influence, some security issues and some option reconstructions.[67]

- Under the Corporations Act and the constitution of most listed entities,[68] the directors are charged with the responsibility and the authority to manage the business of the entity and to make decisions on its behalf on all matters other than those that are specifically reserved to security holders under the Act, the Listing Rules or its constitution.[69]

- Given that responsibility and authority, most listed entity security holders would expect their directors to be proactively managing the entity's portfolio of businesses including, where appropriate, expanding or culling that portfolio, in the interests of the entity and its security holders.

- The imposition of a requirement that a commercial transaction otherwise within the authority of the directors must be submitted to security holders for approval will invariably introduce additional transaction costs, as well as delays and uncertainties that add risk to the transaction. In some cases, it could even threaten the transaction's viability or success. These added costs and risks could well be contrary to the interests of the entity and its security holders.

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64 Listing Rule 18.7.

65 This is to be compared and contrasted with Listing Rule 11.2, which requires a disposal by a listed entity of its main undertaking, in all cases, to be subject to security holder approval.

66 See respectively sections 157; 162; 136(2) and 601GC(1)(a); 246B(2); 411(4); 256B(1)(c); 491; 254H; 257B-257D; 260B; 611 (item 7) and 648D-648H; 200E; and 208 of the Corporations Act.

67 See respectively Listing Rules 11.2; 10.1, 10.11, 10.17 and 10.19; 7.1 and 7.1A; and 6.23.

68 In the case of listed companies, see the replaceable rule in section 198A of the Corporations Act, which invariably has its counterpart in the constitutions of most listed companies. *Strong v J Brough & Son (Strathfield) Pty Ltd* (1991) 5 ACSR 296 confirms that the inclusion of such a provision in a listed company's constitution would, in the absence of Listing Rule 11.2, empower its directors to dispose of its assets, including its main undertaking, without reference to security holders.

The directors of a listed company are, of course, accountable to its security holders through the board election process (Listing Rules 14.4 and 14.5) and, in the case of companies formed in Australia, through the capacity of security holders to remove a director under section 203D of the Corporations Act.

69 In the case of listed trusts, this authority and responsibility is effectively conferred on the directors of the responsible entity through section 601FB of the Corporations Act. The directors of the responsible entity are accountable to the security holders in the trust through the capacity of security holders to remove the responsible entity under section 601FM.

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Listing Rule 11.1.3 empowers ASX to require an entity that is proposing to make a significant change to the nature or scale of its activities to meet the requirements in Chapters 1 and 2 of the Listing Rules as if it were applying for admission to the official list. It is a discretion that ASX can exercise in an appropriate case:

- to ensure that the important controls and protections that are built into ASX's requirements for the admission of an entity to the official list and the quotation of its securities are not circumvented by parties seeking to undertake a back door listing;
- to ensure that security holders in a listed entity and the market generally receive sufficient information about a proposed significant change to the nature or scale of its activities for trading in its securities to occur on a reasonably informed basis (through the requirement for the entity to issue a fresh prospectus, PDS or information memorandum under Listing Rule 1.1 condition 3); and
- otherwise, to verify that an entity which is about to undergo a significant change to the nature or scale of its activities will continue to satisfy the requirements of:
  - Listing Rules 12.1 and 12.2, which oblige a listed entity to satisfy ASX on an ongoing basis that the level of its operations is sufficient, and its financial condition adequate, to warrant its continued listing and the continued quotation of its securities; and
  - Listing Rule 12.4, which obliges a listed entity to maintain a spread of security holdings in its main class which is sufficient to ensure there is an orderly and liquid market in those securities.

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3.2 The main circumstances in which ASX will apply Listing Rules 11.1.2 and 11.1.3

There are four main circumstances[70] in which ASX will usually exercise its discretion to require a significant change to the nature or scale of a listed entity's activities to be approved by the holders of its ordinary securities under Listing Rule 11.1.2:

(1) where the entity is proposing to be party to a transaction which, in ASX's opinion, is a back door listing of another undertaking (this applies whether the undertaking is of the same nature as, or a different nature to, its existing business activities);

(2) where the entity announces a significant transaction soon after its admission or re-admission to the official list or a recapitalisation[71] and the transaction is not consistent with the representations[72] about the nature and scale of its business in any prospectus, PDS or information memorandum it lodged in connection with its admission, readmission or recapitalisation (again, this applies whether the transaction involves a business of the same nature as, or a different nature to, its existing business activities);[73]

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[70] This is not to say that these are the only circumstances in which ASX will exercise its discretions under Listing Rules 11.1.2 and 11.1.3 – simply that these are the main circumstances that arise in practice where ASX will usually do so. ASX reserves the right, where it considers that there are clear and compelling reasons to do so, to exercise its discretion under Listing Rules 11.1.2 and 11.1.3 to require that a significant change to the nature or scale of a listed entity's activities is approved by security holders and/or that the entity re-comply with ASX's admission and quotation requirements.

[71] A "recapitalisation" refers to an entity undertaking a significant capital raising for the purposes of funding its existing main business activity. It therefore is not a transaction that falls within case (3) or (4) mentioned in the text. Often an entity undertaking a recapitalisation will have undergone a deed of company arrangement or a creditors' scheme of arrangement or otherwise substantially dissipated its working capital and will be undertaking the capital raising to save or resurrect its existing main business activity.

[72] This includes being inconsistent with the business objectives of the entity or proposed use of funds disclosed in its listing prospectus, PDS or information memorandum or with the commitments the entity has disclosed to ASX for the purposes of Listing Rule 1.3.2(b).

[73] ASX has exercised this power where a listed entity has announced a major acquisition shortly after its admission or re-admission to the official list that plainly was being negotiated at the time of its admission/re-admission but was not disclosed in the prospectus, PDS or information memorandum lodged with ASX under Listing Rule 1.1 condition 3. ASX has also exercised this power where an entity has entered into a share buyback with a controlling shareholder shortly after its admission that had the effect of replacing the equity capital the shareholder had subscribed for in the entity's initial public offering with a materially smaller secured loan.

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(3) where the entity is proposing to acquire a business, or to make a series of acquisitions of businesses,[74] that will result in a major change to the nature of its main undertaking;[75] or

(4) where the entity has previously disposed of or abandoned its main undertaking and it is proposing to acquire a business, or to make a series of acquisitions of businesses,[76] that will become its new main undertaking (this applies whether its new main undertaking is of the same nature as, or a different nature to, its former main undertaking).

In cases (1) and (2) above, ASX will also invariably exercise its discretion under Listing Rule 11.1.3 to require the entity to re-comply with ASX's admission and quotation requirements.

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In cases (3) and (4) above, ASX will also usually exercise its discretion under Listing Rule 11.1.3 to require the entity to re-comply with ASX's admission and quotation requirements unless ASX is satisfied that:

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- the entity unequivocally meets, and after the transaction will continue to meet, Listing Rules 12.1, 12.2 and 12.4; and
- security holders in the entity and the market generally have received (either through the announcement lodged under Listing Rule 11.1 or through the notice of meeting sent to security holders in connection with a resolution to approve the transaction under Listing Rule 11.1.2) sufficient information about the proposed change for trading in its securities to be occurring on a reasonably informed basis.

The reasons for imposing these requirements in case (1) are explained under '1.1 Back door listings' on page 4.

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Case (2) raises concerns about the veracity of the disclosures the entity made in connection with its admission or re-admission to the official list or its recapitalisation, which ASX considers justify the imposition of these requirements.

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Cases (3) and (4) raise similar policy considerations to the disposal of an entity's main undertaking and, by analogy with Listing Rule 11.2, warrant security holder approval even where they do not involve a back door listing. They may also warrant re-compliance with ASX's admission and quotation requirements in the circumstances outlined above.

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In relation to case (1) above, ASX will carefully examine any proposed transaction notified to it under Listing Rule 11.1 that involves a listed entity acquiring a business from, or merging or amalgamating with, a non-ASX listed entity which is likely to result in a doubling (or more) of any of the following measures for the listed entity:

- consolidated total assets;
- consolidated total equity interests;
- consolidated annual revenue or, in the case of a mining exploration entity, oil and gas exploration entity or other entity that is not earning material revenue from operations, consolidated annual expenditure;
- consolidated annual profit before tax and extraordinary items; or
- total securities on issue (on a fully diluted basis),

to determine whether, in ASX's opinion, it exhibits the hallmarks of a back door listing to which ASX ought to apply its discretions to require security holder approval and re-compliance with ASX's admission and quotation requirements. A transaction that does not result in a doubling (or more) of any of the above measures will not be regarded by ASX as a back door listing.

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[74] This applies regardless of the size of each individual acquisition.

[75] This change in the nature of the entity's main undertaking may arise because, at the same time as proposing to acquire the new undertaking, the entity is also proposing to dispose of some or all of its existing undertaking. Alternatively, it may arise because the new undertaking being acquired dwarfs its existing undertaking.

[76] Again, this applies regardless of the size of each individual acquisition.

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ASX will usually use the entity's most recent published financial statements or, in the case of securities on issue, its Appendix 3B filings with ASX as the reference point for these particular measures to determine whether the "doubling up" threshold will be exceeded. If an entity has more up to date information about these financial measures, it is free to provide that information to ASX with its notification about the transaction under Listing Rule 11.1.

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Again, this "doubling up" benchmark is solely for the purposes of giving clear guidance to listed entities as to what transactions ASX considers clearly are not back door listings and what transactions ASX will examine more closely to determine whether or not they involve a back door listing. The fact that a transaction may result in a doubling (or more) of any of the above measures does not necessarily mean that ASX will regard the transaction as a back door listing.

In cases (3) and (4) above, where the proposed change involves a series of acquisitions of businesses, the individual acquisitions do not have to be inter-related or cross-conditional. It is sufficient that they happen in reasonable proximity to each other and are part of a concerted plan that, if successful, will result in a change to the nature of the entity's main undertaking (in case (3)) or in it having a new main undertaking (in case (4)). Where a listed entity proposes to embark upon such a plan, it should include that information in the notice it gives under Listing Rule 11.1 in relation to the first transaction in the series so that ASX can apply the requirement for shareholder approval before it embarks upon any of the planned transactions.

Occasionally, an entity may move into a new business activity without initially planning to change the nature of its main undertaking but, by virtue of making a series of acquisitions of similar businesses over time, that activity evolves to become its main undertaking. ASX will not generally exercise its discretion under Listing Rule 11.1.2 to require security holder approval to changes in the nature of an entity's main undertaking that do not involve a back door listing[77] and that evolve gradually over time, where security holders have a reasonable opportunity to assess the cumulative effect of those changes. ASX will generally treat 24 months (two full accounting cycles) as a reasonable period for these purposes. However, if within a 24 month period, an entity has made one or more acquisitions without security holder approval under Listing Rule 11.1.2 and is proposing to make a further acquisition that will have the result that its main undertaking is something different in nature to what it was at the commencement of that period, ASX will generally treat the proposed transaction as falling within case (3) above and require security holder approval to the proposed transaction.

It will be noted that each of cases (1)–(4) above involves an acquisition of some sort. With one exception, ASX would rarely, if ever, exercise its discretion under Listing Rule 11.1.2 to require security holder approval to a disposal by an entity of something less than its main undertaking.[78] The one exception is where there is a difference of opinion between ASX and a listed entity as to whether a disposal or series of disposals involves its main undertaking and therefore requires security holder approval under Listing Rule 11.2. In that case, ASX may resolve that difference by exercising its power under Listing Rule 11.1.2 to require the disposal or series of disposals to be subject to security holder approval, regardless of whether Listing Rule 11.2 technically applies.

3.3 The effect of ASX exercising its discretion under Listing Rule 11.1.2 and/or 11.1.3

Where ASX exercises its discretion under Listing Rule 11.1.2 to require security holder approval to a significant change to the nature or scale of a listed entity's activities, or under Listing Rule 11.1.3 to require an entity to re-comply with ASX's admission and quotation requirements, the proposed transaction must not be consummated until ASX's requirements have been met. This includes any security issue that is proposed as part of, or in conjunction with, the proposed transaction.

