



Proposed Changes to ASX Listing Rules and Guidance Note 9

Corporate Governance Disclosures

ASX Public Consultation

16 August 2013

Introduction

The *Corporate Governance Principles and Recommendations* published by the ASX Corporate Governance Council (“CGC”) apply to entities admitted to the official list as an ASX Listing and seek to promote investor confidence and to assist listed entities to meet stakeholder expectations in relation to their corporate governance.

The *Corporate Governance Principles and Recommendations* are underpinned by the ASX Listing Rules. Listing Rule 4.10.3 currently requires a listed entity to include in its annual report:

A statement disclosing the extent to which the entity has followed the recommendations set by the ASX Corporate Governance Council during the reporting period. If the entity has not followed all of the recommendations the entity must identify those recommendations that have not been followed and give reasons for not following them. If a recommendation has been followed for only part of the period, the entity must state the period during which it has been followed.

Listing Rule 1.1 Condition 13 also currently requires an entity seeking admission to the official list as an ASX Listing to:

provide a statement disclosing the extent to which the entity will follow, as at the date of its admission to the official list, the recommendations set by the ASX Corporate Governance Council. If the entity does not intend to follow all the recommendations on its admission to the official list, the entity must identify the recommendations that will not be followed and give reasons for not following them.

In effect, these Listing Rules impose an “if not, why not” reporting requirement in relation to the CGC’s governance recommendations. A listed entity must state whether it complies with the CGC’s recommendations and, in any case where it does not, it must provide reasons for not doing so.

CGC consultation – third edition of Principles and Recommendations

On 16 August 2013, contemporaneously with the release of this consultation paper, the CGC released its own consultation paper seeking comments on a draft third edition of the *Corporate Governance Principles and Recommendations*. The draft third edition seeks to capture and reflect developments in corporate governance matters, both in Australia and internationally, since the second edition was published in 2007. It also seeks to afford greater flexibility to listed entities to make their corporate governance disclosures on their website rather than in their annual report.

ASX consultation – Listing Rule and Guidance Note changes

To complement and give effect to the changes proposed in the third edition of the CGC’s *Corporate Governance Principles and Recommendations*, ASX is proposing to amend Listing Rules 1.1 Condition 13, 4.7, 4.10 and 12.7, to introduce a definition of “corporate governance statement” in Listing Rule 19.12, and to insert a new Appendix 4G into the Listing Rules. These rule changes are proposed to come into effect on 1 July 2014, the same date as the third edition of the *Corporate Governance Principles and Recommendations*.

ASX is also taking the opportunity to make a number of other minor governance-related changes to Listing Rules 3.16, 10.1, 10.14, 10.16, 14.11 and certain related definitions in Listing Rule 19.12, and to introduce a new Listing Rule 3.19B requiring the disclosure of on-market purchases of securities on behalf of employees or directors or their related parties. These changes are proposed to come into effect on 1 January 2014.

In addition, ASX is proposing to update Guidance Note 9 *Disclosure of Corporate Governance Practices*, with effect from 1 July 2014. The proposed new version of Guidance Note 9 also accompanies this consultation paper. It is in mark-up format, showing the changes proposed to be made to the current version.

Summary of Listing Rule changes

ASX is proposing to make the following changes to its Listing Rules:

Changes to give effect to the third edition of the Council’s Principles and Recommendations:

- Listing Rule 4.10.3 (corporate governance disclosures) is proposed to be amended:

- to afford greater flexibility to listed entities to make their corporate governance disclosures either in their annual report or on their website;
 - to make it clearer what an entity should disclose if it has not followed a recommendation of the ASX Corporate Governance Council for any part of the reporting period; and
 - to add a requirement that an entity's corporate governance statement must specify the date at which it is current, which must be the balance date or a later date specified by the entity, and state that it has been approved by the board of the entity (in the case of a trust, the board of the responsible entity of the trust).
- A new Appendix 4G is being added to the Listing Rules which will provide a key to where a listed entity's various corporate governance disclosures can be found. A listed entity will be required to complete the key and give it to ASX at the same time as it lodges its annual report with ASX.
 - Listing Rule 4.7 (entity to give ASX annual report) is proposed to be amended to require a listed entity to lodge with ASX:
 - a completed Appendix 4G; and
 - if the entity chooses to include its corporate governance statement under Listing Rule 4.10.3 on its website rather than in its annual report, to lodge a copy of the corporate governance statement with ASX,
 at the same time as it lodges its annual report with ASX.
 - Listing Rule 19.12 (definitions) is proposed to be amended to add a new definition of "corporate governance statement" so as to facilitate the revisions proposed to Listing Rules 4.7 and 4.10.3 referred to above.
 - Condition 13 of Listing Rule 1.1 (requirements for ASX Listing) is proposed to be amended to make it clearer what an applicant for listing must disclose if it does not intend to follow a recommendation of the ASX Corporate Governance Council after it is listed.
 - Listing Rule 12.7 (audit committees) is proposed to be amended to make some minor drafting corrections.

