

## SECURITY HOLDER RESOLUTIONS

<p><b>The purpose of this Guidance Note</b></p>	<ul style="list-style-type: none"> <li>To assist listed entities and their registries and advisers to understand the requirements for security holder resolutions under the Listing Rules</li> </ul>
<p><b>The main points it covers</b></p>	<ul style="list-style-type: none"> <li>The type of resolution required under the Listing Rules</li> <li>The form of resolution required under the Listing Rules</li> <li>The information to be included in a notice of meeting</li> <li>The requirement to give to ASX a draft notice of meeting for review</li> <li>Voting exclusions</li> <li>The voting process</li> <li>The power of ASX to require the appointment of scrutineers to decide the validity of votes cast at a general meeting</li> <li>Supplementary disclosures</li> <li>Notifying ASX of the results of voting</li> <li>Stale resolutions</li> </ul>
<p><b>Related materials you should read</b></p>	<ul style="list-style-type: none"> <li>Guidance Note 12 <i>Significant Changes to Activities</i></li> <li>Guidance Note 13 <i>Spin-outs of Major Assets</i></li> <li>Guidance Note 19 <i>Performance Shares</i></li> <li>Guidance Note 21 <i>The Restrictions on Issuing Equity Securities in Chapter 7 of the Listing Rules</i></li> <li>Guidance Note 24 <i>Acquisitions and Disposals of Substantial Assets Involving Persons in a Position of Influence</i></li> <li>Guidance Note 25 <i>Issues of Securities to Persons in a Position of Influence</i></li> <li>Guidance Note 33 <i>Removal of Entities from the ASX Official List</i></li> </ul>

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**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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## 1. Introduction

This Guidance Note is published by ASX Limited ("ASX") to assist listed entities and their registries and advisers to understand the requirements for security holder resolutions under the Listing Rules.

This includes resolutions approving:

- an issue of options with certain terms attached under Listing Rule 6.20.3 or 6.22.2A, a cancellation of options for consideration under Listing Rule 6.23.2 or change in the terms of options under Listing Rule 6.23.4;
- the issue of securities under the placement restrictions in Listing Rules 7.1, 7.1A, 7.2 (exception 13), 7.4, 7.6 (exception 6) or 7.9 (exception 6);<sup>1</sup>
- the cancellation of forfeited shares by a limited liability company under Listing Rule 7.26;
- an acquisition or disposal of a substantial asset involving a person in a position of influence under Listing Rule 10.1;<sup>2</sup>
- an issue of securities to a person in a position of influence under Listing Rule 10.11 or 10.14;<sup>3</sup>
- an increase in the aggregate remuneration payable to non-executive directors under Listing Rule 10.17;
- the payment of termination benefits to officers in excess of 5% of the entity's equity interests under Listing Rule 10.19;
- a significant change to the nature or scale of a listed entity's activities under Listing Rule 11.1.2;<sup>4</sup>
- the disposal of an entity's main undertaking under Listing Rule 11.2;<sup>5</sup>
- the spin-off of a major asset under Listing Rule 11.4.1(b);<sup>6</sup>

<sup>1</sup> See Guidance Note 21 *The Restrictions on Issuing Equity Securities in Chapter 7 of the Listing Rules*.

<sup>2</sup> See Guidance Note 24 *Acquisitions and Disposals of Substantial Assets Involving Persons in a Position of Influence*.

<sup>3</sup> See Guidance Note 25 *Issues of Equity Securities to Persons in a Position of Influence*.

<sup>4</sup> See Guidance Note 12 *Significant Changes to Activities*.

<sup>5</sup> See Guidance Note 12 *Significant Changes to Activities*.

<sup>6</sup> See Guidance Note 13 *Spin-outs of Major Assets*.

- the issue of performance shares under Guidance Note 19 *Performance Shares*; and
- the voluntary removal of an entity from the official list under Guidance Note 33 *Removal of Entities from the ASX Official List*.

## 2. The type of resolution required under the Listing Rules

With two exceptions, the type of resolution required to approve something for the purposes of the Listing Rules is an ordinary resolution.<sup>7</sup>

The two exceptions are a resolution approving:

- an entity to have the additional capacity to issue equity securities provided for in Listing Rule 7.1A (commonly referred to as a “7.1A mandate”); and
- the voluntary removal of an entity from the official list under Guidance Note 33 *Removal of Entities from the ASX Official List*,

which in each case is required to be a special resolution.