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[77] If an entity is proposing to be party to a transaction which, in ASX's opinion, is a back door listing of another undertaking, ASX will require security holder approval and re-compliance with ASX's admission and quotation requirements regardless of any prior acquisitions of similar undertakings that the entity may have made, whether in the preceding 24 months or otherwise.

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[78] A disposal by a listed entity of its main undertaking requires security holder approval under Listing Rule 11.2 in any event and therefore does not require ASX to exercise its discretion under Listing Rule 11.1.2. A disposal by a listed entity of something less than its main undertaking does not raise the sorts of policy considerations that a disposal of its main undertaking raises.

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If an entity has taken, or is proposing to take, any steps towards consummating a transaction before ASX's requirements have been met, ASX may require the entity to unwind, or not to proceed with, those steps.[79]

Where an entity is required under Listing Rule 11.1.3 to re-comply with ASX's admission and quotation requirements and it is not able to do so, depending on the circumstances, one consequence could well be its removal from the official list.[80]

3.4 Pre-emptive capital raisings

Plainly, it would be inconsistent with the spirit and intent of the Listing Rules for a listed entity to raise capital (a "pre-emptive capital raising") to spend on a transaction[81] that requires security holder approval under Listing Rule 11.1.2 or re-compliance with ASX's admission and quotation requirements under Listing Rule 11.1.3, ahead of it having met those requirements. ASX will regard this as a serious breach of the Listing Rules and may take appropriate remedial action in relation to that breach. This may include ASX:

- directing the entity to unwind, or not to proceed with, the pre-emptive capital raising;[82]
- exercising its discretion not to quote any securities issued as part of the pre-emptive capital raising;[83]
- suspending the quotation of the entity's securities until the breach has been rectified;[84]
- where Listing Rule 11.1.3 applies, exercising its discretion not to re-admit the entity to the official list;[85] and
- terminating the entity's listing on ASX for breach of the Listing Rules.[86]

ASX will carefully examine any capital raising that occurs in the lead up to, or after, the announcement of a proposed transaction under Listing Rule 11.1 to determine whether it is in the nature of a pre-emptive capital raising.

ASX is alive to parties who seek to circumvent the constraints on pre-emptive capital raisings by issuing securities in an entity or undertaking that the listed entity is proposing to acquire or merge with, which then become securities in the listed entity when the acquisition or merger is consummated. ASX will also carefully examine any capital raising by such an entity or undertaking that occurs in the lead up to, or after, the announcement of a proposed transaction under Listing Rule 11.1 to determine whether it is in the nature of a pre-emptive capital raising.

ASX acknowledges that a listed entity which is short of working capital may need to issue securities to raise cash to cover the costs of getting a transaction to the stage of security holder approval under Listing Rule 11.1.2 and/or achieving re-compliance with ASX's admission and quotation requirements under Listing Rule 11.1.3,[87] plus its ongoing operating costs over that period. ASX will not regard such an issue as a pre-emptive capital raising,

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79 Listing Rule 18.8.

80 Listing Rule 17.12. Whether this occurs will depend on whether the entity is able to meet the requirements for the continued quotation of its securities and its continued listing under Listing Rules 12.1 (sufficient level of operations), 12.2 (adequate financial condition) and 12.4 (sufficient spread of shareholdings), given that it will not be able to pursue the transaction in relation to which Listing Rule 11.1.3 was applied. It will also depend on whether the entity is a long term suspended entity that was otherwise facing removal from the official list under ASX's policy in that regard set out in section 3.4 of Guidance Note 33 *Removal of Entities from the ASX Official List*.

81 Where the transaction which has triggered Listing Rules 11.1.2 or 11.1.3 involves the listed entity acquiring or merging with another entity or undertaking, this would include the listed entity lending some of the funds raised to that entity or undertaking ahead of receiving the requisite security holder approval or achieving re-compliance with ASX's admission and quotation requirements (as applicable).

82 Listing Rule 18.8.

83 Listing Rule 2.9.

84 Listing Rule 17.3.1.

85 Listing Rule 1.19.

86 Listing Rule 17.12.

87 Such as due diligence costs, advisory fees and the costs of convening and holding a meeting of security holders.

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provided the capital raised is not substantially more than is reasonably needed for these purposes[88] and the issue otherwise complies with the Listing Rules.[89] Where such an issue occurs by way of a pro rata offer or under a security purchase plan, ASX is unlikely to classify the securities concerned as restricted securities. Where the issue occurs by way of a placement, however, ASX will examine it carefully and if ASX forms the view that the cash raised is in the nature of seed capital for the transaction or that securities have been issued to a promoter of the transaction, ASX may classify the securities as restricted securities, making them subject to the escrow requirements in Chapter 9 and Appendices 9A and 9B of the Listing Rules.[90]

4. Listing Rule 11.2: disposal of an entity's main undertaking

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4.1 The policy objective of Listing Rule 11.2

The principle underlying Listing Rule 11.2 is that a disposal by a listed entity of its main undertaking is such a transformative transaction, and results in such a major change to the nature of the security holders' investment in the entity, that in all cases it is appropriate for security holders to have to approve it.

4.2 The application of Listing Rule 11.2

Listing Rule 11.2 only applies to a disposal of an entity's "main undertaking".[91]

If an entity is proposing to dispose of all, or substantially all, of its assets and businesses, ASX will regard that as a disposal of its main undertaking, regardless of the make-up of those assets and businesses.

If an entity is proposing to dispose of something less than all, or substantially all, of its assets and businesses, Listing Rule 11.2 will only apply if what is being disposed of constitutes its main undertaking.[92]

Accordingly, in the case of a listed entity that conducts a number of conglomerate businesses where no one of those businesses is identifiable as its "main business", Listing Rule 11.2 will only apply if the entity is proposing to dispose of all, or substantially all, of its businesses. It will not apply to a disposal of only one or some of its businesses, even in the latter case where the businesses being disposed of in aggregate account for more than 50% of its scale (referencing the 50% "rule of thumb" mentioned previously[93]).

In the case of a listed entity that conducts a business of trading in financial products,[94] its main undertaking is the business of trading in financial products, not the individual investments it holds. In such a case, Listing Rule 11.2 will only apply if the entity is proposing to dispose of its business of trading in financial products. It will not apply to a disposal of some or even all of its investments, provided that happens because of a trading decision to convert those investments to cash rather than a strategic decision to exit the trading business.

By necessary implication, Listing Rule 11.2 does not apply to an *in specie* distribution of an entity's main undertaking to the holders of its ordinary securities on a *pari passu* basis.[95]

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[88] Under Listing Rules 18.7 and 18.7A, ASX may require the entity to disclose to ASX and to the market how the entity intends to use any funds raised so as to satisfy ASX that the entity is not seeking to conduct a pre-emptive capital raising in breach of the spirit and intent of Listing Rules 11.1.2 and/or 11.1.3.

[89] Including Listing Rules 7.1, 7.1A and 10.11.

[90] See '8.7 Escrow requirements for restricted securities' on page 38.

[91] See the discussion above of the significance and meaning of an entity's main undertaking.

[92] Although, as noted previously, if there is a difference of opinion between ASX and a listed entity as to whether a disposal or series of disposals involves its main undertaking and therefore requires security holder approval under Listing Rule 11.2, ASX may resolve that difference by exercising its power under Listing Rule 11.1.2 to require the disposal or series of disposals to be subject to the security holder approval, regardless of whether Listing Rule 11.2 technically applies.

[93] See '1.3 The meaning of "main undertaking"' on page See '1.3 The meaning of "main undertaking"' on page 6.

[94] An entity conducting a business of trading in financial products is to be differentiated from an entity whose business consists of holding strategic investments in other entities. In the latter case, depending on the circumstances, it is possible that one of those strategic investments could amount to the main undertaking of the entity.

[95] *Quancorp Pty Ltd v MacDonald* [1999] WASCA 33.

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4.3 What constitutes a "disposal" of a main undertaking?

The term "dispose" is defined expansively in Listing Rule 19.12 to include not only direct disposals but also indirect disposals through another person. It also captures disposals effected by any means, include granting or exercising an option, using an asset as collateral, decreasing an economic interest and disposing of part of an asset.[96]

It is not necessary for an entity to dispose of all of the assets used in its main undertaking[97] for it to dispose of its main undertaking. If it disposes of the key assets needed to conduct its main undertaking and the commercial outcome is that it will no longer continue to conduct its main undertaking, ASX will regard that as a disposal of its main undertaking. For example, a mining exploration entity that disposes of all of its mining tenements will be regarded as having disposed of its main undertaking, even though it may retain some or all of its mining exploration equipment.

An entity can dispose of its main undertaking for the purposes of Listing Rule 11.2 through one transaction or through a series of transactions. In the latter case, the transactions do not have to be inter-related or cross-conditional. It is sufficient that they happen in reasonable proximity to each other and are part of a concerted plan that, if successful, will result in a disposal of the main undertaking.

4.4 Partial disposals of an entity's main undertaking

Where an entity is proposing to dispose of part only of its main undertaking, ASX will apply Listing Rule 11.2, as it is required to do under Listing Rule 19.2, looking beyond form to substance and in a way that best promotes the principles on which the Listing Rules are based. ASX will have regard to whether or not the disposal will cause a change in the nature of the entity's main undertaking. If the nature of the entity's main undertaking will remain the same after the disposal as it was before the disposal, the transaction will not be regarded as a disposal of its main undertaking. This applies regardless of the change in the scale of the business (that is, regardless of the proportion of the main business undertaking that is proposed to be disposed of). On the other hand, if the entity's main undertaking after the proposed disposal will be different in nature to what it was before the disposal, the transaction will be regarded as a disposal of its main undertaking.

The following examples illustrate the approach ASX is likely to take:

> ***Example 1:*** *entity A owns and operates shopping centres at 10 different locations. It does not have any other substantive business operations. It is in serious financial difficulty and is proposing to sell 8 of its shopping centres to raise funds to repay debt. It will continue to operate its remaining 2 shopping centres.*
>
> *This is not a disposal of A's main undertaking. A's main undertaking after the disposal (owning and operating shopping centres) is the same as its main undertaking before the disposal, even though the scale of its business will be much smaller as a result of the disposal and debt repayment.*
>
> ***Example 2:*** *entity B is a mining exploration entity that has succeeded in proving up ore reserves on one of its tenements and now wants to develop and operate a mine on the tenement. Rather than seek to raise capital to do this itself, it proposes to joint venture the development with an established mining entity and to dispose of a 75% undivided interest in the tenement to the other entity in return for the other entity providing capital and know-how to develop the mine.*
>
> *This is not a disposal of B's main undertaking. B's main undertaking after the disposal (mining production) is the same as its main undertaking before the disposal, albeit it will be conducting that undertaking as a 25% joint venturer rather than as a 100% owner.*
>
> ***Example 3:*** *entity C is a mining exploration entity and it has interests in three exploration tenements, each of which accounts for around a third of its value. It wants to get out of the mining exploration business altogether and do something else, however, the pre-emption arrangements in the joint venture agreement*

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[96] It also includes entering into an agreement to dispose.

[97] Indeed, it is quite common for an entity which disposes of a business to retain some of the assets (such as cash and receivables) used in, or generated by, that business.

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for one of the tenements effectively makes it uneconomical for it to dispose of that interest. It proposes to sell its interests in the other two tenements and invest the proceeds until it can identify a better use for them.

ASX is likely to treat this as a disposal of C's main undertaking, notwithstanding that it proposes to retain one of its mining tenements. C's main undertaking after the disposal (investment activities) is different from its main undertaking before the disposal (mining exploration).[98]

***Example 4:** entity D operates an airline business. It is proposing to re-engineer its balance sheet by entering into a sale and leaseback of its entire aircraft fleet.*

This is not a disposal of D's main undertaking as the sale and leaseback does not result in any change to the nature of its main undertaking (operating an airline).[99]

4.5 Agreement to dispose of main undertaking must be conditional on security holder approval

Listing Rule 11.2 provides that an entity must not enter into an agreement to dispose of its main undertaking unless the agreement is conditional on the entity getting security holder approval. This requirement effectively means that the disposal must not be consummated until security holder approval has been obtained.

