Listed@ASX

Compliance Update 30 October 2017
Update no 09/17

1. Listing rule amendments for reverse takeovers

On 20 October, ASX released a document entitled *Reverse Takeovers: Final Listing Rule Amendments*, along with a mark-up of the final form of listing rule amendments intended to regulate reverse takeovers.

This is the culmination of an extensive consultation process that began in November 2015 with ASX's consultation paper *Reverse Takeovers – Consultation on Shareholder Approval Requirements for Listed Company Mergers* and continued earlier this year with ASX's *Response to Consultation: Reverse Takeovers – Shareholder Approval Requirements – Exposure Draft Listing Rule Amendments*.

The listing rule amendments come into effect on 1 December 2017 and are summarised below.

a. **The existing rules**

Listing rule 7.1 generally requires a listed entity to obtain security holder approval for issues of securities in excess of 15% of its existing fully paid ordinary capital over a 12 month period unless an exception applies.

Exception 5 of listing rule 7.2 currently excludes issues of securities under a takeover bid required to comply with the Corporations Act ("takeover bid") or a merger by way of scheme of arrangement under part 5.1 of that Act ("merger scheme"), while exception 6 currently excludes issues of securities to fund the cash consideration payable under a takeover bid or a merger scheme if the terms of the issue are disclosed in the bid/scheme documents.

Therefore, shareholder approval is not currently required under listing rule 7.1 for a bidder to issue securities under a takeover bid or merger scheme, regardless of

the number of securities issued.

b. **The new rules**

Listing rule 7.2 exceptions 5 and 6 will be amended so that those exceptions no longer apply to issues under, or to fund, a reverse takeover. This will have the effect that these issues will now require approval under listing rule 7.1.

A reverse takeover will be defined as a takeover bid or a merger by way of scheme of arrangement under Part 5.1 of the Corporations Act where an entity is proposing to acquire securities of another body and the aggregate number of equity securities issued or to be issued by the entity:

- under the takeover bid or scheme; and/or
- to fund the cash consideration payable under the takeover bid or scheme,

is equal to or greater than the number of fully paid ordinary securities on issue in the entity at the date of announcement of the takeover bid or scheme.

Separate issues will be able to be aggregated if, in ASX's opinion, they form part of the same commercial transaction.

c. **Ancillary amendments**

Listing rule 7.3.2 currently requires an issue of securities to be made within 3 months after shareholders approve the issue under listing rule 7.1. For issues under or to fund a reverse takeover, this period will be extended to 6 months from the date of obtaining the requisite approval. This is designed to strike a balance between giving entities the time practically necessary to complete an issue of equity securities under or to fund a reverse takeover, and ensuring that the securities are issued within a reasonable time frame after security holder approval so that the approval can still be considered to be current and not rendered stale by subsequent events.

A new listing rule 7.3.10 will be added requiring a notice of meeting to approve an issue of securities under or to fund a reverse takeover to disclose information "in relation to the reverse takeover". ASX is intending to publish a new guidance note with guidance on the information ASX will expect to be disclosed in this regard.

The voting exclusion for listing rule 7.1 resolutions set out in listing rule 14.11.1 will be expanded to capture:

- in the case of a proposed issue under a reverse takeover, the reverse takeover target and any person who will obtain a material benefit as a result of the reverse takeover or the proposed issue (except a benefit solely by reason of being a holder of ordinary securities in the entity or the reverse takeover target); and
- in the case of a proposed issue to fund a reverse takeover, the reverse takeover target, any person who is expected to participate in the proposed issue, and any person who will obtain a material benefit as a result of the reverse takeover or the proposed issue (except a benefit solely by reason of being a holder of ordinary securities in the entity or the reverse takeover target).

d. **General changes to voting exclusions**

Currently, the voting exclusion requirements in listing rule 14.11 apply whether an excluded person is voting for or against the relevant resolution. ASX has seen instances where parties have structured a transaction in such a way to attract a voting exclusion for persons who are opposed to the transaction.

The intent of the voting exclusion requirement is to ensure that a transaction can only proceed if it is approved by security holders who do not have a personal interest in the transaction. It is not to deny security holders who are opposed to a transaction an opportunity to vote against it.

ASX is therefore amending listing rule 14.11 so that excluded persons are only precluded from voting in favour of a resolution. They will be entitled to vote against the resolution. This change will apply to all voting exclusions under the listing rules, not just those related to security holder resolutions approving an issue of securities under or to fund a reverse takeover for the purposes of listing rule 7.1.

e. **General changes to the definition of "associate"**

The definition of "associate" in listing rule 19.12 currently incorporates by reference the definition of that term in sections 12 and 16 of the Corporations Act. Section 12(2)(a) addresses groups of bodies corporate that are controlled by a body corporate and deems them all to be associates of each other. However, that section fails to address groups of other types of entities and also groups that are controlled by an individual.