The Listing Rules do not define the terms “ordinary resolution” or “special resolution”.

The term “ordinary resolution” takes its ordinary English meaning, that is, a resolution passed by a simple majority of security holders.

The term “special resolution” takes its meaning from the Corporations Act 2001 (Cth).<sup>8</sup> Under that Act, for a resolution to be a special resolution:

- the notice of meeting proposing the resolution must state both the intention to propose the resolution as a special resolution and the terms of the resolution; and
- it must be passed by at least 75% of the votes cast by members entitled to vote on the resolution.<sup>9</sup>

## 3. The terms of resolution required under the Listing Rules

The Listing Rules generally do not stipulate the specific terms of the resolution required to approve something under the rules.

Where ASX has issued a Guidance Note on the rule in question, ASX will generally include a suggested resolution that will suffice for the purposes of the rule. Where ASX has not issued a Guidance Note on the rule in question, the entity should phrase the resolution to reflect the terms of the rule. For example, a resolution approving an act or transaction under a particular Listing Rule should generally be in the form.

“That [*description of act or transaction*] is approved under and for the purposes of ASX Listing Rule [*insert rule number*].”

Generally, where there are multiple transactions requiring approvals under the Listing Rules (such as multiple issues of securities that require approval under Listing Rule 7.1, 7.4, 7.6 exception 6, 7.9 exception 6, 10.11 or 10.14), there should be separate resolutions approving each relevant transaction. Combining multiple transactions

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<sup>7</sup> Listing Rule 14.9.

<sup>8</sup> Listing Rule 19.3. That Act is referred to in this Guidance Note as the “Corporations Act”. Unless otherwise indicated, references in this Guidance Note to sections of an Act are to sections of the Corporations Act.

<sup>9</sup> See section 249L (Australian companies) and 252J(c) (registered managed investment schemes). Even though the expression “special resolution” is only defined in the Corporations Act in relation to an Australian company and a registered management investment scheme, ASX applies the definition to listed foreign companies and to listed Australian and foreign trusts that are not registered managed investment schemes.

within the one approval resolution can be coercive and ASX is likely to object to any draft notice of meeting that seeks to do this.<sup>10</sup>

Where a single transaction requires multiple approvals under the Listing Rules (such as an acquisition of a substantial asset for an issue of securities where the acquisition requires approval under Listing Rule 10.1 or 11.1.3 and the issue of securities requires approval under Listing Rule 7.1 or 10.11),<sup>11</sup> ASX has no objection to the approvals being combined in the one resolution and being expressed in terms that the transaction “is approved under and for the purposes of the Listing Rules”, provided:

- 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 the Listing Rules will generally make it inappropriate to combine that resolution with any other resolution required in relation to an act or transaction under the Corporations Act.<sup>12</sup>

#### 4. The information required in a notice of meeting

A notice of meeting proposing a resolution under a particular Listing Rule must include a summary of the rule and what will happen if security holders give, or do not give, the approval sought under that rule.<sup>13</sup>

Where ASX has issued a Guidance Note on the rule in question, ASX will generally include a summary of the rule that entities can use for this purpose. Where ASX has not issued a Guidance Note on the rule in question, the entity should phrase the summary to reflect the terms of the rule.

Some Listing Rules requiring a security holder resolution itemise the information that must be included in the notice of meeting proposing the resolution.<sup>14</sup> If a rule does so, the notice of meeting must include all of that information or else the resolution will not be effective.<sup>15</sup>

As a matter of general law, 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 judgement on those matters.<sup>16</sup> This applies even where the Listing Rules itemise information that must be included in the notice of meeting for a particular resolution. Hence, if there is additional information that is needed in an individual case to fully and fairly inform security holders and to enable them to make a properly informed judgement on whether or not to pass a resolution under the Listing Rules, that information must also be included in the notice, even though it is not itemised in the Listing Rule in question.

A number of Listing Rules requiring a security holder resolution do not itemise the information that needs to be included in the notice of meeting proposing the resolution.<sup>17</sup> In such a case, the notice of meeting must meet the general law test mentioned above of providing security holders with such material as will fully and fairly inform them of the matters to be considered at the meeting and enable them to make a properly informed judgement on those matters. Where ASX has issued a Guidance Note on the rule in question, ASX will generally provide guidance on

<sup>10</sup> Listing Rules 15.1 and 15.1.4.

<sup>11</sup> For example, 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.

