

**SIMPLIFYING, CLARIFYING AND ENHANCING THE INTEGRITY
AND EFFICIENCY OF THE ASX LISTING RULES**

CONSULTATION PAPER

**Submissions on Guidance Note 33 Removal of Entities from
the ASX Official List**

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1. BACKGROUND

Steinepreis Paganin welcomes the opportunity to provide a submission to the Australian Securities Exchange (**ASX**) on its consultation paper that has been issued headed *Simplifying, clarifying and enhancing the integrity and efficiency of the ASX Listing Rules (Consultation Paper)*.

This submission relates to the proposed ASX policy change to Guidance Note 33, *Removal of Entities from the ASX Official List*.

Steinepreis Paganin is an independent corporate and resources law firm operating in Perth, Western Australia and Melbourne, Victoria. As part of our practice, we provide legal advice to mid to small cap companies seeking a listing on ASX or existing companies that are listed. Importantly:

- (a) since 2007, our firm has been ranked as the top law firm, Australia wide, for advising on the most listings (by number) on ASX;
- (b) during the same period, we have advised on numerous re-compliance transactions, recapitalisations and merger and acquisition transactions undertaken in the mid to small cap sector; and
- (c) our firm advises approximately 300 mid to small cap companies listed on ASX, with these companies being from the resources, technology, industrial and biotechnology sectors.

Steinepreis Paganin has a unique understanding of the mid to small cap market given that it acts for a significant number of listed public companies in this area and it has been actively involved in the most listings, Australia wide, for a significant period of time.

This submission is supported by various advisers, listed entities and interested parties, and we will separately send a confirmation of the support received.

2. EXECUTIVE SUMMARY OF PROPOSED POLICY CHANGE AND SUBMISSIONS

2.1 Proposed Change

As foreshadowed in the Consultation Paper, from 1 July 2019 (approximately 4 months from now), the Australian Securities Exchange (**ASX**) has indicated a proposed change to its policy where it will automatically remove an entity from the official list if the entity has:

- failed to lodge any of the documents referred to in Listing Rule 17.5 for more than 1 year; or
- been suspended from quotation for a continuous period of 2 years,

whichever occurs first.

The documents referred to in Listing Rule 17.5 include an entity's annual report, preliminary final report, annual accounts, half yearly accounts, quarterly activity report, quarterly cash flow report, an Appendix 4F and the monthly statement of NTA backing per security required from a LIT.

ASX has some discretion to extend the periods, but this will only be used in "limited circumstances". This discretion currently exists, and in our view ASX adopts a very strict approach to the concept of "limited circumstances".

2.2 Submissions

General

The market has operated under current Guidance Note 33 for a short period of time only, our understanding being that it was first adopted in the current format in January 2014, amended in December 2015 and further amended in December 2016.

In particular, the ASX policy to remove from the official list an entity whose securities have been suspended for trading for a continuous period of 3 years was adopted at the commencement of January 2016, as we understand it.

It has been our considered view that this period in its own right was always quite short and to amend the period down to the proposed period of 2 years would create significant timing difficulties for most entities that have been longer term suspended.

It is noted that if this policy does come into effect on 1 July 2019, entities that are not compliant on this date will be automatically removed. In other words, there is no grandfathering of the proposed policy and although parties are being made aware that the policy may be adopted, there is no notice period that applies from the date of its adoption. In our view, this is an unfair restriction on an entity that has previously operated under the express policy of a 3 year rule.

We consider that it is helpful to consider this matter by setting out the timing and process to seek a lifting of the suspension as it applies both in practice and from a formal perspective. This is perhaps best illustrated in the first instance by considering the time period for a re-compliance by the suspended entity, as this is the style of transaction that will take the longest.

This period can be broken down into 2 parts, the negotiation period and the formal approval process period. We will give an illustration of the likely time periods applicable to each part, because although ASX is aware of the general periods, it is important to set out the steps and most likely timing as it applies in practice.

Negotiation Period for a re-compliance

In our experience, the negotiation period involves:

- (a) identifying a list of target entities/assets that the listed entity seeks to acquire;
- (b) approaching those entities and either seeking to come to a meeting of the minds on possible transaction terms and, if possible, undertaking some high level due diligence on the financial position. The general view is that a significant number of approaches get made in respect of various target entities/assets, with each one taking time to consider and analyse;
- (c) if a high level review is positive, seeking to come to initial non-binding indicative terms sufficient to enter into an initial discussion with ASX to ensure that there are no "road blocks" to the proposal;
- (d) following the initial ASX meeting and the high level due diligence review, a more detailed discussion will ensue with the parties signing a non-binding indicative terms sheet, with a more extensive due diligence review to take place after that terms sheet is signed, generally for an exclusive period;
- (e) following the exclusive due diligence period, the proposed transaction either proceeds to the next step, or does not proceed, in which case the time period starts again; and
- (f) if the transaction is to proceed based on a positive due diligence review, the parties will then enter into the formal process to document the transaction via formal agreements and commence a formal process with ASX.

In our view, this period can take anywhere between 3 and 4 months per proposal (and possibly significantly longer if a larger transaction). More relevantly, if a transaction starts but does not proceed, the entity starts the process all over again which re-sets the clock. We have seen many instances where entities have many discussions with various parties and only conclude a transaction to the non-binding indicative stage with the formal due diligence process to commence after 2 years due to a number of false starts, notwithstanding their wish to conclude a transaction.

Formal Approval Process for a re-compliance

After the initial approach to ASX and the non-binding indicative terms sheet is signed, the listed entity would then consult in a formal manner with ASX and seek an in-principle approval, prepare a draft announcement that requires approval by the ASX Managers and seek to conclude the formal documentation, running each of these matters in tandem. In our best estimate, and assuming the matters proceeds smoothly, this can take approximately 2 to 3 months. This

immediately takes us to a period of 5 to 7 months when the negotiation period is taken into account.