ASX considers that the definition of "associate" should apply to groups of entities under common control regardless of whether the controller is an individual, a body corporate or some other type of entity. ASX is therefore amending the definition of "associate" in listing rule 19.12 to have this effect.

2. Amendments to listing rules 1.2 and 1.3

In addition to the listing rule amendments dealing with reverse takeovers mentioned above, ASX is also make some minor amendments to listing rules 1.2 and 1.3 to clarify the accounts that an applicant for listing must provide to ASX with its listing application. The amendments are included in the final form of amendments to the listing rules to regulate reverse takeovers mentioned previously.

3. Amendments to Guidance Notes 1, 4 and 12

ASX is amending Guidance Note 1 Applying for Admission – ASX Listings ("GN 1"), Guidance Note 4 Foreign Entities Listing on ASX ("GN 4") and Guidance Note 12 Significant Changes to Activities ("GN 12") with effect on 1 December 2017.

GN 1 is being updated:

- to include in section 2.9 a reminder that a listed entity will be expected:
    - to lodge its audited or reviewed half yearly accounts and its audited annual

accounts with ASX in accordance with the deadlines specified in chapter 4 of the listing rules; and
    - if it is subject to quarterly cash flow reporting under listing rule 4.7B (Appendix 4C) or 5.5 (Appendix 5B), to lodge its quarterly cash flow reports in accordance with the deadlines specified in those rules,

  from the date it is admitted to the official list and, consequently, if it is admitted a short period before a reporting deadline, it will only have a short period within which to do so and will need to plan for that contingency;

- to include in section 3.3 a paragraph encouraging applicants for listing to lodge their listing prospectus or PDS with ASX as soon as possible after lodging it with ASIC and not to wait until the end of the 7 day lodgement period provided for in the Corporations Act, as well as more information on the role ASX plays in reviewing listing prospectuses and PDSs;

- to update and expand the guidance in section 3.4 explaining the limited circumstances in which ASX will agree to accept an information memorandum rather than a prospectus or PDS under listing rule 1.1 condition 3;

- to clarify aspects of ASX's requirements relating to minimum spread in section 3.8;

- to reflect in section 3.9 the changes to listing rules 1.2 and 1.3 mentioned in section 2 of this Update and to expand the guidance on the accounts that an applicant for listing must provide to ASX with its listing application under those rules;

- to add a new section 3.10 with more detailed guidance on the working capital requirements an entity seeking admission under the assets test must meet;

- to include in section 3.19 more detailed guidance on ASX's good fame and character requirements for directors and proposed directors;

- to incorporate the changes to the definition of "associate" in listing rule 19.12 mentioned in section 1 of this Update; and

- to include a new annexure B with a table, which ASX has settled with ASIC, that summarises the respective accounts requirements an applicant for listing must meet under the ASX listing rules and under ASIC Regulatory Guide 228 *Prospectuses: Effective disclosure for retail investors* in 14 different but common scenarios.

A mark-up showing the changes to GN 1 can be viewed here.

GN 4 is being updated to include in section 2.1 more detailed guidance on the good fame and character requirements directors and proposed directors of a qualifying NZ entity must meet to list as a foreign exempt listing on ASX.

A mark-up showing the changes to GN 4 can be viewed here.

GN 12 is being updated:

- to give further guidance in section 2.7 on the in-principle advice an entity can seek from ASX in relation to a transaction that triggers listing rule 11.1 (significant

change to the nature or scale of an entity's activities);

- to add a new example in section 4.4 confirming that the granting of a fixed and floating charge over an entity's assets to secure a funding facility does not involve a disposal of its main undertaking;

- to amplify the explanation in section 4.6 as to why the disposal of an entity's main undertaking by a receiver, administrator or liquidator does not trigger listing rule 11.2;

- to expand significantly the guidance in section 7 on the requirements for notices of meeting proposing a resolution under listing rule 11.1.2 or 11.2 (including to incorporate the changes to voting exclusion statements and the definition of "associate" mentioned in section 1 of this Update);

- to make section 8.3 consistent with the amended guidance in GN 1 on when ASX will agree to accept an information memorandum rather than a prospectus or PDS under listing rule 1.1 condition 3;

- to update the guidance in section 8.6 on compliance with the profit test and assets test to reflect the changes to listing rules 1.2 and 1.3 mentioned in section 2 of this Update and the amended guidance in GN 1 on the accounts an applicant for listing must provide to ASX; and

- to expand the list of information in annexure A required to be disclosed about transactions that trigger the obligation to re-comply in listing rule 11.1.3, in particular, to include:

    - details of any fees paid or payable by the entity to any person for finding, arranging or facilitating the transaction; and
    - confirmation that the entity has undertaken appropriate enquiries into the assets and liabilities, financial position and performance, profits and losses, and prospects of the target for the board (or, in the case of a listed trust, the responsible entity) of the entity to be satisfied that the transaction is in the interests of the entity and its security holders or, if it hasn't, an explanation of why it hasn't.