<sup>12</sup> 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.

<sup>13</sup> Listing Rule 14.1A.

<sup>14</sup> For example, Listing Rules 7.3 (resolutions under Listing Rule 7.1), 7.3A (resolutions under Listing Rule 7.1A), 7.5 (resolutions under Listing Rule 7.4), 10.5 (resolutions under Listing Rule 10.1), 10.13 (resolutions under Listing Rule 10.11) and 10.15 (resolutions under Listing Rule 10.14).

<sup>15</sup> Listing Rule 14.6.

<sup>16</sup> See *Bulfin v Bebarfalds Ltd* (1938) 38 SR (NSW) 423 and *Chequepoint Securities Ltd v Claremont Petroleum NL* (1986) 11 ACLR 94.

<sup>17</sup> For example, Listing Rules 6.20.3, 6.22.2A, 6.23.2, 6.23.4, 7.26, 10.17, 10.19, 11.1.2 and 11.2.

the minimum information that should be included in the notice of meeting under this general law requirement. Again, if there is additional information that is needed in an individual case to fully and fairly inform security holders and to enable them to make a properly informed judgement on whether or not to pass a resolution under the Listing Rules, that information must also be included in the notice, even though it is not mentioned in the Guidance Note in question.

### 5. The requirement to give a draft notice to ASX for review

Before a listed entity dispatches a notice of meeting that includes a resolution under the Listing Rules, it must give ASX a copy of the draft notice for review.<sup>18</sup> It must not finalise the notice until ASX tells it that ASX does not object to the notice.<sup>19</sup>

The draft notice should be sent by email to the entity's ASX listings adviser at its home branch (not to the ASX Market Announcements Office)<sup>20</sup> and clearly marked "not for public release".<sup>21</sup>

In most situations, ASX tries to review, and notify the entity whether it has any objections to, a draft notice of meeting within 5 business days of receiving the draft notice.<sup>22</sup> It may take longer during particularly busy periods such as August and September, when 30 June reporters are lodging their draft notices of annual general meeting for review by ASX. It may also take longer for some more complex notices<sup>23</sup> or if the draft notice is of poor quality.

ASX will generally tell an entity within 5 business days if it needs more time to examine a draft notice of meeting. However, an entity should not assume just because it has not heard from ASX within 5 business days of lodging a draft notice with ASX that ASX must not have any objections to the draft notice. The entity must not dispatch the notice unless and until it receives specific confirmation from ASX that it has no objection to the draft notice.

Entities should make due allowance in setting their timetable for a general meeting for the time ASX will require to review the draft notice of meeting and make sure they get the draft notice to ASX at the earliest opportunity.

ASX may object to a draft notice of meeting if it appears to ASX that:

- it does not include the information specifically required under the Listing Rules;
- it does not satisfy the general law disclosure obligation mentioned in section 4 above;
- it does not include the required voting exclusion statement or the voting exclusion statement it includes is incorrectly worded or insufficiently clear;<sup>24</sup> or
- ASX considers the notice to be inaccurate or misleading.

The fact that ASX notifies an entity that it has no objections to a draft notice of meeting does not prevent ASX from raising subsequently that the notice of meeting did not meet the requirements above.

<sup>18</sup> Listing Rules 15.1, 15.1.4 and 15.1.7.

<sup>19</sup> Listing Rule 15.1.

<sup>20</sup> Listing Rules 15.2.2.

<sup>21</sup> Listing Rules 15.6.

<sup>22</sup> Listing Rule 15.1.

<sup>23</sup> This includes draft notices relating to transactions involving a significant change in the nature or scale of an entity's activities, 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: see section 7.3 of Guidance Note 12 *Significant Changes to Activities*.

<sup>24</sup> This includes a voting exclusion statement describing an excluded person whose votes are to be disregarded when in ASX's opinion it would be clearer for all concerned for the excluded person to be specifically named.