If an entity is proposing to dispose of its main undertaking through a series of transactions, each of the agreements for those transactions must be conditional on the entity obtaining security holder approval.

If an entity has taken, or is proposing to take, any steps towards consummating a disposal of its main undertaking before security holder approval has been obtained, ASX may require the entity respectively to unwind, or not to proceed with, those steps under Listing Rule 18.8.

4.6 Disposals by a receiver, administrator or liquidator

ASX does not regard Listing Rule 11.2 as applying to a disposal of a listed company's main undertaking by a receiver acting on behalf of a secured creditor or creditors under a charge or other security instrument, or by an administrator or liquidator acting under their statutory powers, even though technically they may be acting as agent for and on behalf of the company.[100] A receiver, administrator or liquidator has a statutory power to dispose of the company's main undertaking that would override any requirement in the Listing Rules for the transaction to be approved by security holders.[101]

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However, Listing Rule 11.2 does apply to a disposal by a listed entity of its main undertaking as part of a plan to pay down debt or recapitalise its balance sheet, notwithstanding that the transaction may be instigated to avoid or cure a default under its financing agreements and hence to avoid the appointment of a receiver, administrator or liquidator.

4.7 Other Listing Rule issues

Depending on the circumstances, a disposal by a listed entity of its main undertaking can also raise issues under Listing Rules 12.1 and/or 12.2, which oblige a listed entity to satisfy ASX on an ongoing basis that the level of its

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[98] Listing Rule 12.3 may also apply to C once it is holding more than half of its assets in cash or in a form readily convertible to cash.

[99] See also the observations of Windeyer J in *ASC v Cracow Resources Ltd*, note 1313 above, that:

> *"For instance the main asset of a bus company may be its buses; but its undertaking is I consider the business operation of a bus company. If the directors determined for the purposes of the business of a bus company to sell all its buses and then to lease them back that would not I think amount to a disposal of its main undertaking; it would still be operating the same business."*

[100] Although it should be noted that Listing Rule 10.1 may apply to the disposal of the main undertaking of a listed entity by a receiver, administrator or liquidator if the disposal is to a party described in that rule.

[101] See section 420(2)(g) (receivers), 437A(1)(c) (administrators) and 477(2)(c) and 506(1)(b) (liquidators) of the Corporations Act. A similar analysis applies to a disposal by someone winding up a managed investment scheme under Part 5C.9 of the Corporations Act.

Also, in the case of an administrator disposing of a listed company's main undertaking under a deed of company arrangement, such an arrangement, when approved by the creditors of the company in the manner required under the Corporations Act, is binding on the company and its members, without the need for any separate approval by members (see section 444G of the Corporations Act).

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operations is sufficient, and its financial condition adequate, to warrant its continued listing and the continued quotation of its securities. It can also raise issues under Listing Rule 12.3, which provides:

> *If half or more of an entity's total assets is cash or in a form readily convertible to cash, ASX may suspend quotation of the entity's securities until it invests those assets or uses them for the entity's business. The entity must give holders of ordinary securities in writing details of the investment or use. This rule does not apply to the following:*
> - *a bank or a non-bank financial institution; or*
> - *a mining exploration entity or oil and gas exploration entity, unless ASX decides otherwise.*

Often, the disposal by a listed entity of its main undertaking will effectively convert it into a "cash box".

Sometimes, this may be a precursor to the listed entity being wound up, with any surplus cash remaining after the payment of creditors being distributed to security holders. In such a case, notwithstanding Listing Rule 12.3, ASX will, in the absence of any other reason to suspend the quotation of the entity's securities, generally continue the quotation of its securities for up to six months to allow it time to complete the formalities needed to commence its winding up.[102]

Other times, the disposal by a listed entity of its main undertaking may be a precursor to the entity embarking on a new business venture, either immediately or once a suitable business has been identified and acquired.[103] In such a case, notwithstanding Listing Rule 12.3, ASX will, in the absence of any other reason to suspend the quotation of the entity's securities, generally continue the quotation of its securities for up to six months to allow it time to identify, and make an announcement of its intention to acquire, a suitable new business.

If an entity is not able, in the former case to complete the formalities for its winding up, or in the latter case to make an announcement of its intention to acquire a new business, within six months of completing the disposal of its main undertaking, ASX will generally exercise its discretion under Listing Rules 12.3, 17.3.2 and/or 17.3.4 to suspend the quotation of its securities at the end of that six month period. The suspension will continue until the entity makes an announcement acceptable to ASX about its future activities.

5. Listing Rule 11.3: suspension of quotation

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5.1 The policy objectives of Listing Rule 11.3

Listing Rule 11.3 empowers ASX to suspend the quotation of an entity's securities until the entity has satisfied the requirements of Listing Rules 11.1 or 11.2. It is a discretion that ASX can exercise to secure compliance with the requirements of Listing Rules 11.1 or 11.2 and to ensure that the market is supplied with sufficient information about a proposed significant change to the nature or scale of a listed entity's activities for trading in its securities to be taking place on a reasonably informed basis.

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5.2 ASX's approach to announcements under Listing Rule 11.1

Generally, an announcement by a listed entity under Listing Rule 11.1 will be treated as a market sensitive announcement and its securities placed into a 10 minute trading halt under ASX Operating Rule 3301, to allow the market time to absorb and react to the information in the announcement.

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If ASX is not satisfied with the information in the announcement, it may suggest to the entity that it request a trading halt under Listing Rule 17.1 to enable a further announcement to be made to the market or else exercise its discretion under Listing Rules 11.3 and 17.3 to suspend trading in the entity's securities until the situation has been rectified. This may happen, in particular, where ASX considers that the transaction is one where it is likely to exercise its discretion to require security holder approval under Listing Rule 11.1.2 and/or re-compliance with ASX's

[102] Such as the making of a court order under section 459A, or the passage of a special resolution under section 491, of the Corporations Act. ASX will normally suspend trading in the entity's securities as soon as those formalities have been completed and the entity has been placed into winding up.

[103] As noted above, in such a case, ASX will generally exercise its discretion under Listing Rule 11.1.2 to require security holder approval to the acquisition of the new business. Depending on the circumstances, it may also exercise its discretion under Listing Rule 11.1.3 to require the entity to re-comply with the conditions for admission to the official list and quotation.

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admission and quotation requirements under Listing Rule 11.1.3 and the notice does not inform readers of the likelihood and consequences of that happening. It may also happen where ASX considers that the transaction involves a disposal of the entity's main undertaking and the notice does not inform readers of the requirement for security holder approval under Listing Rule 11.2.

5.3 ASX's approach to situations requiring security holder approval only

Where:

- ASX exercises its discretion under Listing Rule 11.1.2 to require security holder approval to a significant change to the nature or scale of an entity's activities but does not exercise its discretion under Listing Rule 11.1.3 to require the entity to re-comply with ASX's admission and quotation requirements; or
- in the case of a disposal, ASX forms the view that Listing Rule 11.2 requires security holder approval to a the transaction,

in the absence of any other reason to suspend the quotation of the entity's securities (see below), ASX will usually continue the quotation of its securities during the period from the announcement of the transaction up to the beginning of the trading day on which the meeting of security holders is due to be held to consider the resolution to approve the transaction. Thereafter, ASX will apply the following process:

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- The entity should request a trading halt under Listing Rule 17.1 to apply from the start of trading on the day of the security holders' meeting. If it does not, ASX will suspend trading in the entity's securities under Listing Rule 11.3 before trading starts on that day.
- The trading halt will end or the suspension will be lifted after the entity has made an announcement to the market confirming the result of the security holder vote and, as a consequence, that it will be, or will not be, proceeding with the transaction (as the case may be).

5.4 ASX's approach to situations requiring re-compliance

Where ASX exercises its discretion under Listing Rule 11.1.3 to require an entity to re-comply with ASX's admission and quotation requirements, ASX treats that as if it were a new listing application. To maintain parity with a new listing application, ASX considers it inappropriate for the entity's securities to be able to be traded on ASX ahead of the entity meeting ASX's requirements for admission and quotation. ASX will therefore suspend quotation of the entity's securities from the time it announces the transaction triggering the application of Listing Rule 11.1.3 until it meets ASX's requirements for admission and quotation or those requirements are no longer applicable.

Hence, if it is aware at the time of announcing a transaction under Listing Rule 11.1 that ASX will exercise its discretion under Listing Rule 11.1.3 to require the entity to re-comply with ASX's admission and quotation requirements,[104] the entity should, at the same time as making the announcement, request a voluntary suspension under Listing Rule 17.2[105] to operate from the time of the announcement until it meets ASX's requirements for admission and quotation or those requirements are no longer applicable. If it doesn't, ASX will suspend trading in the entity's securities under Listing Rules 11.3 and 17.3 as soon as it becomes aware of the announcement.[106]

As mentioned previously,[107] if at the time of announcing a transaction under Listing Rule 11.1 an entity is unsure whether entity will be required to re-comply with the requirements for admission and quotation under Listing Rule 11.1.3, it should state that fact in its announcement and mention that it is applying to ASX for a determination

[104] Because, for example, the entity has been told in initial discussions with ASX, or received in-principle advice from ASX, that ASX will exercise its discretion to require the entity to re-comply with the requirements for admission and quotation under Listing Rule 11.1.3.

[105] Guidance Note 16 *Trading Halts and Voluntary Suspensions* has guidance on how to apply for a voluntary suspension.

[106] The suspension will last until ASX decides to reinstate the entity's securities to quotation following its re-compliance with ASXs admission and quotation requirements or those requirements are no longer applicable.

[107] See '2.8 The form and contents of a notification under Listing Rule 11.1' on page 11.

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on the matter.[108] If its securities are not already in a trading halt, the announcement should be accompanied by a written request to ASX for its securities to be placed into a trading halt, effective immediately and to last until an announcement is made to the market of ASX's determination.[109] If the entity is not already in, and does not request, a trading halt, ASX will likely suspend trading in the entity's securities under Listing Rule 11.3 and/or 17.3 as soon as it becomes aware of the announcement and until it makes a determination on the issue.

Whether or not the entity is already in a trading halt, the entity should also request that if ASX makes a determination to exercise its discretion under Listing Rule 11.1.3 to require the entity to re-comply with ASX's admission and quotation requirements, ASX place the entity's securities into voluntary suspension under Listing Rule 17.2 from the time of that determination until those requirements are met or are no longer applicable. If it doesn't, ASX will generally suspend trading in the entity's securities under Listing Rule 11.3 and 17.3 as soon as it makes such a determination.[110]

Again, as mentioned previously,[111] if an entity announces a transaction under Listing Rule 11.1 and its announcement does not address the application or possible application of Listing Rule 11.1.3, ASX may suspend trading in its securities under Listing Rule 11.3 and/or 17.3 until that issue has been resolved.

5.5 Other circumstances in which ASX will exercise its discretion under Listing Rule 11.3

In addition to the circumstances outlined above, ASX may exercise its discretion to suspend trading in an entity's securities under Listing Rule 11.3 and/or 17.3 if it considers that:

- the security holders in the entity and the market generally have not received sufficient information about the proposed significant change to the nature or scale of its activities for trading in its securities to occur on a reasonably informed basis – in which case, ASX may impose a suspension until the entity rectifies the situation;
- the entity is in breach of Listing Rule 11.1 or 11.2 – in which case, ASX may impose a suspension until the entity remedies the breach; or
- the entity is taking an unreasonable time to comply with the requirements of Listing Rule 11.1 or 11.2 – in which ASX may impose a suspension until the entity completes all of the steps required to comply fully with the requirements of Listing Rules 11.1 and 11.2.

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6. Requirements for agreements

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6.1 Conditionality of agreements

As mentioned above, Listing Rule 11.2 provides that an entity must not enter into an agreement to dispose of its main undertaking unless the agreement is conditional on the entity obtaining security holder approval.

Unlike Listing Rule 11.2, there is no express requirement in Listing Rule 11.1 that an agreement relating to a transaction which will result in a significant change to the nature or scale of a listed entity's activities must be subject to the approval of its security holders or to the entity re-complying with ASX's admission and quotation

[108] The entity should make a written application to ASX for a determination on whether Listing Rules 11.1.2, 11.1.3 and/or 11.2 apply at the same time as, or as soon as practicable after, its announcement. The application should be addressed to the entity's home branch and clearly marked "Not for public release" (Listing Rule 15.6). It should include any submissions that the entity may wish to make on the issues.