A mark-up showing the changes to GN 12 can be viewed here.

4. Medical cannabis listings

Reflecting the strong market interest in recent times in medical cannabis listings, ASX has noticed an increase in the number of enquiries it is receiving about the prospects of listing a medical cannabis business on the ASX market. These enquiries are coming from potential IPO applicants as well as existing listed entities contemplating a possible back-door listing transaction. Many of these enquiries involve very early stage businesses with little or no operating or financial history.

ASX would remind interested parties that an applicant for listing (whether it is an IPO or backdoor listing) must have a structure and operations that are appropriate for a listed entity (listing rule 1.1 condition 1) and of the following examples in Guidance Note 1 of where an applicant may not meet this requirement:

- the applicant has a vague or ill-defined business model or its business operations

do not appear to ASX to have any substance;
- the applicant's proposed business is little more than a concept or idea; and
- the applicant has not yet secured the key licences, government approvals, intellectual property rights or other property or rights it will need to operate its business.

ASX also notes that the legal status of medical cannabis businesses in the US presently is subject to uncertainty under US federal law. An applicant seeking to list a US medical cannabis business will need to satisfy ASX that its business can be lawfully carried on in the US (under both Federal and State law) before ASX will admit it to the official list. ASX will generally expect this to be confirmed in a legal opinion from a reputable US law firm and for the opinion to be included in the applicant's listing prospectus or PDS.

5. Bitcoin and ICO listings

ASX has also noticed an increase in the number of enquiries it is receiving about the prospects of listing a business investing in, or making initial coin offerings ("ICOs") of, bitcoins or other crypto-currencies. Again these enquiries are coming from both IPO applicants and existing listed entities contemplating a back-door listing transaction.

These businesses raise significant legal, regulatory and public policy issues. Their regulatory status in a number of overseas jurisdictions is subject to considerable uncertainty and rapid change. For example, ICOs have recently been ruled to be securities under US law and therefore are only able to be offered in the US in compliance with their securities laws. ICOs have been banned altogether in China and South Korea. In Australia, Japan, Canada and elsewhere changes are being made to regulate crypto-currencies under anti-money laundering legislation and this could materially affect their value over time.

ASIC has recently published guidance on the legal obligations to which issuers of ICOs may be subject in Australia and warned consumers of the potential risks of investing in ICOs, including the potential for these products to be scams (see ASIC Information Sheet 225).

An applicant seeking to list a business investing in, or making ICOs of, bitcoins or other crypto-currencies will need to satisfy ASX that its business is bona fide, that it has a structure and operations that are appropriate for a listed entity (see section 4 above), that it will comply with all applicable legal requirements in Australia and in all jurisdictions where it is proposes to carry on business, and that proper disclosure has been made to investors of the risks (including emerging regulatory risks) involved.

6. ASX Compliance changes

ASX has recently updated its governance arrangements for ASX Compliance.

There are a number of entities in the ASX group licensed to operate markets and clearing and settlement facilities under the Corporations Act. Each of them is obliged under that Act to have adequate arrangements for handling conflicts and for monitoring and enforcing compliance with their operating rules (including, in the case of ASX Limited, its listing rules). The Corporations Act permits a licensee to appoint a related entity to assist with these arrangements, although the licensees remain responsible for the performance of their statutory obligations.

For the past 7 years, the ASX licensees have used ASX Compliance Pty Limited, a wholly owned subsidiary within the ASX group, to assist with the oversight of these arrangements. ASX's Chief Compliance Officer, the head of the ASX Compliance function, has had a dual reporting line to the Chairman of ASX Compliance Pty Limited and to the ASX Managing Director and CEO. The Board of ASX Compliance Pty Limited has included ASX directors and non-ASX directors.

ASX has re-assessed the need for these arrangements in discussion with its regulators and decided to restructure the reporting lines for ASX Compliance. The oversight of the ASX Compliance function will now be performed directly by the boards of the ASX Group licensees rather than by the board of ASX Compliance Pty Limited. This will allow the licensee boards to have direct line of sight to these important activities to confirm that they are meeting their statutory obligations under the Corporations Act. Oversight of ASX's conflict handling arrangements will be performed by the ASX Audit and Risk Committee, which will also receive regular reporting on compliance matters. The Audit and Risk Committee has an independent chair and consists of a majority of independent directors.