## 6. Voting exclusions

Most resolutions under the Listing Rules attract a voting exclusion prohibiting certain nominated parties (“excluded persons”) and their associates from voting in favour of the resolution.<sup>25</sup>

A voting exclusion is applied by including a “voting exclusion statement” in the notice of meeting. This is a statement to the effect that the entity will disregard any votes cast in favour of the resolution by or on behalf of an excluded person or an associate of an excluded person, save where it is cast by:

- a person as proxy or attorney for a person who is entitled to vote on the resolution, in accordance with directions given to the proxy or attorney to vote on the resolution in that way;
- the chair of the meeting as proxy or attorney for a person who is entitled to vote on the resolution, in accordance with a direction given to the chair to vote on the resolution as the chair decides; or
- a holder acting solely in a nominee, trustee, custodial or other fiduciary capacity on behalf of a beneficiary, provided the following conditions are met:
  - the beneficiary provides written confirmation to the holder that the beneficiary is not excluded from voting, and is not an associate of a person excluded from voting, on the resolution; and
  - the holder votes on the resolution in accordance with directions given by the beneficiary to the holder to vote in that way.<sup>26</sup>

In the last case above, the entity is entitled to rely on a representation from the nominee, trustee, custodian or fiduciary that it has obtained the required written confirmation from the beneficiary and that it is voting in accordance with the beneficiary’s directions unless the entity has reason to believe that the representation may not be correct. If the entity has reason to believe that the representation may not be correct, then it should request the nominee, trustee, custodian or fiduciary to provide a copy of the written confirmation and evidence of the beneficiary’s voting directions. If the nominee, trustee, custodian or fiduciary is not able to provide this to the entity’s satisfaction, the entity should disregard any votes the nominee, trustee, custodian or fiduciary may cast on behalf of the beneficiary.

An entity must in fact disregard the votes it says it will disregard in a voting exclusion statement or else the resolution to which it relates will not be valid.<sup>27</sup>

The table in Listing Rule 14.11.1 specifies who are “excluded persons” for the various resolutions under the Listing Rules. The excluded persons identified in that table must be named or described in the notice of meeting proposing the resolution.<sup>28</sup> If the number of excluded persons is small, ASX will generally expect them to be specifically named in the voting exclusion statement (eg “X and its associates” or “X, Y and their respective associates”). If the number is not small, ASX will generally accept a description of the excluded persons, provided the description is precise enough to be understood by a reasonable reader (eg, in the case of a resolution approving an issue of securities, “the persons who subscribed for shares in the issue and their associates”).

The final entry in the table in Listing Rule 14.11.1 gives ASX a general discretion to treat as an “excluded person” any person whose votes, in ASX’s opinion, should be disregarded. If ASX exercises this discretion, the person in question must be named or described in the voting exclusion statement in the notice of meeting.<sup>29</sup> Their associates will also be precluded from voting in favour of the resolution.<sup>30</sup>

<sup>25</sup> See Listing Rule 14.11.1.

<sup>26</sup> Listing Rule 14.11.

<sup>27</sup> Listing Rules 14.6 and 14.7.

<sup>28</sup> Listing Rule 14.11.1.

<sup>29</sup> See the note to the final entry in the table in Listing Rule 14.11.1.

<sup>30</sup> By virtue of Listing Rule 14.11.

ASX also has a general discretion to designate any person whose votes, in ASX's opinion, should be disregarded, despite the notice of meeting having already been sent out.<sup>31</sup> Where ASX exercises this discretion, it will typically name or describe the person or persons whose votes are to be disregarded in a written communication<sup>32</sup> to the entity. For example, ASX may require the votes of "[named person X] and their associates" to be disregarded. If ASX does exercise this discretion, it is not necessary for the entity to send a further notice of meeting with an amended voting exclusion statement naming or describing the relevant person or persons whose votes have been excluded by ASX.<sup>33</sup> However, ASX will expect the entity to make an announcement to the market of ASX's determination. ASX will also expect the chair of the meeting to advise the meeting of ASX's determination at the commencement of the meeting or at the commencement of the discussion on the relevant resolution.

In some cases, ASX may impose a requirement under the Listing Rules for security holder approval even though the Listing Rules themselves do not specifically require such an approval. For example, where an entity requests to be removed from the ASX official list under Listing Rule 17.11 and its securities are not readily able to be traded on another exchange, ASX will generally impose a requirement that the entity obtain the approval of its ordinary security holders to the removal by a special resolution.<sup>34</sup> In this case, this requirement is imposed under Listing Rule 17.11 itself, pursuant to the provision in that rule stating that ASX may require conditions to be satisfied before ASX will act on the request by the entity to be removed from the official list. Similarly, where an entity proposes to issue performance shares, ASX will generally impose a requirement that the entity obtain the approval of its ordinary security holders to the issue by an ordinary resolution.<sup>35</sup> In this case, the requirement is imposed through a combination of the requirement in Listing Rule 6.1 that the terms that apply to each class of equity securities must in ASX's opinion be appropriate and equitable and ASX's general power to impose conditions in relation to any exercise of a power or discretion under the Listing Rules.<sup>36</sup>

ASX considers that these are nonetheless a resolution under and for the purposes of the Listing Rules and therefore ASX may require the application of a voting exclusion in relation to the resolution under the final entry in the table in Listing Rule 14.11.1 or under Listing Rule 14.11.2.