After the announcement is made on ASX, the next step is to commence preparing a Notice of Meeting. The Notice of Meeting is expected to take approximately 4 weeks to prepare and if an expert's report is required, which is common, this period is expected to be 6 weeks. The Notice of Meeting is then lodged with ASX where the designated period of review is 15 Business Days (3 weeks). The Notice of Meeting is then printed and despatched with a meeting held approximately 6 weeks after ASX clearance of the Notice. ASX currently requires the appropriate 20 cent waivers and other relief instruments to be granted before the Notice of Meeting is approved, so it is possible that this period will be longer so we would allow 2 months for this process. This now takes us to 7 to 9 months.

The next step is the preparation of the re-compliance prospectus which will often commence after the Notice of Meeting is approved, although a significant amount of preparatory work will have been undertaken due to the need to complete the Notice of Meeting and the due diligence work on the assets will have been performed. We would estimate a period of 2 months for this work, and therefore the Prospectus could be lodged somewhere around the meeting date, and generally not more than 1 month after that date.

When the prospectus is lodged the formal Appendix 1A process commences and assuming the capital raising is completed quickly, and the process runs smoothly within ASX, the conditional approval letter can be expected within 2 months after the Appendix 1A is lodged. Then, the securities will be re-instated about 2 weeks after the approval is received.

This formal period is now a total of around 10 to 12 months, assuming that the process proceeds smoothly. It is accepted that on lodgement of the Notice of Meeting and the Prospectus, ASX has a discretion to grant further time for the completion of the transaction, however this remains a discretion of ASX and it is applied in "limited circumstances", accordingly it is important that the total timing be considered for certainty.

Time Periods

As can be seen, even if the re-compliance is commenced immediately after the suspension, and the shortest period for a negotiation is achieved of 3 months, and the shortest period for the formal re-compliance process of 10 months is also achieved, the shortest time period in the perfect scenario is 13 months.

It is clear to us that these matters generally do not proceed smoothly, both at a negotiation level or at the ASX level, for various reasons. Therefore, if ASX imposes a period of 2 years, there is very little scope for slippage on a re-compliance transaction.

We would comment that the internal ASX processes that have been recently adopted, such as LAR, have increased the time periods that are needed for the re-compliance and other matters generally. While we support the LAR process and consider it to be a good initiative as it provides certainty to listed entities and advisers, to now reduce the period under GN 33 from 3 years to 2 years while adding to the process and therefore the time for completion seems to be at odds with the intent of the changes made.

Administration, DOCA's and other transactions

The time period is arguably even more problematic for an entity that has had an administrator appointed and which is then subject to a DOCA.

First, these entities would commonly seek relief from ASIC from the key reporting obligations in the proposed policy, so it would seem odd that ASIC has granted relief but ASX will delist an entity for the non-compliance.

Second, an entity that is suspended and which then enters into a DOCA can find that the process to complete the investigations into the entity by the administrator, the entry into the DOCA and any re-capitalisation process being completed would in most instances well exceed the 2 year period.

In our submission, an exemption should be provided for those entities that are in administration or subject to a DOCA that provides them with a period of 2 years post the completion of the administration and full effectuation of the DOCA to be re-instated.

Other comments

We also believe that given the market climate has changed significantly and the equity capital markets are currently quite soft, it would not be the right time to impose this reduction. ASX should encourage its listed entities to comply with their reporting obligations and seek new transactions, plus pay their listing fees, and provided that the entity is compliant with those reporting obligations and fee payments, we do not see any necessity to prematurely delist that entity.

Further, the risk is that a short period will encourage listed entities that seek to re-comply to undertake a transaction that may be sub-optimal, but they are forced to do so in order to maintain their listing. This should be discouraged. In the alternative, a vendor knowing that the listed entity's 2 year period is close, may seek to extract a commercial advantage given that the options available to the listed entity are somewhat constrained by the time period imposed.

ASX has also encouraged entities to place themselves into a "voluntary suspension" pending a review of certain transactions and has then, in some cases, provided very little guidance as to what the entity is required to do to come out of the suspension which has been "voluntary" or taken a substantial period of time to do so resulting in the inability of a listed entity to issue a cleansing statement. We would encourage earlier engagement from all parties on this process, so as to continue to provide greater clarity to the market participants.

In the end result, the shareholders of the listed entity are the parties most affected, because they have no control over the process, and may see the value of their holding in the listed entity diminish substantially if the entity is delisted. We believe this will result in a significant increase in shareholder complaints.

3. RECOMMENDATION

We strongly recommend that the 3 year period remain. To the extent ASX is fixed in its view that a 2 year period is appropriate following the receipt of submissions, we would strongly recommend that the new policy be grandfathered, and that it not apply until 1 July 2020.

This is to ensure that those entities that have relied on the current policy setting are given 1 year after it is adopted to allow them the time to seek to enter into a suitable transaction. ASX may seek to point out that it has given notice to listed entities already, however the current position is that ASX is in consultation and listed entities should not have to conclude a transaction based on a "what if". The listed entity needs certainty and a set future time from which the rule will apply after it is implemented (if at all).

Further, for an entity in administration and then subject to a DOCA, we would strongly recommend that a period of 2 years after the DOCA is fully effectuated be imposed for that entity to be re-instated.

Both recommendations would be a fair result and ensure that action is not taken against ASX to seek to set aside the policy for administrative law reasons, a very real possibility following our discussions with clients.

We have sought support for this submission from various advisers, listed entities and interested parties, and will separately send a confirmation of the support received.