[109] Guidance Note 16 *Trading Halts and Voluntary Suspensions* has guidance on how to apply for a trading halt.

Note that a trading halt can last for a maximum of 2 trading days. If ASX is not able to make a determination on the entity's application within that period, the entity may need to apply for a voluntary suspension to operate from the end of the trading halt until ASX has made a decision on the application and the decision has been announced to the market.

[110] Again, the suspension will last until ASX decides to reinstate the entity's securities to quotation following its re-compliance with ASXs admission and quotation requirements or those requirements are no longer applicable.

[111] See '2.8 The form and contents of a notification under Listing Rule 11.1' on page 11.

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requirements.[112] This is in keeping with the fact that Listing Rules 11.1.2 and 11.1.3 simply confer on ASX the discretion to impose these conditions, rather than mandate that all such changes must be subject to these conditions.

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Clearly, however, it would be prudent for a listed entity that is proposing to enter into an agreement for a transaction which will result in a significant change to the nature or scale of its activities, either:

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- to seek in-principle advice from ASX in advance of entering into the agreement that ASX will not exercise its discretion to require security holder approval or re-compliance with ASX's admission and quotation requirements; or
- to include in the agreement appropriate safeguards to protect the interests of the entity and its security holders in the event that ASX does exercise that discretion.[113]

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An appropriate safeguard would be making the agreement conditional on ASX not requiring security holder approval or re-compliance with ASX's admission and quotation requirements or, if it does, the satisfaction of those requirements.

The fact that an entity does not include such a condition in an agreement will not deter ASX, in an appropriate case, from exercising its discretion under Listing Rules 11.1.2 and 11.1.3 to require security holder approval or re-compliance with ASX's admission and quotation requirements, or its power under Listing Rule 18.8 to impose any other requirement it considers fit to ensure compliance with the Listing Rules.

6.2 Break fees

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ASX has no objection to an agreement for a transaction which will result in a significant change to the nature or scale of a listed entity's activities, including a disposal of its main undertaking, incorporating a reasonable break fee in the event that the entity is not able to obtain security holder approval or to re-comply with ASX's admission and quotation requirements where it is required to do so, provided the triggers for the break fee are reasonable in the circumstances and do not include a naked "no vote" from security holders. Reasonable triggers for a break fee might include:

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- a change of directors' recommendation (except where the change of recommendation occurs because an expert opines that the transaction is not fair and reasonable to security holders);
- a competing transaction that successfully completes;
- a material condition precedent within the entity's control not being satisfied; or
- a material breach by the entity of the transaction agreements.

ASX will apply the guidance in Takeovers Panel Guidance Note 7 *Lock-up devices*[114] in determining what constitutes a reasonable break fee for these purposes and when the triggers for a break fee are unreasonable or coercive.[115]

A break fee that is unreasonably high or that has unreasonable triggers would be inconsistent with the spirit and intent of Listing Rules 11.1 and 11.2 and will not be allowed.

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[112] This is to be compared and contrasted with Listing Rule 11.2, which requires all agreements for the disposal of a main undertaking by a listed entity to be conditional on security holder approval.

[113] A failure to take these precautions could well raise issues for the directors and other officers of the listed entity in terms of their statutory and common law obligations to exercise due care and diligence: see, in particular, section 180 (officers of listed companies) and section 601FD (officers of responsible entities of listed trusts) of the Corporations Act.

[114] This is available on the Takeovers Panel's website: http://www.takeovers.gov.au/.

[115] See, in particular, paragraphs 9 and 10 of Takeovers Panel Guidance Note 7 *Lock-up devices*.

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6.3 Option arrangements

ASX has no objection to a listed entity entering into an option which, if exercised, will result in a disposal of its main undertaking, provided the exercise of the option is conditional on the entity obtaining security holder approval to the disposal under Listing Rule 11.2.

Similarly, ASX has no objection to a listed entity entering into an option which, if exercised, will result in any other significant change to the nature or scale of a listed entity's activities, provided, if ASX exercises its discretion under Listing Rule 11.1.2 or 11.1.3 to require security holder approval or re-compliance with ASX's admission and quotation requirements, those requirements are met before the option is exercised.

In either case above, the payment of a more than nominal option fee in advance of obtaining security holder approval or re-complying with ASX's admission and quotation requirements (as applicable) would be inconsistent with the spirit and intent of Listing Rules 11.1 and 11.2 and will not be allowed.

ASX will expect any such option to be announced to the market as a "proposed transaction" under Listing Rule 11.1 as soon as the option is entered into and then a further announcement to be made to the market if and when the option is exercised, the option lapses or the entity determines that it will not be exercising the option.

ASX is alive to entities seeking to use option arrangements to avoid ASX's policy of suspending trading in an entity's securities when it announces a transaction that requires re-compliance under Listing Rule 11.1.3. ASX may suspend trading in the entity's securities from the date it announces an option to enter into such a transaction.[116] The suspension will last until ASX decides to reinstate the entity's securities to quotation following its re-compliance with ASXs admission and quotation requirements or the entity announces that the option has lapsed or otherwise is not being exercised.

7. Requirements for notices of meeting

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7.1 The contents of the notice

As a general proposition, a notice of meeting must include such material as will fully and fairly inform security holders of the matters to be considered at the meeting and enable them to make a properly informed judgment on those matters.[117] Where the notice relates to a resolution by a listed entity's security holders approving a transaction for the purposes of Listing Rule 11.1.2 or 11.2, this includes a reasonable level of detail about the transaction, including:

- the parties to, and material terms of, the transaction;
- if the transaction involves the acquisition by the listed entity of another entity or undertaking, all material information that the listed entity has in its possession about the assets and liabilities, financial position and performance, profits and losses, and prospects of the other entity or undertaking, including:
  - in the case of an entity, the jurisdiction where the entity is established and the jurisdiction(s) where the entity carries on its principal activities; and
  - in the case of an undertaking, the jurisdiction(s) where that undertaking is carried on;
- an assessment of the financial effect of the transaction on the entity and on the interests of security holders in the entity;[118]
- details of how the entity will be modifying its business model to accommodate the change in the nature or scale of its activities;

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[116] Under Listing Rule 11.3 or 17.3.

[117] See *Bulfin v Bebarfalds Ltd* (1938) 38 SR (NSW) 423 and *Chequepoint Securities Ltd v Claremont Petroleum NL* (1986) 11 ACLR 94.

[118] *ENT v Sunraysia* [2007] NSWSC 270.

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- if the transaction will result in the entity needing to borrow funds or raise capital in the short term, information about its needs in that regard;

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- any changes proposed to the entity's board or senior management in conjunction with, or as a consequence of, the transaction; and

- the timetable for implementing the transaction.

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The required information may be given in the notice itself or in an accompanying explanatory memorandum to security holders.[119]

Where an entity is required both to obtain security holder approval to a proposed transaction under Listing Rule 11.1.2 and to re-comply with ASX's admission and quotation requirements under Listing Rule 11.1.3, ASX would generally expect any material information about the transaction to be included in any prospectus, PDS or information memorandum lodged to re-comply with the admission requirement in Listing Rule 1.1 condition 3, also to be included in the notice of meeting to security holders seeking their approval. This is on the basis that if the information is sufficiently material to require disclosure to investors in a prospectus, PDS or information memorandum, it is likely also to be sufficiently material to require disclosure to security holders in the notice of meeting.

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Having said this, ASX recognises that an entity in this situation may not want to go to the effort and expense of preparing a prospectus, PDS or information memorandum under Listing Rule 1.1 condition 3 unless and until it knows that its security holders approve the transaction. It therefore may not have available to it at the time it prepares and dispatches the notice of meeting seeking security holder approval all of the information that will ultimately find its way into the prospectus, PDS or information memorandum. Where that is the case, the entity should nonetheless include in the notice of meeting all material information that is known to it and its directors at the time of dispatching the notice.

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Thus, for example, if at the time the entity prepares and dispatches the notice of meeting seeking security holder approval, it already has in its possession audited accounts or a completed review by a registered company auditor or independent accountant of the pro forma statement of financial position that it will be lodging to re-comply with ASX's admission and quotation requirements,[120] those documents should generally be included with the notice of meeting.

Listed entities and their advisers should note the comments of Austin J in *ENT v Sunraysia*[121] that:

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> *"the level of disclosure [under Listing Rule 11.2] is influenced by the nature of the decision that the shareholders are being asked to make. Under a typical corporate constitution (and see the replaceable rule in s 198A), the directors are empowered to manage or direct the management of the business of the company. Therefore, the decision to dispose of the company's main undertaking is the directors' decision. The Listing Rule gives shareholders the function of approving the directors' decision (or their proposed decision), and so the shareholders' meeting supplements the directors' decision rather than usurping the directors' power.*
>
> *The shareholders do not need to have all of the information required by the primary decision-makers, the directors. For example, they do not need to be presented with information about the range of alternative proposals that would need to be considered before a particular transaction is chosen. Reviewing all the alternatives is a task for the primary decision-makers.[122] The shareholders' task is limited to approving or rejecting the particular proposal that the directors present to the meeting, and it is not their role to choose or*

[119] Listing Rule 14.1.

[120] See note 194 above and the accompanying text.

[121] See note 118118 above.

[122] Even though the courts have determined that is not necessary for security holders to be given information about the range of alternative proposals that the board has considered before selecting the particular transaction being put to security holders for approval under Listing Rule 11.1.2 or 11.2, there is nothing to prevent a listed entity providing that information to security holders so that they are better informed on that matter.

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advocate a transaction of some other kind. The question for the shareholders is not whether the directors have selected the best possible transaction, but whether the transaction they have selected should be approved. However, ***the shareholders are entitled to receive all of the information that is material to the question of whether the transaction proposed by the directors should be approved, including all the commercial information that is material to that question. That includes the material commercial information known to the directors, and also other commercial information that is material and accessible to the directors even if they are not aware of it.***" [Emphasis added]

While these comments were made specifically in relation to a resolution under Listing Rule 11.2, ASX considers that they apply with equal force to a resolution under Listing Rule 11.1.2.

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In relation to the comment highlighted above that a notice of meeting should include commercial information that is material and accessible to directors, ASX would expect the directors of a listed entity that is proposing to undertake a significant acquisition of or merger with another entity or undertaking to have overseen an appropriate due diligence program that gives them confidence that the acquisition/merger is in the interests of the listed entity and its security holders before they put the proposal to security holders for approval.[123] Any material information derived from that due diligence program should be included in the notice of meeting seeking security holder approval to the transaction.

Listing Rules 11.1.2 and 11.2 empower ASX to impose additional requirements in relation to a notice of meeting. If there is a difference of opinion between ASX and a listed entity as to whether certain material is required to be included in a notice of meeting relating to a resolution under one of those rules, ASX may resolve that difference by exercising its power under the relevant rule to require that material to be included in the notice of meeting.

7.2 Draft notice to be given to ASX

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Before a listed entity sends out a notice of meeting that includes a resolution by security holders approving a transaction for the purposes of Listing Rule 11.1.2 or 11.2, it must give ASX a copy of the draft notice for review. It must not finalise the notice until ASX tells it that ASX does not object to it.[124]

In most situations, ASX tries to review and notify the entity whether it objects to a draft notice of meeting within 5 business days of receipt.[125] Draft notices relating to transactions where ASX has exercised its discretion both to require security holder approval under Listing Rule 11.1.2 and the entity to re-comply with ASX's admission and quotation requirements under Listing Rule 11.1.3, however, are particularly complex and ASX is likely to take closer to 15 business days to review such notices and may take longer if the application raises any issues under Listing Rule 1.1 condition 1 (the entity's structure and operations must be appropriate for a listed entity[126]) or that might cause ASX to exercise its discretion under Listing Rule 1.19 to refuse the application for re-admission.[127]

ASX may object to a draft notice of meeting if it appears to ASX that it does not meet the requirements of the Listing Rules or the required standard of disclosure mentioned above. ASX may also object to a draft notice of meeting where it has exercised its discretion to require security holder approval under Listing Rule 11.1.2 and the entity to re-comply with ASX's admission and quotation requirements under Listing Rule 11.1.3 if ASX considers, based on the information in the draft notice of meeting, that:

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[123] A failure to oversee a proper due diligence program could well raise issues for the directors and other officers of the listed entity in terms of their statutory and common law obligations to exercise due care and diligence: see, in particular, section 180 (officers of listed companies) and section 601FD (officers of responsible entities of listed trusts) of the Corporations Act.