7. Indication of price sensitive announcements – proposed change in ASX process

The Market Announcements Office process an average of 500 announcements per day. ASX seeks to release announcements as promptly as it reasonably can in order to promote the objectives of the continuous disclosure regime. Part of the process for releasing market announcements involves an assessment of whether or not they may be price sensitive. If ASX forms that view, it will attach a "price sensitive" tag to the announcement and, if the market is then trading, the announcement will automatically attract a 10 minute trading pause (or, in the case of an announcement about a takeover or scheme, one hour).

ASX recognises that an entity will have an awareness of the sensitivity of the announcement in understanding its business and the key factors influencing it. As such, ASX is proposing to include functionality in the lodgement process for a listed entity to indicate that an announcement is 'price sensitive' at the time of submitting the announcement to the ASX.

This price sensitivity indication will assist Market Announcement Officers in more quickly forming a view on the materiality of the announcement, which will lead to increased timeliness in the release of announcements and increased accuracy in classifying announcements as price sensitive. To maintain consistency and integrity, however, the Market Announcements Office will make the final assessment of price sensitivity prior to the release of the announcement to the market.

ASX is seeking to implement the 'price sensitivity indication' during mid-2018. Further information will provided as this initiative progresses.

8. Proposed changes to the reporting framework for oil and gas companies

ASX wishes to bring to the attention of oil and gas entities that that the Society of

Petroleum Engineers (SPE) have released a revised Petroleum Reserves Management System (PRMS) for public consultation. Written submissions commenting on the proposed revisions to PRMS are due by **14 November 2017**. A copy of the draft revised PRMS currently subject to consultation is available at Draft Petroleum Resources Management System 2017.

PRMS underpins the disclosure requirements applicable to the public reporting of petroleum resources in Chapter 5 of the ASX listing rules. Under the listing rules, petroleum resources must be classified in accordance with the PRMS and reported in the most specific resource class in which petroleum resources can be classified under the PRMS. The listing rules allow for the reporting of the complete resource base, subject to all the relevant reporting requirements being met and that the resources are reported in the most specific resource class, that is, reserves (1P, 2P, 3P), contingent resources (1C, 2C, 3C) and prospective resources (low estimate, best estimate, high estimate).

When the listing rules were updated in 2012, ASX took the view that allowing a company to disclose estimates of its complete resource base would provide for a more informed market. This was predicated on ASX having appropriate disclosure requirements in place to minimise the potential for misleading disclosure, including the requirement to include 'health warnings' to highlight the types of uncertainty that existed in relation to the realisation and development of estimates of particular resources.

ASX is supportive of the need for periodic reviews and revisions to PRMS to ensure that it remains relevant in the context of evolving technologies and industry developments. ASX considers that the draft revised PRMS includes additional guidance in a number of areas that could provide for greater market integrity of the estimates reported and minimise the potential for investor confusion. A large number of the proposed changes are of a technical nature and will benefit from review and input from appropriately qualified professionals specialising in the evaluation and estimation of petroleum reserves and resources.

However, the most significant change included in the PRMS that warrants consideration by the industry is the proposal that requires the low estimate (1P) of a project to be economic to provide a basis for 1P or proved reserves to exist (and subsequently be reported). This is a significant change in the approach to proved reserves and, if adopted, could potentially require companies to write down their reserves for some projects. ASX has some concerns that such a change could lead to a less informed market, particularly recognising that project decisions are based on the best estimate (P2) being economic.

ASX is planning on making a submission to the SPE on the proposed changes to PRMS, and suggests that oil and gas entities consider the changes and whether there is merit in also making a submission. ASX would welcome the views of oil and gas entities on the proposed changes, in particular, the more conservative approach to proved reserves.

9. Listed entity market capitalisation on asx.com.au

As foreshadowed in Listed@ASX Update no 08/17 ASX is now publishing the number of shares and market capitalisation of listed entities on the 'company information' pages of the ASX website. The detailed methodology for calculating the number of ordinary securities can be viewed here.

ASX recommends that listed entities check to ensure that their number of shares and

market capitalisation displayed is correct.

If you have any queries, please contact your Listings Compliance Adviser.

10. Periodic report due date reminder

Listed entities are reminded of upcoming deadlines for periodic reports:

- Annual reports, 30 June balance date: *Tuesday 31 October 2017*
- Next quarterly reports for mining and commitments test entities: *Tuesday 31 October 2017*

Listed entities are also reminded that a failure to lodge the relevant documents on time will result in an automatic suspension of the entity's securities (refer to listing rule 17.5).

11. Subscribe to Listed@ASX - Compliance Update

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