Other governance-related changes:

- The list of exclusions to Listing Rule 3.16.4 (notification of material terms of employment, service or consultancy agreements with a CEO, director or related party) is proposed to be amended:
 - to add a further exclusion for provisions requiring an entity to indemnify officers or exempt them from liability that conform with section 199A of the Corporations Act; and
 - to qualify the exclusion related to directors and officers insurance to require the insurance arrangements to conform with section 199B of the Corporations Act.
- A new Listing Rule 3.19B is proposed to be added requiring any on-market purchases under the terms of a scheme that provides for the purchase of securities by or on behalf of employees or directors or their related parties to be disclosed to the market within 5 business days.
- The opening paragraph in Listing Rule 4.10 (information to be included in annual reports) is proposed to be amended to recognise the increasingly common practice of a number of listed entities who file their annual reports with ASX well before sending the "glossy version" to their security holders. Rather than requiring the information specified in that rule to be current as at a date specified by the entity, which is not "more than 6 weeks before the report is *sent to security holders*", it is proposed to modify the rule so that the information must be current as at a date that is on or after the entity's balance date and not "more than 6 weeks before the report is *given to ASX*".
- Listing Rule 10.1 (approval required for certain acquisitions or disposals involving persons in a position of influence) is proposed to be amended to improve and clarify its drafting and to delete the notes referring to the meaning of "associate", given the new definition proposed for that term in Listing Rule 19.12 (see below).

- Listing Rule 10.14 (approval required to acquire securities under an employee incentive scheme) is proposed to be amended:
 - to correct a minor drafting error in the opening paragraph of, and to update the drafting in the note to, the rule;
 - to extend the exception in the last sentence of the opening paragraph to cover share schemes that provide for purchases by or on behalf of related parties of an employee or director, as well as purchases by or on behalf of an employee or director; and
 - to replace the reference to an “associate” of a director in Listing Rule 10.14.2, with a reference to a “related party” of a director.
- Listing Rule 10.16 (underwritings by directors and associates) is proposed to be amended to replace the references to “associate” with reference to a “related party”.
- Listing Rule 14.11.1 (voting exclusion statements) is proposed to be amended to recognise and incorporate the definition of “associate” proposed to be added to Listing Rule 19.12 (see below).
- Listing Rule 19.12 (definitions) is proposed to be amended:
 - to add a new definition of “associate” for the purposes of Listing Rules (more specifically, Listing Rules 10.1, 10.10, 14.11.1 and the definition of “promoter” in Listing Rule 19.12); and
 - to make changes to the definition of “promoter” to improve its drafting and to acknowledge and incorporate the new definition of “associate”.

The proposed Listing Rule changes are outlined and explained in further detail in a document entitled *Proposed Governance-Related Amendments to the ASX Listing Rules* which accompanies this consultation paper.

The new Appendix 4G

Perhaps the most significant of the changes to the Listing Rules proposed by ASX is the insertion of the new Appendix 4G into the Listing Rules. As mentioned previously, under changes proposed to Listing Rule 4.7, a listed entity will be required to complete an Appendix 4G and give it to ASX at the same time as it gives its annual report to ASX.

The Appendix 4G is intended to address a number of issues that ASX perceives with the current corporate governance reporting framework, as embodied in Listing Rule 4.10.3 and the *Corporate Governance Principles and Recommendations*. These include:

- The current CGC recommendations suggest a number of matters that ought to be disclosed outside of the entity’s corporate governance statement in its annual report. In some cases, the recommendations state that the information “should be publicly available, ideally by posting it on the company’s website in a clearly marked corporate governance section” (see, for example, recommendations 1.1, 3.1, 3.2, 5.1, 6.1 and 7.1 and the corresponding guides to reporting on those matters in recommendations 1.3, 3.5, 5.2, 6.2 and 7.4). In other cases, the CGC recommendations simply suggest that certain matters should be disclosed without recommending where (see, for example, recommendations 1.2 and 2.5 and the corresponding guides to reporting on those matters in recommendations 1.3 and 2.6).

An entity that complies with a CGC recommendation technically is not required to make any further disclosure about that matter in its corporate governance statement under Listing Rule 4.10.3, since that rule only requires disclosure where an entity does not follow a particular recommendation. In practice, this can mean that an entity complies with a CGC recommendation (for example to have an audit committee and to disclose its charter) without identifying where it has disclosed information relevant to that recommendation (in the example given, where it has disclosed the charter of its audit committee). This can make it difficult and/or time consuming to locate disclosures made in connection with the CGC recommendations.