[124] Listing Rule 15.1.7.

[125] Listing Rule 15.1. ASX will tell an entity within 5 business days if it needs more time to examine a draft notice of meeting.

[126] See section 3.1 of Guidance Note 1 *Applying for Admission – ASX Listings*.

[127] See section 2.8 of Guidance Note 1 *Applying for Admission – ASX Listings*.

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- the entity is unlikely to be able to re-comply with ASX's admission and quotation requirements (including, for example and without limitation, because ASX is not satisfied that the entity will have a structure and operations appropriate for a listed entity[128]); or

- ASX is likely to exercise its discretion under Listing Rule 1.19 not to re-admit the entity to the official list.[129]

Any financial information included in a draft notice of meeting must be based on up-to-date audited or reviewed accounts of the entity. If an entity has been suspended for failing to lodge its accounts with ASX, ASX will usually require it to lodge all outstanding accounts with ASX before ASX will approve a draft notice of meeting approving a transaction for the purposes of Listing Rule 11.1.2 or 11.2.

The fact that ASX does not object to a draft notice of meeting does not preclude ASX from raising Listing Rule issues at a later stage of the transaction (for example, when an Appendix 1A listing application and accompanying documents are provided to ASX) or from reconsidering the application of the Listing Rules to matters disclosed in the draft notice of meeting.

7.3 Fee for reviewing draft notices under Listing Rules 11.1.2 and 11.1.3

ASX charges a fee of $10,000 (plus GST) for reviewing a draft notice of meeting relating to a transaction where ASX has exercised its discretion both to require security holder approval under Listing Rule 11.1.2 and the entity to re-comply with ASX's admission and quotation requirements under Listing Rule 11.1.3.[130] Payment must be made at the time of lodging the notice with ASX for review.[131]

ASX will not commence its review of the draft notice until the fee has been paid.

7.4 Voting exclusion statement

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A notice of meeting that includes a resolution by security holders approving a transaction for the purposes of Listing Rule 11.1.2 or 11.2 must include a voting exclusion statement,[132] that is, a statement that the entity will disregard votes cast on the resolution by:

- a person who might obtain a benefit, except a benefit solely in the capacity of a security holder, if the resolution is passed; and

- an associate of that person,

[128] Listing Rule 1.1 condition 1. See also section 3.1 of Guidance Note 1 *Applying for Admission – ASX Listings*.

[129] See section 2.8 of Guidance Note 1 *Applying for Admission – ASX Listings*.

[130] See Listing Rule 16.7 and the schedule of fees set out in Guidance Note 15A *ASX Schedule of Listing Fees*. This fee is in addition to the fee payable for reviewing any Appendix 1A application and accompanying documents that the entity may subsequently lodge in connection with its re-compliance with ASX"s admission and quotation requirements. If re-compliance is successful, both fees will be off-set against the entity's initial listing fee.

[131] Payment can be made either by cheque made payable to ASX Operations Pty Ltd or by electronic funds transfer to the following account:

Bank: National Australia Bank
Account Name: ASX Operations Pty Ltd
BSB: 082 057
A/C: 494728375
Swift Code (Overseas Customers): NATAAU3302S

If payment is made by electronic funds transfer, the applicant should email its remittance advice to ar@asx.com.au or fax it to (612) 9227-0553, describing the payment as "fee for reviewing draft notice of meeting" and including the name of the listed entity and the home branch where the entity has lodged its draft notice of meeting (ie Sydney, Melbourne or Perth) and the amount paid.

[132] Listing Rule 14.11.

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except where the votes are cast: (a) by a person as proxy for a person who is entitled to vote, in accordance with the directions on the proxy form; or (b) by the person chairing the meeting as proxy for a person who is entitled to vote, in accordance with a direction on the proxy form to vote as the proxy decides.[133]

7.5 The form of resolution required

The resolution required to approve a transaction for the purposes of Listing Rule 11.1.2 or 11.2 is an ordinary resolution passed at a general meeting of the holders of ordinary securities.[134]

Typically, the resolution will be couched in terms that the transaction described in the notice of meeting, or explanatory statement given to security holders for the meeting, is "approved for the purposes of" Listing Rule 11.1.2 or 11.2 (as applicable).

Where multiple approvals are required under the Listing Rules (eg where the transaction requires approval under Listing Rule 7.1, 10.1 or 10.11, as well as under Listing Rule 11.1.2 or 11.2), ASX has no objection to the approvals being combined in the one resolution and being expressed in terms that the transaction "is approved for the purposes of the Listing Rules", provided:

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- the notice of meeting or explanatory statement given to security holders for the meeting makes it clear which elements of the transaction are being approved under which Listing Rules; and
- the voting exclusion statements required under the Listing Rules in respect of each of the resolutions are not substantively different.

The requirement to include a voting exclusion statement for a resolution under Listing Rule 11.1.2 or 11.2 will generally make it inappropriate to combine that resolution with any other resolution required in relation to the transaction under the Corporations Act.[135]

7.6 Supplemental or revised notices

As mentioned above, each of Listing Rules 11.1.2 and 11.2 empowers ASX to impose additional requirements in relation to the notice of meeting. ASX considers that this power can be exercised even after a notice of meeting has been dispatched by a listed entity to its security holders. Hence, if ASX becomes aware of material deficiencies in a notice of meeting (including any accompanying explanatory memorandum) that has already been dispatched to security holders under Listing Rule 11.1.2 or 11.2, it may require those deficiencies to be corrected in a supplemental notice to security holders or, in an extreme case, require a revised notice of meeting to be dispatched.

7.7 Stale resolutions

Where a resolution is approved by a listed entity's security holders under Listing Rule 11.1.2 or 11.2 and, in ASX's opinion, there is:

- a fundamental change in the terms of the transaction from those approved by security holders;
- a fundamental change in the entity's circumstances from those applicable at the time of the resolution; or
- an excessive delay in consummating the transaction,

[133] ASX may also require the voting exclusion statement to extend to other persons whose vote, in ASX's opinion, should be disregarded – see the final entry in the table that appears in Listing Rule 14.11.1.

[134] Listing Rule 14.9. If an entity has other securities on issue that might otherwise be entitled to vote on a resolution put to ordinary security holders at a general meeting, the notice of meeting should make it clear that, under the ASX Listing Rules, the holders of those other securities are not entitled to vote on the resolution under Listing Rule 11.1.2 or 11.2 (as the case may be) and that, if they do vote, their vote will be disregarded.

[135] For example, a resolution under the Corporations Act approving a scheme of arrangement, reduction of capital or share buy-back, where there generally are no comparable voting exclusions.

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such that the approval should no longer be regarded as current, ASX may require the entity to seek a fresh approval from its security holders under that rule.[136] Without limiting its discretion to require this earlier, ASX will look carefully at this issue in any case where an entity takes more than 12 months to consummate a transaction from the date of the resolution approving the transaction.

8. Re-compliance with ASX's admission and quotation requirements

8.1 The steps involved in re-compliance with ASX's admission and quotation requirements

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Where ASX exercises its discretion under Listing Rule 11.1.3 to require a listed entity to re-comply with ASX's admission and quotation requirements in Chapters 1 and 2 of the Listing Rules, ASX treats that as if it were a *de novo* application by the entity to be admitted to the official list. Where the discretion is exercised in relation to a proposed acquisition of or proposed merger with another entity or undertaking, ASX will apply the Listing Rules as if the acquisition or merger had been completed and look to ensure that the resulting combination meets ASX's requirements for admission and quotation.

Re-complying with ASX's admission and quotation requirements involves (among other things):

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- completing an Appendix 1A *ASX Listing Application and Agreement* and the accompanying Information Form and Checklist (ASX Listings);[137]
- having a structure (including a capital structure) and operations that are appropriate for a listed entity;[138]

Deleted: (Listing Rule 1.1 condition 1);

- issuing a prospectus, PDS or information memorandum;[139]

Deleted: (Listing Rule 1.1 condition 3);

- meeting ASX"s minimum free float requirement;[140]
- meeting ASX's minimum spread requirements;[141]

Deleted: (Listing Rule 1.1 condition 7);

- meeting the profit test or assets test;[143]

Deleted: [142] (Listing Rule 1.1 condition 8);

- complying with Chapter 9 of the Listing Rules in relation to any "restricted securities" it has on issue or is proposing to issue (Listing Rule 1.1 condition 10);[144]

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- unless ASX chooses not to apply this requirement (see below), having the entity's quoted securities (except options) issued or sold for at least 20 cents in cash;[145]

Deleted: (Listing Rule 2.1 condition 2);

- unless ASX chooses not to apply this requirement (see below), having any options the entity has issued exercisable for at least 20 cents in cash;[146]

Deleted: (Listing Rule 1.1 condition 11); and

[136] ASX may do this either by treating the original resolution as not being effective for the purposes of Listing Rule 11.1.2 or 11.2 (as the case may be) or by imposing a requirement in that regard under Listing Rule 18.8.

[137] Listing Rule 1.7. See also section 2.2 of Guidance Note 1 *Applying for Admission – ASX Listings*.

[138] Listing Rule 1.1 condition 1. See also section 3.1 of Guidance Note 1 *Applying for Admission – ASX Listings*.

[139] Listing Rule 1.1 condition 3. See also section 3.3 and 3.4 of Guidance Note 1 *Applying for Admission – ASX Listings*.

[140] Listing Rule 1.1 condition 7. See also section 3.7 of Guidance Note 1 *Applying for Admission – ASX Listings*.

[141] Listing Rule 1.1 condition 8. See also section 3.8 of Guidance Note 1 *Applying for Admission – ASX Listings*.

[143] Listing Rule 1.1 condition 9. An entity which re-complies with ASX's admission and quotation requirements on the basis of the assets test and its "commitments" under Listing Rule 1.3.2(b) must also comply with the ongoing requirements that apply to such entities. Listing Rule 4.7B requires the entity to lodge quarterly cash flow reports for the first eight quarters after satisfying the admission test. Listing Rule 4.10.19 requires the entity to include in its annual reports for the first two years after satisfying the admission test a statement about whether it used its cash in a way consistent with its objectives. See also section 3.9 of Guidance Note 1 *Applying for Admission – ASX Listings*.

[144] Listing Rule 1.1 condition 10. See also section 3.10 of Guidance Note 1 *Applying for Admission – ASX Listings*.

[145] Listing Rule 2.1 condition 2.

[146] Listing Rule 1.1 condition 12.

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- satisfying ASX that each director or proposed director at the date of admission is of good fame and character;[147] and

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- having any securities issued under a prospectus or PDS admitted to quotation within the time limits prescribed under the *Corporations Act*.[148]

Having to re-comply with ASX's admission and quotation requirements also enlivens ASX's ability to impose such conditions on admission and/or quotation as it considers appropriate[149] and its absolute discretion to decide whether or not to admit an entity to the official list and to quote its securities.[150] ASX may exercise this discretion notwithstanding that the entity is currently admitted to the official list and even where the entity otherwise meets, or is expected to meet, the specific conditions set out in the Listing Rules for listing and quotation.

Detailed guidance on the requirements mentioned above can be found in Guidance Note 1 *Applying for Admission – ASX Listings*, Guidance Note 4 *Foreign Entities Listing on ASX* and Guidance Note 11 *Restricted Securities and Voluntary Escrow*. Entities pursuing transactions that have a connection with an emerging or developing market should note, in particular, the additional requirements that ASX may impose in relation to those transactions mentioned in Guidance Note 1.[151]

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The commentary under the subheadings below provides additional guidance on issues that often arise in the context of Listing Rule 11.1.3.

