



ASIC
Australian Securities &
Investments Commission

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and Investments Commission**

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Dear Ms Tan

**ASX Listing Rules Consultation – Proposed amendments to Guidance Note 33
Removal of Entities from the ASX Official List**

We refer to the public consultation paper released by the Australian Securities Exchange Limited (**ASX**) on 28 November 2018, seeking feedback in relation to a package of proposed amendments to various ASX Listing Rules and Guidance Notes.

We note the consultation paper states that ASX is seeking submissions in relation to proposed amendments to Guidance Note 33 *Removal of Entities from the ASX Official List* (**GN 33**).

ASIC provides the following submissions in relation to ASX's proposed amendments to GN 33.

1. Proposed amendments to Guidance Note 33

Listing Rule 17.11 provides that ASX may remove an entity from the official list at the request of the entity and may require conditions to be satisfied before it will act on the request.

Section 2.7 of GN 33 provides that, where an entity's securities are not able to be readily traded on another exchange, ASX will usually require that the entity obtain approval of its security holders to its removal from the official list.

GN 33 states that security holder approval should take the form of an ordinary resolution and all holders of ordinary securities, including those with large or even controlling security holdings, will generally be permitted to vote on the resolution, except in the following cases:

- a) where ASX is concerned that the removal may be intended, in part, to avoid the application of the Listing Rules to a particular transaction or

- situation that would otherwise require security holder approval and that would otherwise attract a voting exclusion under Listing Rule 14; or
- b) where the entity has been the subject of a takeover bid in the preceding 12 months and, in ASX's opinion, the bidder and its associates have attained effective control of the entity without satisfying certain usual conditions in takeover situations.

The proposed amendments to section 2.7 of GN 33 include the addition of two other cases where ASX may exercise its discretion to impose a voting exclusion in a de-listing vote:

- c) where ASX is concerned that the de-listing may be intended, in part, to avoid the disclosure obligations the entity would otherwise have under the Listing Rules and s674 and 675 of the Corporations Act 2001; and
- d) where ASX is concerned that a security holder (or their associates) are likely to obtain a material benefit from the entity no longer being listed that is or may not be available to other security holders generally.

ASX is also proposing to include footnote 30 in GN 33 that notwithstanding the position that all holders will generally be permitted to vote on a de-listing resolution, *'ASX reserves the right to impose a voting exclusion on a resolution approving an entity's removal from the official list, if ASX considers it appropriate to do so in any specific case.'*

(the above referred to as the **Proposed Amendments**)

2. ASIC's submissions

ASIC considers that the request of a company to be de-listed is a critical decision that has implications on the future of the company and its security holders. The consequences of a de-listing include uncertainty surrounding a company's access to capital, loss of protections under the Listing Rules, lower levels of disclosure, limited exit avenues for minority shareholders and lack of liquidity through the removal of a market for security holders to trade their securities. It is for reasons such as these, that we consider the decision to de-list as a significant matter in which the views of all shareholders must be carefully considered.

ASIC is generally supportive of the Proposed Amendments as they broaden ASX's ability to exercise its discretion to impose a voting exclusion for a de-listing vote.

Notwithstanding this, we submit that ASX should change its current requirement for security holder approval via an ordinary resolution, to a more appropriate voting threshold for a de-listing vote, noting that:

- a) ASIC has received many complaints in relation to recent de-listings where a major shareholder is able to pass the de-listing vote alone due to it being an ordinary resolution. We consider that a de-listing vote should not be able to be passed by one shareholder, whose interests and views on a de-listing may differ substantially from minority shareholders; and

- b) our research on international settings indicates that a number of other stock exchanges impose a higher voting threshold for a de-listing vote (for example a special resolution).

Recent de-listings

ASIC has received many complaints in relation to de-listings involving the ability of a major shareholder to, alone, pass the de-listing resolution in circumstances where minority shareholders do not support the de-listing.

The large number of complaints is indicative of the clear divergence of views there can be between a major shareholder and other shareholders on the benefit of the de-listing. This supports our view that a de-listing resolution should not be able to be passed by a small number of shareholders whose views on a de-listing necessarily differ from all other shareholders, by virtue of their shareholding and position of control over the company.