## 7. Associates excluded from voting

As mentioned in section 6 above, where a person is excluded from voting in favour of a resolution under the Listing Rules, the associates of that person are also excluded from voting in favour of the resolution.

An excluded person's associates include:

- if the excluded person is a natural person, any entity<sup>37</sup> the excluded person controls;
- if the excluded person is an entity:<sup>38</sup>
  - any entity the excluded person controls;
  - any entity that controls the excluded person;
  - any entity that is controlled by an entity that controls the excluded person;

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<sup>31</sup> Listing Rule 14.11.2.

<sup>32</sup> This includes an email communication (Listing Rule 19.3(l)).

<sup>33</sup> See the note to Listing Rule 14.11.2.

<sup>34</sup> See section 2.7 of Guidance Note 33 *Removal of Entities from the ASX Official List*.

<sup>35</sup> See section 9 of Guidance Note 19 *Performance Shares*.

<sup>36</sup> Listing Rule 18.5A.

<sup>37</sup> "Entity" in this context means a body corporate, partnership, unincorporated body or a trust and includes, in the case of a trust, the responsible entity of the trust (see the definition of "associate" in Listing Rule 19.12).

<sup>38</sup> See note 37 above.

- any person with whom the excluded person has, or proposes to enter into, a relevant agreement<sup>39</sup> for the purpose of controlling or influencing the composition of the listed entity's board<sup>40</sup> or the conduct of the listed entity's affairs; or
- any person with whom the excluded person is acting, or proposing to act, in concert in relation to the listed entity's affairs.<sup>41</sup>

Where the excluded person is a natural person, their related parties are taken to be their associates unless the contrary is established.<sup>42</sup> This provision exists as an evidentiary aid. It is based on the premise that because of the close connection between an individual and their related parties, it should be presumed that the individual is able to control a related party, or that a related party is acting in concert with the individual, unless the contrary is proven. Otherwise it is too easy for the individual and the related party simply to deny any association and to put others to the task of proving that they are associates.

The related parties of an individual include:

- (i) the individual's spouse or de facto spouse;
- (ii) the parents and children of the individual and the parents and children of the individual's spouse or de facto spouse;
- (iii) an entity controlled by the individual or anyone referred to in (i) or (ii) above;
- (iv) anyone who has fallen within (i) – (iii) above within the past 6 months;
- (v) anyone who believes or has reasonable grounds to believe that they are likely to fall within (i) – (iii) above at any time in the future; and
- (vi) a person who acts in concert with the individual or anyone referred to in (i) – (v) above.<sup>43</sup>

## 8. Voting by employee incentive schemes

Securities held by or for an employee incentive scheme must only be voted on a resolution under the Listing Rules if and to the extent that:

- they are held for the benefit of a nominated participant in the scheme;

<sup>39</sup> "Relevant agreement" has the same meaning as in section 9 of the Corporations Act (Listing Rule 19.3). It includes an agreement, arrangement or understanding: (a) whether formal or informal or partly formal and partly informal; (b) whether written or oral or partly written and partly oral; and (c) whether or not having legal or equitable force and whether or not based on legal or equitable rights.

<sup>40</sup> If the listed entity is an externally managed trust, the reference to controlling or influencing the composition of the listed entity's board is taken to be a reference to controlling or influencing whether a particular entity becomes or remains the trust's responsible entity. If the listed entity is an internally managed trust, the reference to controlling or influencing the composition of the listed entity's board is taken to be a reference to controlling or influencing the board of the trust's responsible entity.

<sup>41</sup> See the definition of "associate" in Listing Rule 19.12. This definition is based on, but in some respects is broader than, the definition of "associate" in section 12 of the Corporations Act. For example, in the Listing Rules definition, the references to a body corporate in section 12(2)(a) have been replaced with references to an entity so as to capture trusts, partnerships and other unincorporated bodies (see note 37 above) and a new paragraph has been added specifying that if the primary person is a natural person, their associates include any entity they control.