8.2 Processing time

ASX Listings Compliance aims to process re-compliance applications as quickly as it reasonably can, given its workloads at the time. Typically, a re-compliance application will take ASX around six weeks to process, from the time a properly completed application for admission to the official list and all other required documents are lodged with ASX, until a decision is made on whether or not to reinstate the applicant's securities to quotation following its re-compliance. It may take longer, however, if:

- the application raises any issues under Listing Rule 1.1 condition 1 (the entity's structure and operations must be appropriate for a listed entity[152]) or that might cause ASX to exercise its discretion under Listing Rule 1.19 to refuse the application;[153] or
- the applicant is seeking an atypical number or type of waivers from the Listing Rules.
- the applicant is making a non-underwritten offer of securities that is subject to a minimum subscription condition and it takes longer than four to six weeks to satisfy that condition.[154]

In either of the first two cases above, the applicant should discuss the matter with ASX Listings Compliance at the earliest opportunity to determine the impact that may have on its timetable for reinstatement. In the third case above, the applicant should keep ASX apprised of its progress in satisfying its minimum subscription condition.

The time it takes ASX to process an application for reinstatement is very much a function of the quality of the application. The better the quality of the application, the more quickly and efficiently ASX is likely to be able to

[147] Listing Rule 1.1 condition 20. See also section 3.18 of Guidance Note 1 *Applying for Admission – ASX Listings*.

[148] See sections 723(3) and 724 (securities offered under a prospectus) and sections 1013H and 1016D (securities offered under a PDS). See also section 2.6 of Guidance Note 1 *Applying for Admission – ASX Listings*.

[149] Listing Rules 1.19 and 2.9.

[150] Listing Rules 1.19 and 2.9. See section 2.8 of Guidance Note 1 *Applying for Admission – ASX Listings*.

[151] See sections 2.8 and 3.8 of Guidance Note 1 *Applying for Admission – ASX Listings*.

[152] See section 3.1 of Guidance Note 1 *Applying for Admission – ASX Listings*.

[153] See section 2.8 of Guidance Note 1 *Applying for Admission – ASX Listings*.

[154] Where the applicant is making a non-underwritten offer of securities that is subject to a minimum subscription condition, ASX may defer finalising its review of the application until it is advised by the applicant in writing that the minimum subscription condition has been, or is close to being, satisfied.

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process it. ASX therefore encourages applicants to engage professional advisers who are experienced in ASX listings and to seek their advice and assistance in preparing their application for reinstatement.

Subject to the comments above, ASX Listings Compliance will generally try to process a re-compliance application within a timeframe that is consistent with the timetable outlined in any prospectus, PDS or information memorandum the applicant issues in connection with its re-compliance. That said, if an applicant intends to specify in its prospectus, PDS or information memorandum a timetable that is shorter than six weeks from the date of lodgement of the application with ASX, it should discuss the matter with ASX Listings Compliance at the earliest opportunity to determine whether its proposed timetable can be accommodated.

8.3 Prospectus / PDS / information memorandum

It is common for an entity proposing to make a significant change to the nature or scale of its activities to be making an offer of securities as part of, or in conjunction with, the transaction.[155] In that case, the entity may use the prospectus or PDS it prepares for that offer to satisfy Listing Rule 1.1 condition 3, provided it otherwise complies with the content requirements in section 710 (in the case of a prospectus) or sections 1013D and 1013E (in the case of a PDS) of the Corporations Act. ASX will not accept under Listing Rule 1.1 condition 3 a prospectus or PDS that has been prepared relying on the abridged content requirements applicable to offers of continuously quoted securities in sections 713 or 1013FA of the Corporations Act.[156]

If an entity is not making an offer of securities as part of, or in conjunction with, a significant change to the nature or scale of its activities, ASX may agree, for the purposes of Listing Rule 1.1 condition 3, to accept an information memorandum in lieu of a prospectus or PDS. If it does, the information memorandum must meet the content requirements set out in Listing Rule 1.4. These include:

- if the entity is a company, a statement that the information memorandum contains all the information that would be required under section 710 of the Corporations Act if the information memorandum were a prospectus offering for subscription the same number of securities for which quotation will be sought;
- if the entity is a trust, a statement that the information memorandum contains all the information that would be required under section 1013C of the Corporations Act if the information memorandum were a PDS offering for subscription the same number of securities for which quotation will be sought;
- a statement that the entity has not raised any capital for the 3 months before, and will not need to raise any capital for 3 months after, the date of issue of the information memorandum;[157] and
- a statement that the applicant will issue a supplementary information memorandum if it becomes aware of any of the following between the date of issue of the information memorandum and the date the entity's securities are quoted or reinstated:
    - a material statement in the information memorandum is misleading or deceptive;
    - there is a material omission from the information memorandum;
    - there has been a significant change affecting a matter included in the information memorandum; or

[155] The purpose of the capital raising may be to raise the money required for the entity to pay the purchase price for an acquisition that will result in a significant change in the nature or scale of its activities. In the case of a back-door listing, it may also be to replenish the assets of the entity so that it meets the assets test in Listing Rule 1.1 condition 9 and Listing Rule 1.3, the minimum free float requirement in Listing Rule 1.1 condition 7 or the minimum spread requirements in Listing Rule 1.1 condition 8.

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[156] Where ASX requires an entity that is undergoing a significant change to the nature or scale of its activities to re-comply with ASX's listing requirements, one of the reasons will generally be to ensure that the market has sufficient information about the entity and the transaction for trading in the entity's securities to occur on a reasonably informed basis. Allowing an entity to produce an abridged prospectus or PDS in satisfaction of Listing Rule 1.1 condition 3 would run counter to that policy objective.

[157] Where a listed entity is proposing to acquire another entity as part of a significant change to the nature or scale of its activities, ASX will scrutinise carefully any capital raising undertaken by the other entity during the 6 month period in question to determine if it breaches the spirit of this requirement.

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- a significant new circumstance has arisen and it would have been required to be included in the information memorandum.

To obtain ASX's agreement to use an information memorandum in lieu of a prospectus or PDS, the entity will need to demonstrate to ASX's satisfaction that:

- it does not need to issue any securities to meet ASX's minimum free float and minimum spread requirements (discussed below);
- it does not need to raise any funds by an issue of securities in order to have sufficient working capital to carry out its stated objectives; and
- the absence of a prospectus or PDS will not have the result that an offer for sale of its securities on ASX after it is reinstated to quotation on ASX could infringe the secondary sales provisions of the Corporations Act.[158]

ASX will not agree to the use of an information memorandum by an entity that has been suspended from quotation for any material period at the time it announces a transaction requiring re-compliance with ASX's admission and quotation requirements under Listing Rule 11.1.3.[159]

In an appropriate case, ASX may refer an information memorandum to ASIC for its opinion on whether an information memorandum should be permitted in the circumstances and whether it meets any applicable Corporations Act requirements. This may affect the timing for ASX to process an application for re-admission involving an information memorandum.

8.4 Minimum free float

An entity must have a free float at the time of its re-admission to the official list of not less than 20%.[160]

"Free float" means the percentage of the entity's main class of securities that:

- are not "restricted securities"[161] or subject to voluntary escrow;[162] and
- are held by non-affiliated security holders.[163]

[158] Sections 707(3) (in the case of securities otherwise requiring a prospectus) and 1012C(6) (in the case of financial products otherwise requiring a PDS). An entity warrants in its Appendix 1A application for listing that an offer of its securities for sale within 12 months after their issue will not infringe these provisions.

[159] Among other reasons, in these circumstances, the absence of an offer under a prospectus or PDS makes it difficult for ASX to assess the value of an entity's free float and of a parcel of securities for the purposes of determining whether the entity has satisfied the minimum spread test.

[160] Listing Rule 1.1 condition 7.

[161] The concept of "restricted securities" is explained in greater detail in Guidance Note 11 *Restricted Securities and Voluntary Escrow*.

[162] As defined in Listing Rule 19.12.

[163] Listing Rule 19.12.

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"Non-affiliated security holders" means security holders who are not (a) a related party[164] of the entity; (b) an associate[165] of a related party of the entity; or (c) a person whose relationship to the entity or to a person referred to in (a) or (b) above is such that, in ASX's opinion, they should be treated as affiliated with the entity.[166]

Securities held by or for an employee incentive plan are not regarded by ASX as forming a part of an entity's free float.[167]

8.5 Meeting the minimum spread test

To meet ASX's minimum spread requirements:

- if the entity has a free float at the time of its re-admission to the official list of less than $50 million,[168] there must be at least 200 non-affiliated security holders;[169] or
- if the entity has a free float at the time of its re-admission to the official list of $50 million or more, there must be at least 100 non-affiliated security holders,

each of whom holds a parcel of the entity's main class of securities[170] that are not "restricted securities"[171] with a value of at least $5,000.[172]

Where an entity is undertaking a material capital raising in conjunction with its re-compliance with ASX's admission and quotation requirements, ASX will normally use the issue price under the prospectus or PDS for that capital raising to determine whether a holder's securities have a value of at least $5,000 for the purposes of the minimum spread test.[174] ASX may, however, use a different measure to determine the value of a holder's securities if the entity is not undertaking a material capital raising in conjunction with its re-compliance with ASX's admission and quotation requirements or if ASX is concerned that the issue price under the prospectus or PDS does not fairly reflect the market value of its main class of securities.

[164] "Related party", in the case of a body corporate, has the same meaning in section 228 of the Corporations Act and, in relation to a trust, means the responsible entity of the trust and a related party of the responsible entity under section 228 of the Corporations Act, as modified by section 601LA of the Corporations Act (Listing Rule 19.12).

[165] "Associate" has the meaning given in sections 12 and 16 of the Corporations Act, with section 12 applied as if paragraph 12(1)(a) included a reference to the Listing Rules and on the basis that the entity is the "designated body" for the purposes of that section (Listing Rule 19.12).

It should be noted that a related party of a director or officer of the entity or of a child entity is to be taken to be an associate of the director or officer unless the contrary is established.

[166] Listing Rule 19.12.

[167] If they do not fall within paragraph (a) or (b) of the definition of non-affiliated security holder in Listing Rule 19.12, ASX will regard them as falling within paragraph (c) of that definition.

[168] Where an entity is undertaking a material capital raising in conjunction with its re-compliance with ASX's admission and quotation requirements, ASX will normally use the offer price under the prospectus, PDS or information memorandum for that capital raising to calculate the value of the entity's free float and the value of a parcel of securities. ASX may, however, use a different price to determine these values if the entity is not undertaking a material capital raising in conjunction with its re-compliance with ASX's admission and quotation requirements or if ASX is concerned that the offer price under the prospectus, PDS or information memorandum does not fairly reflect the value of its main class of securities (see the note to Listing Rule 1.1 condition 8). In an appropriate case, ASX may require these values to be verified by an independent expert (Listing Rule 1.17).

[169] As defined in '8.4 Minimum free float' on page 34.

[170] If CDIs are issued over securities in the main class, holders of the CDIs are included for these purposes. If securities or CDIs are registered in the name of a nominee or custodian, they are to be taken to be held by the underlying beneficial owner.

[171] The concept of "restricted securities" is explained in greater detail in Guidance Note 1 *Applying for Admission – ASX Listings*. See also Guidance Note 11 *Restricted Securities and Voluntary Escrow*.

[172] The value of securities is usually based on the offer price under the entity's prospectus or PDS.

[174] See the note to Listing Rule 1.1 condition 8.