- Compounding the issue in the previous bullet point, while the various guides to reporting in the current CGC recommendations generally recommend that most governance disclosures are made in a discrete corporate governance statement in the entity’s annual report, there are some recommendations (see for example recommendations 3.3 and 3.4 and the corresponding guide to reporting on those matters in recommendation 3.5)

where the disclosure is simply recommended to be in the entity's annual report. For instance, a significant number of listed entities do not disclose in their corporate governance statement the number of women directors on their board (recommendation 3.4). ASX assumes that this is on the basis that this information will be apparent from the director profiles usually included elsewhere in an annual report. This leads to the need to review the width and breadth of the annual report, rather than a discrete corporate governance section, to find some of the disclosures relevant to governance matters. Again, this can make it difficult and/or time consuming to locate disclosures made in connection with the CGC recommendations.

- ASX has noticed some instances where corporate governance statements appear to be pro forma or standardised documents produced by professional advisers, leading to some doubt as to whether they reveal an accurate and granular picture of the actual governance practices adopted by the entity. The issues identified in the two bullet points above make it more difficult to identify cases where that might be so, since an entity could have disclosed further information relevant to compliance with the CGC recommendations in another part of its annual report (that is, in a different part of the annual report to its corporate governance statement) or on its website.

ASX considers that without some pre-emptive remedial action, the flexibility being introduced by the third edition of the *Corporate Governance Principles and Recommendations* and the associated changes to ASX's Listing Rules to allow listed entities to choose to make their governance disclosures on their website rather than in their annual report could exacerbate the issues identified above.

The proposed Appendix 4G seeks to address these issues by providing a key to where the relevant governance disclosures can be found.

The Appendix 4G is not intended to replace, or in any way detract from, the requirement for listed entities to include a corporate governance statement in their annual report or on their website under Listing Rule 4.10.3 – simply to ensure that the disclosures made in accordance with that rule or in connection with the *Corporate Governance Principles and Recommendations* are readily identifiable and easily located.

ASX considers that the new Appendix 4G will deliver significant benefits for all key stakeholders:

1. **Benefits for listed entities:** by particularising each CGC recommendation that needs to be reported against, the Appendix 4G will assist listed entities to comply with their obligations under Listing Rule 4.10.3 and provide them with a documented verification process to confirm their compliance with that Listing Rule.

Given the significant criminal and civil liabilities that can attach to a listed entity and its directors and officers if the entity's annual report contains false or misleading information (see, for example, sections 1041E, 1308(2) and 1309 of the Corporations Act), ASX would expect most listed entities to be conducting a detailed verification exercise in relation to their annual reports to confirm that the statements in the annual report have a reasonable basis in fact and are not misleading. The Appendix 4G will aid that exercise, in so far as the annual report includes disclosures made in connection with the CGC's recommendations.

2. **Benefits for investors:** the Appendix 4G will provide investors with improved disclosure about whether or not listed entities have followed specific CGC recommendations and make it easier for them to identify and locate corporate governance disclosures. This will empower investors to better assess the governance practices of listed entities and, in turn, help investors to make more informed investment decisions.
3. **Benefits for ASX and the market generally** - the Appendix 4G will facilitate a quick real time review of corporate governance disclosures by ASX Listings advisers and therefore enable faster detection and correction of instances of material non-compliance with Listing Rule 4.10.3.

Invitation to provide comments to ASX

ASX is inviting comment from listed entities, their advisers and other stakeholders on the changes it is proposing to its Listing Rules and Guidance Note 9.

ASX is particularly interested to hear whether there might be any unforeseen consequences involved with any of the proposed Listing Rule changes and to receive feedback on the form and content of the proposed new Appendix 4G.

ASX is also particularly interested to hear whether there are any issues that listed entities or other stakeholders consider would merit further guidance from ASX that are not currently addressed, or not addressed in sufficient detail, in the revised version of Guidance Note 9.

If you wish to provide comments, please do so by Friday, 15 November 2013 to the following email address: mavis.tan@asx.com.au.

ASX is proposing to make the submissions it receives in response to this consultation paper publicly available on its website unless a respondent clearly indicates that they wish their submission to remain confidential.

Parties are welcome to send a combined submission to ASX addressing its proposed Listing Rule and Guidance Note changes and to the CGC addressing its consultation on the third edition of the *Principles and Recommendations*.

ASX will be reviewing the feedback received from this consultation internally and with the CGC to determine whether it is appropriate to proceed with the proposed changes to its Listing Rules and Guidance Note 9, before they are published in final form. The Listing Rule changes intended to take effect on 1 January 2014 will be published in final form before year end. The Listing Rule changes and the updates to Guidance Note 9 intended to take effect on 1 July 2014 will likely be published in early 2014, at the same time as the CGC publishes the final form of the third edition of the *Principles and Recommendations*.