The definition of "associate" in Listing Rule 19.12 has an equivalent carve-out to that provided in section 16 of the Corporations Act, which states that a person is not an associate of another person merely because of one or more of the following: (a) one gives advice to the other, or acts on the other's behalf, in the proper performance of the functions attaching to a professional capacity or a business relationship; (b) one, a client, gives specific instructions to the other, whose ordinary business includes dealing in financial products, to acquire financial products on the client's behalf in the ordinary course of that business; (c) one has sent, or proposes to send, to the other an offer under a takeover bid for securities held by the other; or (d) one has appointed the other, otherwise than for valuable consideration given by the other or by an associate of the other, to vote as a proxy or representative at a meeting of members, or of a class of members, of the listed entity.

<sup>42</sup> See the final paragraph of the definition of "associate" in Listing Rule 19.12.

<sup>43</sup> Paragraph (d) of the definition of "related party" in Listing Rule 19.12.

- the nominated participant is not excluded from voting on the resolution under the Listing Rules; and
- the nominated participant has directed how the securities are to be voted.<sup>44</sup>

This limitation is separate to, and does not need to be mentioned in, the voting exclusion statement for the resolution.

### 9. Identifying security holders excluded from voting

Where a voting exclusion applies to a resolution under the Listing Rules, it is the responsibility of the entity to identify all security holders who are “excluded persons” and to use all reasonable endeavours to ensure that they and their associates do not vote in favour of the resolution or, if they do, that their votes are identified and excluded from the result of the vote.

In most cases, this should not prove unduly onerous. For example, where a voting exclusion applies to a counterparty who has entered into a transaction with the entity, the entity should be aware of the identity of the counterparty and it should be a relatively easy task for the entity to:

- include terms in the transaction documentation requiring the counterparty:
  - to disclose the identity of any associates who hold securities in the entity, either directly or beneficially through an arrangement with a nominee, trustee, custodian or fiduciary; and
  - not to vote, and to procure that its associates do not vote, in favour of the resolution in question; and
- validate, or have its registry or auditor validate, that the counterparty and the named associates did not vote in favour of the resolution in question or, if they did, that their votes were disregarded.

Similarly, where a voting exclusion applies to some or all of the related parties of the entity, the entity should be aware of the identity of its related parties<sup>45</sup> and it should be a relatively easy task for the entity to:

- request its related parties ahead of the vote to identify any associates who hold securities in the entity, either directly or beneficially through an arrangement with a nominee, trustee, custodian or fiduciary;
- advise its related parties that they must not vote, and must procure that their associates do not vote, in favour of the resolution in question; and
- validate, or have its registry or auditor validate, that its related parties and their named associates did not vote in favour of the resolution in question or, if they did, that their votes were disregarded.

Likewise, where a voting exclusion applies to a substantial holder of its securities, the entity should be aware of the identity of the substantial holder and its associates through the substantial holding notices they will have given to the entity under section 671B of the Corporations Act (or equivalent overseas legislation) and it should be a relatively easy task for the entity to validate, or have its registry or auditor validate, that the substantial holder and its named associates did not vote in favour of the resolution in question or, if they did, that their votes were disregarded.

ASX accepts that there may be some cases where it will be unduly burdensome for an entity to have to take steps to determine the identity of all of the associates of the excluded persons caught by a voting exclusion statement. An example would be a resolution approving an issue of securities to a material number of security holders under Listing Rule 7.1 or 7.4, where each of those security holders will be an “excluded person”. In such a case, ASX will accept that the entity has complied with the spirit of the Listing Rules<sup>46</sup> provided it:

<sup>44</sup> Listing Rule 14.10.

<sup>45</sup> Including for the purposes of complying with the various accounting requirements applicable to related party transactions under Accounting Standard AASB 124 *Related Party Disclosures* and its legal obligations in relation to related party transactions under Chapter 2E of the Corporations Act (or equivalent overseas legislation) and Chapter 10 of the Listing Rules.

<sup>46</sup> As it is required to do under Listing Rule 19.2.

- compares the names of the persons who participated in the issue against the names of the security holders who voted on the resolution and validates that none of those persons voted in favour of the resolution or, if they did, that their votes were disregarded; and
- where the entity is specifically on notice of an association between a person who participated in the issue and another person who holds securities in the entity (for example, through related party or substantial holder disclosures), it validates that the associate did not vote in favour of the resolution or, if they did, that their votes were disregarded.