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300 holders each holding a parcel of the main class of securities with a value of at least A$2,000 (excluding restricted securities), with at least 50% of the securities in the main class being held by non-related security holders (excluding restricted securities held by the non-related security holders).[173]¶
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8.6 Meeting the profit test or assets test

Generally speaking, it would be uncommon (although not out of the question) for an entity required under Listing Rule 11.1.3 to re-comply with ASX's admission and quotation requirements to do so by complying with the profit test. Among other things, this would require it to have:

- conducted the same main business activity during the last 3 full financial years and through to the date it is re-admitted;[175]
- aggregated profit from continuing operations for the last 3 full financial years of at least $1 million;[176] and
- consolidated profit from continuing operations for the 12 months to a date no more than 2 months before the date it applied for admission of at least $500,000.[177]

It is more common for an entity required under Listing Rule 11.1.3 to re-comply with ASX's admission and quotation requirements to do so by complying with the assets test. To do this, an entity that is not an "investment entity"[178] must meet the following requirements:

- it must have at the time it is re-admitted:
  - net tangible assets of at least $5 million after deducting the costs of fund raising; or
  - a market capitalisation of at least $20 million;[179]
- either:
  - less than half of its total tangible assets (after raising any funds) are cash or in a form readily convertible to cash;[180] or
  - if half or more of its total tangible assets (after raising any funds) are cash or in a form readily convertible to cash, it must have commitments consistent with its business objectives to spend at least half of its cash and assets readily convertible to cash;[181]
- if its prospectus, PDS or information memorandum does not contain a statement that it has enough working capital to carry out its stated objectives, it must give ASX one from an independent expert;[182] and
- its working capital must be at least $1.5 million, or if it is not, it would be at least $1.5 million if its budgeted revenue for the first full financial year that ends after it is re-admitted was included in the working capital. This amount must be available after allowing for the first full financial year's budgeted administration costs

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[175] Listing Rule 1.2.2.

[176] Listing Rule 1.2.4.

[177] Listing Rule 1.2.5.

[178] An "investment entity" is one which in ASX's opinion has as a principal part of its activities investing (directly or through a child entity) in listed or unlisted securities or futures contracts and whose objectives do not include exercising control over or managing any entity, or the business of any entity, in which it invests: see Listing Rule 19.12.

[179] Listing Rule 1.3.1. Where an entity is undertaking a material capital raising in conjunction with its re-compliance with ASX's admission and quotation requirements, ASX will normally use the offer price under the prospectus, PDS or information memorandum for that capital raising to calculate the entity's market capitalisation. ASX may, however, use a different price to determine market capitalisation if the entity is not undertaking a material capital raising in conjunction with its re-compliance with ASX's admission and quotation requirements or if ASX is concerned that the offer price under the prospectus, PDS or information memorandum does not fairly reflect the value of its main class of securities (see the note to the definition of "market capitalisation" in Listing Rule 19.12). In an appropriate case, ASX may require an entity's market capitalisation to be verified by an independent expert (Listing Rule 1.17).

[180] Listing Rule 1.3.2(a).

[181] Listing Rule 1.3.2(b). In this case, the entity's business objectives must be clearly stated and include an expenditure program. If this information is not included in the entity's prospectus, PDS or information memorandum, it must be separately given to ASX.

[182] Listing Rule 1.3.3(a).

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and the cost of acquiring any assets referred to in its prospectus, PDS or information memorandum, to the extent those costs are to be met out of working capital.[184]

If the entity is an "investment entity",[185] it must at the time it is re-admitted:

- have net tangible assets of at least $15 million after deducting the costs of fund raising; or
- be a pooled development fund and have net tangible assets of at least $2 million after deducting the costs of fund raising.[186]

As part of demonstrating its compliance with the profit test or the assets test, an entity seeking to be admitted to the official list for the first time ordinarily must provide to ASX financial statements for its last 3 full financial years and, if the last full financial year ended more than 8 months before the entity applied for admission, financial statements for the last half year (or longer period if available) from the end of the last full financial year.[187] The annual financial statements have to be audited and any financial statements for a half year (or longer period less than a full financial year) have to be audited or reviewed.

Where an entity is required under Listing Rule 11.1.3 to re-comply with ASX's admission and quotation requirements, it ordinarily will have been lodging with ASX audited annual financial statements and audited or reviewed half-yearly financial statements under Chapter 4 of the Listing Rules.[190] ASX will accept those lodgements (and, if the entity has been listed for less than 3 full financial years, any financial statements it lodged with its original listing application), as satisfying the requirement to lodge financial statements as part of the re-admission process. In other words, the entity will not be required to re-lodge any financial statements it has already lodged with ASX.

If the entity has failed to lodge any financial statements required under Chapter 4 in the period prior to its re-admission, or if the financial statements it has lodged with ASX have not been properly audited or reviewed as required by Chapter 4, ASX will insist that default is cured prior to its readmission taking effect.[191]

If the entity is applying for re-admission under the assets test and it is proposing to acquire another entity or business as part of, or in conjunction with, its readmission, unless ASX agrees otherwise,[192] the entity must provide to ASX:

- audited accounts for the last 3 full financial years for that other entity or business; and
- if the last full financial year for that entity or business ended more than 8 months before the entity applied for admission, audited or reviewed accounts for the last half year (or longer period if available) from the end of the last full financial year for that other entity or business.[193]

As part of demonstrating its compliance with the profit test or the assets test, an entity seeking to be admitted to the official list for the first time must also provide to ASX a reviewed pro forma statement of financial position, together with the review.[194] The review must be conducted by a registered company auditor[195] or an independent accountant. The pro forma statement of financial position would ordinarily be expected to reflect any transactions

[184] Listing Rule 1.3.3(b). The cost of acquiring assets includes the cost of acquiring and exercising an option over them.

[185] See note 178 above.

[186] Listing Rule 1.3.4.

[187] Listing Rules 1.2.3(a) and (b) (profit test) and 1.3.5(a) (assets test).

[190] Listing Rules 4.2A (half-yearly financial statements) and 4.5 (annual financial statements).

[191] To allow otherwise would run counter to the clear policy objective reflected in Listing Rule 17.5 that the securities of a listed entity should only be allowed to trade on ASX where it meets its periodic reporting obligations.

[192] ASX may agree to accept less than 3 full financial years of audited accounts but will generally only agree to do so in the circumstances where ASIC will do likewise outlined in Part F of ASIC Regulatory Guide 212. Any agreement by ASX to accept less than 3 full financial years of audited accounts may be conditional on the entity providing additional financial information about the relevant entity or business under Listing Rule 1.17. ASX may require that additional financial information to be audited or reviewed.

[193] Listing Rule 1.3.5(b). The audit report or review must be provided with the accounts.

[194] Listing Rules 1.2.3(c) (profit test) and 1.3.5(c) (assets test).

[195] If the entity is a foreign entity, the review can be conducted by an overseas equivalent of a registered company auditor.

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(including any acquisitions, disposals or capital raisings) contemplated to occur in conjunction with, or at or around the time of, the admission of the entity to the official list, as well as any material change in the financial position of the entity since the balance date of the last financial statements given to ASX with the admission application. Typically, the reviewed pro forma statement of financial position would be included in the prospectus, PDS or information memorandum lodged by the entity with ASX under Listing Rule 1.1 condition 3, on the basis that it is material information for investors.

Where an entity is required under Listing Rule 11.1.3 to re-comply with ASX's admission and quotation requirements, it must provide to ASX a reviewed pro forma statement of financial position, together with the review, as if it were being admitted to the official list for the first time. The reviewed pro forma statement of financial position must show the effect if the proposed transaction or transactions that led to ASX imposing the requirement to re-comply with ASX's admission and quotation requirements are consummated, as well as reflect any material change in the financial position of the entity since the balance date of the last financial statements given to ASX under Chapter 4. Again, ASX would expect the reviewed pro forma statement of financial position to be included in the prospectus, PDS or information memorandum the entity lodges with ASX to meet Listing Rule 1.1 condition 3, on the basis that it is material information for investors.

Guidance Note 1 *Applying for Admission – ASX Listings* has more detailed guidance about the requirements for meeting the profit test and assets test.

8.7 Escrow requirements for restricted securities

Where ASX exercises its discretion under Listing Rule 11.1.3 to require re-compliance with ASX's admission and quotation requirements, ASX will consider afresh whether any of its securities should be treated as "restricted securities", that are subject to the escrow requirements in Chapter 9 and Appendices 9A and 9B of the Listing Rules.

If the discretion is exercised in relation to a transaction that involves the entity acquiring a classified asset,[198] the consideration paid to the vendor(s) of the asset must be "restricted securities"[199] that are subject to escrow.

If the discretion is exercised in relation to a transaction that involves an issue of securities for cash, ASX will look very closely at the issue to determine whether, in its opinion, the capital raised is in the nature of seed capital for the transaction or the recipient(s) of the securities are promoters of or professional consultants involved in the transaction.[201] If ASX forms that opinion, it is likely to classify the securities as restricted securities,[202] making them subject to escrow.

Restricted securities are not quoted on ASX until the relevant escrow period has expired.[203]

If an entity subject to re-compliance has any restricted securities on issue, as a condition of reinstatement to quotation, it will be required to give ASX copies of correctly executed restriction agreements, and provide confirmation either that the certificates for the restricted securities have been deposited with a bank or recognised trustee or that a holding lock has been placed on the restricted securities by the entity's share registry.[204]

ASX notes that in an initial public offering (IPO), seed capitalists can take advantage of the "cash formula"[205] to reduce proportionately the number of securities subject to escrow by reference to the percentage of the IPO price[206] they paid for their securities, whereas vendors of classified assets cannot.[207] Where ASX exercises its discretion under Listing Rule 11.1.3 in relation to an acquisition of another entity or undertaking that is a classified asset, in

198 As defined in note 6 above.

199 Listing Rule 1.1 condition 11 and rows 3-6 of the table in Appendix 9B.

201 See rows 1, 2 and 7 of the table in Appendix 9B.

202 Listing Rule 1.1 condition 10.

203 Listing Rule 2.12.

204 Listing Rules 9.3 and 9.5.

205 As defined in Listing Rule 19.12.

206 In the context of a transaction requiring re-compliance, ASX will usually treat an offering of securities under a prospectus, PDS or information memorandum lodged with ASX under Listing Rule 1.1 condition 3 as the equivalent of an IPO.

207 Compare rows 1 and 2 of Appendix 9B with rows 3 and 4.

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certain instances, ASX may be prepared to grant a waiver from Listing Rule 9.1.3 (referred to as "look-through" relief) to permit the owners of the entity or undertaking to be treated as seed capitalists rather than as vendors. This relief is provided on the basis that if the entity or undertaking had applied for listing in its own right, its owners would have been treated as seed capitalists rather than as vendors.

Where look-through relief is granted, the applicable escrow period will start at the time the owner paid cash to acquire their ownership interests in the entity or undertaking being acquired, rather than the date they acquired their securities in the listed entity. This upholds the principle of the Listing Rule escrow regime that seed capitalists who are not related parties or promoters should be subject to escrow only for a period of 12 months beginning when they contribute their cash.

Applications for look-through relief must be made in writing to ASX. The application should be made no later than 5 weeks prior to the proposed reinstatement date.

ASX will only grant look-through relief where:

- the listed entity is acquiring 100% of the entity or undertaking in question;
- the consideration paid by the listed entity to the owners of the entity or undertaking to acquire their ownership interests is securities in the listed entity;
- the owners of the entity or undertaking being acquired paid cash to the entity or undertaking for their ownership interests; and
- the entity or undertaking being acquired does not return capital, distribute any assets or make any unusual distributions to its owners before the acquisition becomes effective.

ASX will not grant look-through relief in relation to owners:

- who obtained their ownership interests in the entity or undertaking being acquired as consideration for assets or services; or
- who ASX regards as related parties of the listed entity or promoters of the transaction requiring re-compliance.

ASX will usually require proof (such as copies of application forms and bank statements) that owners paid cash for their ownership interests in the entity or undertaking being acquired as condition of granting look-through relief.

For the avoidance of doubt, ASX is prepared to grant only one level of look-through relief.

ASX would encourage an entity that is proposing to issue securities as part of, or in conjunction with, a transaction to which Listing Rule 11.1.3 has been or may be applied, to consult with ASX at the earliest opportunity in relation to potential escrow issues.

Guidance Note 11 *Restricted Securities and Voluntary Escrow* has further guidance on how ASX applies the escrow provisions in the Listing Rules.

8.8 The 20 cent rule

As mentioned above, it is not uncommon for an entity proposing to make a significant change to the nature or scale of its activities to be making an offer of securities as part of, or in conjunction with, the transaction. If those securities are in its main class of securities and ASX has exercised its discretion under Listing Rule 11.1.3 to require re-compliance with ASX's admission and quotation requirements then, to comply with Listing Rule 2.1 condition 2 (the

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"20 cent rule"),[208] that offer would ordinarily have to be undertaken at a minimum issue price or sale price of 20 cents in cash per security.