We note that ASX's own policy provides that its requirement for obtaining shareholder approval is to ensure that *'the interests of security holders, as a group, are addressed and that all security holders have an opportunity to express a view on whether or not the entity should be removed from the official list'*¹ (emphasis added). We do not consider that an ordinary resolution for a de-listing vote addresses the interests of all security holders as a group and may potentially serve to advance the interests of a select few parties.

For the reasons outlined above, ASIC is of the view that a more appropriate voting threshold would be a special resolution (as is the case in overseas exchanges – see examples below).

We also note that there may be instances where a de-listing raises similar concerns to GN 33's exceptions (see paragraph 1(a)-(d) above) but does not technically fall within those paragraphs due to factual differences. For example, a de-listing transaction may have a change of control impact and raise similar concerns to a takeover bid, but may not necessarily fall within paragraph 1(b) above, if there has not been a takeover bid in the preceding 12 months.

Given the potential for such issues to arise, where the factual circumstances may not fall within paragraphs 1(a)-(d) but raise the same concerns, we consider that GN 33 should include a statement that ASX will take a principles based approach to applying the voting exclusions, rather than limiting the exercise of that discretion to specified examples. In this regard, we consider that the wording in proposed footnote 30 should be part of the body of GN 33 (rather than a footnote) and should be expanded to reflect this position.

International settings – other stock exchanges

A number of other foreign market operators impose a higher voting threshold for a de-listing vote:

¹ Section 2.7 of GN 33.

Relevant exchange	Voting threshold for a voluntary de-listing
London Stock Exchange – for companies on the Main Market with premium listings ²	<ul style="list-style-type: none"> • Approval by at least 75% of the votes; and • Where there is a controlling shareholder³, approval from a majority of the votes attaching to shares of independent shareholders⁴ voted on the resolution.
Hong Kong Stock Exchange (HKSE) ⁵	<ul style="list-style-type: none"> • Approval by at least 75% of the votes; • Any controlling shareholder⁶ or their associates must abstain from voting or where there are no controlling shareholders, directors and the chief executive and their associates should abstain from voting; and • No more than 10% of votes are cast against the resolution to de-list.
Singapore Exchange (SGX) ⁷ – for companies listed on SGX Mainboard	<ul style="list-style-type: none"> • Approval by at least 75% of the votes; and • No more than 10% of votes are cast against the resolution to de-list.
TSX Venture Exchange ⁸	<ul style="list-style-type: none"> • Approval from a majority of the minority shareholders.

The above examples demonstrate measures already in place in some foreign markets to ensure de-listings take into account the votes of minority shareholders and are not solely carried by a controlling shareholder's vote. This suggests that GN 33's policy on voting thresholds may be out of line with other jurisdictions and supports our view that ASX should change the current requirement for approval via an ordinary resolution to a more appropriate voting threshold.

3. ASIC recommendations

In light of the above, ASIC recommends that ASX revise GN 33 to:

- a) Impose a higher voting threshold for a de-listing vote, such as a special resolution. ASX may also wish to consider whether some of the other shareholder voting requirements that overseas exchanges, such as the London Stock Exchange, require for a de-listing may be appropriate; and

² Listing Rule 5.2.5(2) of the FCA Handbook, in relation to cancellation of a listing of equity shares.

³ Defined in the FCA Handbook as any person who exercises or controls (on their own or together with any person whom they are acting in concert with) 30% or more of the votes able to be cast on all or substantially all matters at a general meeting of a company.

⁴ Defined in the FCA Handbook as any person entitled to vote on the election of directors of a listed company that is not a controlling shareholder of the listed company.

⁵ In relation to companies with no alternative listings. See Rules 6.12 to 6.16 of the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited.

⁶ Defined in the HKSE Rules as any person or group of persons who are entitled to exercise or control the exercise of 30% or more of the voting power at general meetings of a company or who are in the position to control the composition of a majority of the board of directors of a company.

⁷ See SGX Rulebook Main Board Rules, Chapter 13, Part IV.

⁸ See paragraph 4, TSXV Policy 2.9 Trading Halts, Suspension and Delisting.

- b) Reflect the wording in proposed footnote 30 in the body of GN 33 (not in a footnote) and expand this to state that ASX will take a principles based approach to applying the voting exclusions.

If you have any questions or would like to discuss the above matters, we would be happy to discuss further.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'R Howitt', is positioned below the 'Yours faithfully' text.

Claire LaBouchardiere and Rachel Howitt
Senior Executive Leaders, Corporations
Australian Securities and Investments Commission