## 10. The voting process

A listed entity must conduct a properly managed voting process and keep appropriate records of that process to corroborate that a resolution under the Listing Rules was duly passed at a properly convened meeting of security holders. This includes having proper processes to:

- validate the authenticity and validity of proxies and powers of attorney received from security holders ahead of the meeting;
- screen the attendees at the meeting to verify that only security holders on the register of members at the closing date for determining voting entitlements, or their duly appointed proxies or attorneys, receive voting papers; and
- ensure that all valid votes are collected and tallied and that invalid votes (such as those covered by a voting exclusion statement) are identified and excluded from the result.

ASX would note that most resolutions under the Listing Rules attract a voting exclusion. In ASX's view, for an entity to determine with any confidence that the votes that should have been disregarded under a voting exclusion statement were in fact disregarded, it is essential that the vote on the resolution is conducted by a poll rather than by a show of hands.

Accordingly, as a matter of proper governance, all Listing Rule resolutions must be decided by a poll rather than by a show of hands.<sup>47</sup>

If ASX is not satisfied that an entity has conducted a properly managed and recorded voting process in relation to a resolution under the Listing Rules, ASX may require the entity to seek a fresh approval from its security holders under the rule in question.<sup>48</sup>

## 11. ASX's power to require scrutineers to be appointed

ASX may require an entity to appoint its auditors, or some other person acceptable to ASX, to act as a scrutineer to decide the validity of votes cast at a general meeting and whether the votes that should have been disregarded were in fact disregarded.<sup>49</sup>

On the face of it, this power applies to any and all resolutions being considered at a general meeting of a listed entity and not just those under the Listing Rules. Having said this, ASX is generally reluctant to exercise this power except:

- in relation to a Listing Rule resolution, where ASX wants to ensure that the entity is complying with its obligations under the Listing Rules and ASX has the jurisdiction to take corrective action if the resolution is not validly passed; or

<sup>47</sup> ASX would note that recommendation 6.4 of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* provides that all substantive resolutions, not just those under the Listing Rules, should be decided by a poll rather than by a show of hands.

<sup>48</sup> ASX may do this either by treating the original resolution as not being effective for the purposes of the Listing Rules or by imposing a requirement in that regard under Listing Rule 18.8.

<sup>49</sup> Listing Rule 14.8.

- at the request of the Australian Securities and Investments Commission (“ASIC”), in relation to a resolution under the Corporations Act or the general law, where ASIC has the jurisdiction to take corrective action if the resolution is not validly passed.

If ASX requires the voting on a resolution to be scrutineered, ASX will expect the vote to be decided by way of a poll, rather than by a show of hands, so that the scrutineer can in fact opine on whether the resolution has been validly passed.<sup>50</sup> ASX will also expect the scrutineer to prepare a written report for the entity confirming the following matters in relation to the resolution and to make that report available to ASX upon request.<sup>51</sup>

- the number and percentage of securities that were voted for the resolution, the number and percentage of securities that were voted against the resolution and the number and percentage of securities that formally abstained from voting on the resolution, broken down in each case to show those who voted in person, by proxy or attorney, or electronically;
- the aggregate number and percentage of securities for which valid proxies were received before the meeting, showing separately:
  - the aggregate number and percentage of securities in respect of which the proxy was directed to vote for the resolution;
  - the aggregate number and percentage of securities in respect of which the proxy was directed to vote against the resolution;
  - the aggregate number and percentage of securities in respect of which the proxy was directed to abstain from voting on the resolution; and
  - the aggregate number and percentage of securities in respect of which the proxy could vote at their discretion;
- the aggregate number and percentage of securities in respect of which proxies were received before the meeting that were ruled to be invalid, showing separately:
  - the aggregate number and percentage of securities in respect of which the proxy was directed to vote for the resolution;
  - the aggregate number and percentage of securities in respect of which the proxy was directed to vote against the resolution;
  - the aggregate number and percentage of securities in respect of which the proxy was directed to abstain from voting on the resolution; and
  - the aggregate number and percentage of securities in respect of which the proxy could vote at their discretion;
- where a voting exclusion applied, information about the process used to identify the persons excluded from voting and to validate that they did not vote in favour of the resolution or, if they did, that their votes were disregarded; and
- in light of the above, whether the resolution was duly passed or not passed (as the case may be).