As a practical matter, this means that if the entity's main class of securities have been trading on ASX at materially less than 20 cents each, the entity will usually need to consolidate those securities or undertake some other form of capital restructure to boost their value to something around 20 cents so as to ensure that the relative value of the entity's existing securities (as measured by their market price) and the issue price or sale price for the new securities are not out of kilter.[209]

ASX recognises that where an entity's securities have been trading on ASX at less than 20 cents, having to undertake a consolidation or other restructure to facilitate compliance with the 20 cent rule prior to, or in conjunction with, a capital raising can impose structural, timing and other impediments to the completion of a transaction that might otherwise be in the interests of an entity and its security holders. In such a case, ASX will consider a request[210] from the entity not to apply the 20 cent rule provided:

- the price at which the entity's securities last traded on ASX was not less than two cents each;
- the issue price or sale price for any securities being issued or sold as part of, or in conjunction with, the transaction:
  - is not less than two cents each;[211] and
  - is specifically approved by security holders as part of the approval(s) obtained under Listing Rule 11.1.2; and
- ASX is otherwise satisfied that the entity's proposed capital structure after the transaction will satisfy Listing Rules 1.1 condition 1 and 12.5 (appropriate structure for a listed entity).

An entity that does not meet the conditions above will not be granted relief from the 20 cent rule.

ASX also recognises that practical difficulties can arise, in those cases where this relief is not granted and an entity undertakes a consolidation to facilitate compliance with the 20 cent rule using a consolidation ratio based on the market price of its securities on a particular date, if there is a subsequent material drop in market price.[212] Again, in these circumstances, ASX will consider a request[213] from the entity for ASX not to apply the 20 cent rule provided the entity has made a bona fide attempt to comply with the rule. To show this, the entity must demonstrate to ASX that the consolidation ratio would have been sufficient, based on the lowest price at which the entity's securities

[208] Listing Rule 2.1 condition 2 requires the issue price or sale price of all the securities for which an entity seeks quotation (except options) to be at least 20 cents in cash. Listing Rule 2.1 condition 2 only applies at the point of listing. Thereafter, a listed entity is free under the Listing Rules to pursue a capital raising at any price that its directors consider appropriate (subject, in the case of a placement under Listing Rule 7.1A, to the price floor specified in Listing Rule 7.1A.3).

[209] Of course, if the proposed issue price or sale price for the new securities is higher than the 20 cent minimum under the Listing Rules, the entity will usually need to consolidate its existing securities or undertake some other form of capital restructure to boost their value to something around that higher price.

[210] The request should take the form of an application for a waiver or a request for in-principle advice. For further guidance, see Guidance Note 17 *Waivers and In-Principle Advice*.

[211] The two cent floor means that an entity's securities can fall in value by as much as 95%, or 19 price steps, before they reach the minimum price step for trading securities on ASX of 0.1 cents per security. Allowing securities to be issued at a lower price than this would be likely to raise concerns regarding potential volatility and whether the entity's capital structure after the issue will satisfy Listing Rule 1.1 condition 1 (appropriate structure for a listed entity).

[212] For the reasons outlined in the preceding paragraph, ASX will not grant this relief if the market price of the entity's securities has fallen to less than two cents each or if ASX is not satisfied that the entity's proposed capital structure after the transaction will satisfy Listing Rules 1.1 condition 1 and 12.5 (appropriate structure for a listed entity).

[213] Again, the request should take the form of an application for a waiver or a request for in-principle advice. For further guidance, see Guidance Note 17 *Waivers and In-Principle Advice*.

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traded over the 20 trading days preceding the date that it sent its notice of meeting to security holders seeking approval to the consolidation, to achieve a market value per security of 20 cents.[214]

ASX would encourage an entity that is proposing to issue securities as part of, or in conjunction with, a transaction to which Listing Rule 11.1.3 has been or may be applied, to consult with ASX at the earliest opportunity in relation to potential application of the 20 cent rule.

Where an entity is not proposing to undertake a capital raising as part of, or in conjunction with, a significant change to the nature or scale of its activities,[215] the 20 cent rule has no application. In that case, if ASX has any concerns about the level at which an entity's securities are likely to trade following the significant change,[216] it will address those concerns on a case-by-case basis. This may include requiring the entity to consolidate or otherwise restructure its share capital as a condition of it being readmitted to the official list.[217]

ASX will closely examine any capital raising by a listed entity or any entity the listed entity is proposing to acquire or merge with in the lead-up to, or following, the announcement of a transaction that requires re-compliance under Listing Rule 11.1.3, to ensure that it does not undermine the spirit and intent of the 20 cent rule or the policy considerations that underpin when ASX will consider granting relief from that rule. An example is where the listed entity raises capital at a price less than two cents per security (that being the minimum floor price at which ASX will consider not applying the 20 cent rule). Another example is where the entity being acquired or merged with issues securities that, upon consummation of the acquisition or merger, will convert into securities in the listed entity at an effective price of less than two cents per security. In these cases, ASX is likely to deny any relief from the 20 cent rule.

8.9 Minimum option exercise price

Closely related to the 20 cent rule is the requirement in Listing Rule 1.1 condition 12 for any options on issue to be exercisable for at least 20 cents in cash (the "minimum option exercise price rule").

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The minimum option exercise price rule only applies at the time of listing and therefore it is possible for an entity that is required under Listing Rule 11.1.3 to re-comply with ASX's admission and quotation requirements to have existing options on issue with an exercise price of less than 20 cents. Where that is the case, ASX will not generally apply Listing Rule 1.1 condition 11 so as to require the entity to restructure those options to increase their exercise price to at least 20 cents.[218]

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If an entity is proposing to issue options over ordinary securities as part of, or in conjunction with, the transaction that has caused ASX to apply Listing Rule 11.1.3 and its ordinary securities have been trading at less than 20 cents, ASX will consider a request[219] from the entity for ASX not to apply the minimum option exercise price rule, provided:

- the exercise price for the options:
  - is not less than two cents each;[220] and

[214] Of course, the need for such a waiver will not apply in those cases where ASX has decided not to apply the 20 cent rule in the first place.

[215] Note that this situation effectively requires the entity to prepare an information memorandum in lieu of a prospectus or PDS and will therefore only be available if the entity has not raised any capital for the 3 months before, and will not need to raise any capital for 3 months after, the date of issue of the information memorandum (see the final bullet point in Listing Rule 1.4.7 and the materials under '3.3 Prospectus / PDS / information memorandum' on page 33).

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[216] For example, under Listing Rules 1.1 condition 1 and 12.5 (appropriate structure) or Listing Rule 12.4 (level of spread).

[217] Using its powers in that regard under Listing Rules 1.19 and 18.8.

[218] Although the entity is free to do so, if it wishes, provided it complies with the requirements in Listing Rule 6.23 for changing the terms of options.

[219] Again, the request should take the form of an application for a waiver or a request for in-principle advice. For further guidance, see Guidance Note 17 *Waivers and In-Principle Advice*.

[220] See note 211 above.

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- is specifically approved by security holders as part of the approval(s) obtained under Listing Rule 11.1.2; and

- ASX is otherwise satisfied that the proposed capital structure of the entity after the transaction in question will satisfy Listing Rule 1.1 condition 1 (appropriate structure for a listed entity).

ASX may have concerns on this latter issue if, for instance, the number of options to be issued is disproportionate to the number of ordinary securities on issue.[221]

ASX will not grant relief from the minimum option exercise price rule for options that are in the money.

8.10 Directors must be of good fame and character

Listing Rule 1.1 condition 20 requires an entity seeking admission to the official list to satisfy ASX that each director or proposed director of the entity[222] at the date of listing is of good fame and character. This is considered to be an appropriate safeguard to apply in relation to directors who have been installed by the promoters of an entity before its listing, particularly in a context where the entity is usually seeking to raise funds from investors.

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In summary, an entity applying for admission to the official list is required to provide to ASX for each director or proposed director at the date of listing:

- a police/CrimTrac national criminal history check (or an overseas equivalent);

- a search of the Australian Financial Security Authority National Personal Insolvency Index (or an overseas equivalent); and

- a completed statutory declaration at the date of listing confirming various matters (including that the director has not been the subject of relevant disciplinary or enforcement action by an exchange or securities market regulator) or, if the director is not able to give such confirmation, a statement to that effect and a detailed explanation of the circumstances involved.

An entity may also be required to provide additional information about its directors or proposed directors to ASX, if ASX requires. Guidance Note 1 *Applying for Admission – ASX Listings* has more detailed guidance about ASX's "good fame and character" requirements.

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The Listing Rules do not impose any equivalent requirement in relation to directors appointed following admission. This is on the basis that those directors must submit to an election by security holders and the listed entity has an obligation, in that context, to put all material information about the director in its possession[223] in the notice of meeting proposing his or her election. Security holders therefore get an opportunity to express their opinion on whether the director is of good fame and character and someone to whom they wish to entrust the management of the listed entity.

To maintain symmetry with this approach, where an entity is required under Listing Rule 11.1.3 to re-comply with ASX's admission and quotation requirements, ASX will require the entity to satisfy it that each director:

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- who has been appointed since the entity's last annual general meeting[224] as a director other than pursuant to an election of security holders; or

- who is proposed to be appointed in connection with the transaction,

[221] See Listing Rule 7.16.

[222] For these purposes, if the entity is a trust, references to the directors or proposed directors of the entity, are to be taken to mean the directors or proposed directors of the responsible entity of the trust.

[223] In this regard, ASX would expect the board of a listed entity to undertake appropriate background checks on any person it proposes to appoint as a director in its own right or to put forward at a meeting of security holders for election as a director.

[224] Listing Rule 14.4 requires any director (other than a managing director) appointed to fill a casual vacancy or as an additional director to stand down at the next annual general meeting unless he or she is re-elected.

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is of good fame and character. ASX will not generally require any director who has previously been elected by security holders to meet this requirement unless ASX has specific information about the fame and character of the director that ASX considers was not brought to the attention of security holders at the time the director was elected.

8.11 Requirements for additional information

ASX may require an entity that is required under Listing Rule 11.1.3 to re-comply with ASX's admission and quotation requirements to disclose additional information over and above that required under Appendix 1A and the accompanying Information Form and Checklist (ASX Listings).[225]

ASX may submit, or require the entity to submit, any information given to ASX to the scrutiny of an expert selected by ASX.[226]

ASX may also impose a condition on re-admission that the applicant disclose certain information to the market before its re-admission takes effect.[227]

[225] Listing Rule 1.17.

[226] Listing Rule 1.17. The costs of the expert must be paid for by the applicant.

[227] Listing Rules 1.19 and 2.9.

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Moved up [34]: Voting exclusion statement¶

Moved up [13]: Listing Rule 11.3: suspension of quotation¶

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Moved up [8]: Pre-emptive capital raisings¶

Moved up [33]: ASX may object to a draft notice of meeting if it

Moved up [10]: Listing Rule 11.2: disposal of an entity's main

Moved up [9]: ASX will regard this as a serious breach of the Listing

Deleted: ASX acknowledges that a listed entity that is short of working …

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Moved up [11]: *production) is the same as its main undertaking before*

Moved up [12]: A receiver, administrator or liquidator has a statutory

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Moved up [18]: Requirements for agreements¶

Moved up [19]: requirements.[244] This is in keeping with the fact that …

Moved up [21]: to include in the agreement appropriate safeguards to

Moved up [22]: Break fees¶

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Moved up [24]: Requirements for notices of meeting¶

Moved up [25]: an assessment of the financial effect of the transaction

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Moved up [26]: if the transaction will result in the entity needing to

Moved up [27]: the timetable for implementing the transaction.¶

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Moved up [29]: and expense of preparing a prospectus, PDS or

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Moved up [35]: , 10.1 or 10.11, as well as under Listing Rule 11.1.2 or

Moved up [14]: .3 empowers ASX to suspend the quotation of an

Moved up [15]: Generally, an announcement by a listed entity under

Moved up [16]: Thereafter, ASX will apply the following process:¶

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