

24 December 2020

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By email

Dear Kevin,

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Consultation Paper: Proposed Listing Rules changes: online forms, notification of security issues and corporate action timetables

Who we are

Governance Institute of Australia is a national membership association, advocating for our network of 40,000 governance and risk management professionals from the listed, unlisted and not-for-profit sectors.

As the only Australian provider of chartered governance accreditation, we offer a range of short courses, certificates and postgraduate study. Our mission is to drive better governance in all organisations, which will in turn create a stronger, better society.

Our members have primary responsibility for developing and implementing governance frameworks in public listed, unlisted and private companies, as well as not-for-profit organisations and the public sector. They have a thorough working knowledge of the operations of the markets and the needs of investors. We regularly contribute to the formation of public policy through our interactions with Treasury, ASIC, APRA, ACCC, ASX, ACNC and the ATO.

Thank you taking the time to discuss the Consultation Paper with our members on 17 December 2020. This letter outlines the issues we raised with you during that conversation as well as one or two issues that, on further reflection, our members wish to raise with you.

Our comments

Proposed Listing Rule 3.10.3E - Appendix 3H Notification of cessation of securities

Our members consider the addition of the new form is useful, but that there are some practical difficulties with introducing a requirement to notify ASX within five business days of the cessation of securities. Employees leave companies frequently leading to the lapse of rights under employee incentive schemes. Given that the numbers of securities involved is generally small there is the potential for a flow of this information which is of limited benefit to informing the market. In addition, there can also be a delay between human resources teams notifying company secretariats about employees' departures which means that an entity could potentially be in breach of the rule on a weekly basis. Where entities have currently adopted a practice of notifying ASX of the cessation of securities, they generally 'batch' these notifications on a monthly or quarterly basis.

Our members also question whether the information provided through these forms assists in informing the market, given that it will be provided without any context and there is no materiality threshold. This is likely to lead to large numbers of immaterial announcements being made to ASX. Our members consider a preferred approach would be to provide this information to ASX on a quarterly or monthly basis.

Where there is a material lapsing of securities, for example, where the board determines that all, or a material number of securities issued under an employee incentive scheme will not vest, we consider this is likely to trigger an immediate disclosure under Listing Rule 3.1.

Governance Institute recommends that the requirement to notify ASX within five business days of the cessation of equity securities under the proposed Listing Rule 3.10.3E should be lengthened to notification on a quarterly or monthly basis and be subject to a materiality qualification.

Proposed Listing Rule 12.13 – Changes in dividends, distributions or interest payments

Thank you for confirming that the practice of announcing an ‘estimate’ of a proposed dividend on the record date followed by an announcement of the final amount of the dividend can continue and is specifically covered by the Note to Listing Rule 3.21. This is a legitimate practice, and our members would be concerned were the proposed Rule to prevent this.

While our members appreciate the background to the proposed Listing Rule, they have the following concerns:

- In their experience there are a range of circumstances where an entity may announce a dividend or other payment covered by the Rule, but then determine not to make the payment. This may be because the board determines it would be imprudent to make the payment or it decides to make a lesser payment for capital management purposes. Neither of these reasons are ‘contrary to law’, they are rather a board making a judgement in the best interests of security holders, a decision they are unlikely to make lightly. Our members would be concerned were ASX to require them to seek a waiver of the proposed Rule where the directors are making a decision in the best interests of security holders
- There is frequently a delay of two to three months between the declaration of a dividend and the announcement of final results. An entity’s circumstances may change dramatically during this period leading its board to make a judgement, acting in the best interests of security holders, not to make a payment because of the entity’s changed circumstances. Our members consider this situation is not ‘contrary to law’.
- The proposed Rule may also cause difficulties for listed regulated entities where a regulator may encourage, but not legally require, an entity not to pay a dividend. This can occur, even where the dividend has been announced, the entity meets the solvency test, and the directors consider it would be in the best interests of security holders to make the payment.

Our members consider that a potential solution in these circumstances would be for an entity to provide appropriate disclosure to ASX of its changed circumstances and the reasons for withdrawing the dividend or distribution. This proposed solution would enable directors, when making a decision about whether or not to pay a dividend or to pay a lesser amount, to consider and take account of the *actual circumstances* of the company at the relevant time, which (as noted in the first bullet point above) a board would be required to do as part of their general duties to act with care and diligence and in the best interests of security holders.