## 12. Supplementary disclosures

Where materially new or different information emerges after a notice of meeting proposing a resolution under the Listing Rules has been sent to security holders but before the vote on the resolution, the entity may need to make

<sup>50</sup> In ASX’s view, for a scrutineer to decide with any confidence the validity of votes cast on a resolution and whether the votes that should have been disregarded were in fact disregarded, it is necessary for the vote to be conducted by a poll rather than by a show of hands.

<sup>51</sup> Listing Rule 18.7.

supplementary disclosure to security holders. This should be done in sufficient time ahead of the meeting to allow security holders to consider, and if necessary take advice on, how the new or different information should affect their vote on the resolution.

In line with ASIC guidance on similar matters,<sup>52</sup> ASX generally considers that security holders should receive the supplementary information at least 10 days before they are required to vote. Anything less may warrant an adjournment of the meeting or the calling of a new meeting. Generally speaking, this information should be sent to security holders in the same manner as the original notice of meeting. However, in an appropriate case, ASX may agree to allow the information to be disseminated by a market announcement published on the ASX Market Announcements Platform.

### 13. Notifying ASX of the results of voting

Immediately<sup>53</sup> after a meeting of security holders, the entity must notify ASX of the outcome of each resolution put to the meeting showing separately:

- both the number and a short description of the resolution;
- whether the resolution was passed or not passed;
- whether the resolution was decided on a show of hands or a poll;
- if the resolution was decided on a poll, the number and percentage of securities that were voted for the resolution, the number and percentage of securities that were voted against the resolution and the number and percentage of securities that formally abstained from voting on the resolution;
- regardless of how the resolution was decided, the aggregate number and percentage of securities for which valid proxies were received before the meeting, showing separately:
  - the aggregate number and percentage of securities in respect of which the proxy was directed to vote for the resolution;
  - the aggregate number and percentage of securities in respect of which the proxy was directed to vote against the resolution;
  - the aggregate number and percentage of securities in respect of which the proxy was directed to abstain from voting on the resolution; and
  - the aggregate number and percentage of securities in respect of which the proxy could vote at their discretion; and
- if the resolution related to the adoption of the entity's remuneration report and the outcome constitutes a "first strike" or "second strike" under section 250U of the Corporations Act, that fact,

and, if a resolution was proposed in the notice of meeting but not put to the meeting, the number and a short description of the resolution, the fact that it was not put to the meeting and an explanation of why it was not put to the meeting.<sup>54</sup>

This applies to all resolutions considered at a meeting of security holders, not just those under the Listing Rules.

<sup>52</sup> See section E of ASIC Regulatory Guide 60 *Schemes of arrangement*.

<sup>53</sup> ASX interprets the word "immediately" in this context in the same manner as it does for Listing Rule 3.1, that is, promptly and without delay (see Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B*).

<sup>54</sup> Listing Rule 3.13.2.

If the meeting is adjourned, the entity must immediately tell ASX of the adjournment and the outcome in respect of each resolution dealt with before the adjournment.<sup>55</sup>

The notification given to ASX must be headed “Results of Meeting” or something similar.<sup>56</sup>

ASX has prepared a pro forma notification that entities can use to notify ASX of the results of a meeting of security holders. An editable version in both Word and Excel format can be downloaded from the ASX website at: [www.asx.com.au/regulation/compliance/compliance-downloads.htm](http://www.asx.com.au/regulation/compliance/compliance-downloads.htm).

## 14. Stale resolutions

Where a transaction is approved by a listed entity’s security holders under the Listing Rules and, in ASX’s opinion:

- materially new or different information emerges after security holders have voted on the resolution;
- there is a material change in the terms of the transaction from those approved by security holders;
- there is a material change in the entity’s circumstances from those applicable at the time of the resolution;  
or
- there is an excessive delay in consummating the transaction,

ASX may require the entity to seek a fresh approval from its security holders under the applicable Listing Rule.<sup>57</sup> Without limiting its discretion to require this earlier, ASX will look very carefully at this last issue in any case where an entity takes longer than 6 months to consummate a transaction after the passing of the resolution approving the transaction.

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<sup>55</sup> Listing Rule 3.13.2, penultimate paragraph.

<sup>56</sup> Listing Rule 3.13.2, final sentence.

<sup>57</sup> Again, ASX may do this either by treating the original resolution as not being effective for the purposes of the Listing Rules or by imposing a requirement in that regard under Listing Rule 18.8.