Governance Institute recommends that where an entity’s circumstances have changed between the announcement of a payment and the due date for payment and the payment is not ‘contrary to law’, but the board has made a judgement in the best interests of security holders not to make the payment, the entity provide appropriate disclosure to ASX of its changed circumstances and the reasons for withdrawing the dividend or distribution.

Other matters

Listing Rule 3.10.3A Note

Our members consider there may be a contradiction between the first paragraph of the note and the penultimate paragraph of the Note and would be grateful if you would review the drafting of the paragraph.

Forms generally

We have received feedback from our members that a number of the forms are not user-friendly particularly the Word versions available for emergencies. While they note that many of ASX's forms will be smart forms in the future they have identified one practical difficulty with the forms. In most entities forms are drafted for review by a senior team member. In some cases, the version for checking can exceed 50 pages because while many of the fields are unused the forms are designed so that blank fields print. We would be grateful if you would confirm with the ASX Team working on the forms that this will not continue either in the Word versions available for emergencies or in the new smart forms.

Share buy-back forms

Appendix 3E Daily share buy-back notice

An issue our members have raised is that it may be more efficient and lead to fewer errors if this were to be retained as a paper form. There are short time frames involved in lodging these forms. Market practice is for them to be completed by brokers and sent to the entity for checking and lodgement. Our members consider that if an entity is required to re-key this information there is an increased likelihood of error particularly where a buy-back is active. We would be grateful if you would consult with the ASX Team working on the forms about this issue.

Listing Rule 3.8A - Buy-backs and Listing Rule 3.10.3E Cessation of securities

Our members note the proposal to require lodgement of an Appendix 3H within five business days of the cancellation of the securities bought back. This is to replace the current requirement to lodge ASIC Form 484 immediately after the cancellation is submitted to ASIC. The Form 484 must be lodged within 28 days of a cancellation. Under section 257(3) of the *Corporations Act*, shares are cancelled 'immediately after the registration of the transfer to the company of the shares bought back', that is, effectively on T+2 settlement. This means that when an entity is undertaking an on-market buy-back and is potentially in the market every day, securities are potentially being legally cancelled daily after they settle on a T+2 basis, notwithstanding the registry may *process* the cancellation on the register on a periodic basis, for example, weekly or monthly. The proposal could require an entity to lodge an Appendix 3H every five 5 business days when it is actively buying back stock. Our members consider this would create an unnecessary burden given that it is largely an administrative task and there is daily disclosure to the market of the number of securities bought back. Their preferred approach is that ASX should require an entity to lodge an Appendix 3H no later than five business days after the relevant Form 484 is lodged with ASIC, instead of within five business days of the cancellation.

In the case of buy-backs **Governance Institute recommends** that ASX should require an entity to lodge an Appendix 3H no later than five business days after the relevant Form 484 is lodged with ASIC, instead of within five business days of the cancellation.

Appendix 3C – Notification of buy-back and proposal to combine the existing Appendices 3C, 3D, 3E and 3F into one form

Our members consider the current Appendices 3C, 3D, 3E and 3F are all used at very specific points in a buy-back. They do not consider that there is a benefit from combining these forms because entities would generally only use one section of a form at any point in time. They consider the proposal would make the form confusing and less, rather than more user-friendly. It would also presumably result in a significant part of each form being 'not applicable'.

As noted above market practice in an on-market buy-back is for brokers to complete the Appendix 3E in Word format daily and send it to the entity for checking and lodgement. The time frames are short given that the form needs to be lodged 30 minutes before the market opens on the day after any securities are bought back. Our members consider that there is significant potential for inefficiency and the risk of transposition errors in re-keying information into an online form. Our members consider it would be preferable to retain these forms as separate forms and not move to an online form for Appendix 3E.

Governance Institute recommends retaining Appendices 3C, 3D, 3E and 3F as separate forms and the ability to lodge Appendix 3E as a paper form.

If you wish to discuss any of the issues raised in this letter, please contact Catherine Maxwell.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Megan Motto', with a stylized, cursive script.

Megan Motto
CEO