

Listed@ASX Compliance Update no. 09/20

15 September 2020

1. Changes to the temporary emergency capital raising relief

ASX announced in Listed@ASX Compliance Update no 03/20 dated 31 March 2020 that it had introduced two class order waivers (“Class Waivers”) implementing temporary emergency capital raising measures to help listed entities affected by the COVID-19 pandemic to raise urgently needed capital. The Class Waivers were updated on 22 and 23 April 2020, and in Listed@ASX Compliance Update no 07/20 dated 13 July 2020 ASX announced that its temporary emergency capital raising measures had been extended until 30 November 2020.

At the time of introducing the Class Waivers and throughout the period of their operation, ASX recognised, following consultation with stakeholders, that the volatile market environment presented significant challenges for many entities needing to raise capital, whether or not the entity was directly impacted by COVID-19. Therefore, in addition to urgent capital raisings by entities directly impacted by COVID-19, the Class Waivers facilitated a wider range of capital raisings that were potentially affected by dislocation in the broader market environment. This policy was reflected in ASX’s [Listed@ASX Compliance Update no 5/20](#) dated 1 May 2020.

Having regard to the significant stabilisation in market conditions since the extension of the Class Waivers on 13 July 2020, ASX considers it prudent and timely to further revise the settings for the availability of the Class Waivers.

From 16 September 2020, any entity wishing to rely on the Class Waivers must satisfy ASX that the entity is raising capital predominantly for the purposes of addressing the existing or potential future financial affect on the entity resulting from the COVID-19 health crisis, and/or its economic impact, along with satisfying the other conditions set out in the Class Waivers. Where a capital raising appears to ASX to have inequitable features for existing security holders, ASX may still withhold the benefit of the Class Waivers for that capital raising, even if the capital raising is specifically COVID-19 related and urgently needed.

The amendments have been implemented by the publication of two replacement Class Waivers dated 15 September 2020: [Temporary Extra Placement Capacity Class Waiver](#) and [Non-renounceable Offers Class Waiver](#). The replacement Class Waivers apply to all relevant capital raisings announced on or after 16 September 2020 and on or before 30 November 2020.

2. Issues of securities made under listing rule 7.1 class waiver cannot be ratified

ASX has had a number of queries from listed entities and their advisers on whether the additional 10% temporary extra placement capacity provide for in ASX’s class waiver can be ratified under listing rules 7.1 or 7.4.

The short answer is no. Paragraph 1.1.2 of the previous versions of the Class Waiver expressly stated that the temporary extra placement capacity was not able to be ratified or replenished under listing rule 7.1 or 7.4.

ASX has since updated paragraph 1.1.2 in the 15 September 2020 version of the Class Waiver to clarify how this constraint affects an entity’s 15% placement capacity under listing rule 7.1 for the following 12 months.

Listed entities that have relied on the additional 10% temporary extra placement capacity in the class waiver are able to approve or ratify issues made from their normal 15% placement capacity under listing rule 7.1 but not from the additional 10% temporary extra placement capacity.

The same is true for listed entities that had an additional 10% placement capacity approved by security holders under listing rule 7.1A (a ‘7.1A mandate’) but that used the additional 10% temporary placement capacity in the class waiver rather than their 7.1A mandate to issue shares above their normal 15% placement capacity under listing rule 7.1. They are able to approve or ratify issues made from their normal 15% placement capacity under listing rule 7.1 but not from the additional 10% temporary extra placement capacity.

Listed entities that had a valid 7.1A mandate and used it to issue shares in the preceding 12 months, rather than the additional 10% temporary extra placement capacity provided for in the class waiver, can approve or ratify the issue

under listing rule 7.1 or 7.4 in the usual way. However, in this case, the issue must have complied with all of the requirements in listing rule 7.1A, including the pricing constraints in listing rule 7.1A.3.

3. Updates to listing rules Guidance Notes 3, 4, 12 and 19

ASX released updates to listing rules Guidance Notes 3, 4, 12 and 19 on 28 August 2020.

Guidance Note 3 *Co-operatives and Mutuals Listing on ASX* has been updated to add a new section 7.6 addressing the 'mutual capital instruments' that mutual entities are now able to issue under Part 2B.8 of the Corporations Act and the similar 'co-operative capital units' that co-operatives are able to issue under Division 2 of Part 3.4 of the Co-operatives National Law.

Guidance Note 4 *Foreign Entities Listing on ASX* has been amended to add the Tel Aviv Stock Exchange (TASE) as an acceptable listing venue for foreign exempt listings and to reflect the relief ASIC has recently granted to US-incorporated listed companies to allow them to prepare and file accounts under section 601CK of the Corporations Act using US GAAP rather than Australian IFRS.

The revisions to Guidance Note 12 *Significant Changes to Activities* include:

- The guidance in existing sections 2.6 – 2.14 (now sections 2.6 – 2.12) on the preliminary steps an entity should take before announcing a proposed significant transaction under listing rule 11.1 and on various aspects of the announcement process has been substantially re-drafted and re-ordered to improve its clarity.
- A paragraph has been added to section 2.7 (*Seeking in-principle advice from ASX*) noting that receipt of favourable in-principle advice on an entity's suitability for re-admission to the official list, by itself, is not to be taken as an indication that the entity will receive any other listing rule waiver or confirmation required or contemplated by the proposed transaction – if an entity wants comfort in that regard, it will need to apply for specific in-principle advice on ASX's preparedness to grant the waiver or confirmation in question.
- What is now section 2.10 (*Additional steps for transactions requiring re-compliance under listing rule 11.1.3*) has been substantially amended to outline a new process that an entity must follow before and after announcing a transaction that requires re-compliance with ASX's admission and quotation requirements under listing rule 11.1.3.
- The guidance around case (2) in section 3.2 (*The main circumstances in which ASX will apply listing rules 11.1.2 and 11.1.3*) has been revised to acknowledge that, in such a case, ASX will consider afresh whether the entity is suitable for admission or re-admission to the official list.

In addition, case (3) in section 3.2 has been expanded to apply to an entity ceasing to pursue its main undertaking (in addition to one disposing of or abandoning its main undertaking).

- The guidance on minimum spread in section 8.5 (*Minimum spread*) has been amended to reflect standard conditions to be imposed in all re-compliance listings announced after 28 August 2020 that:
 - spread must come from subscriptions to the capital raising being conducted by the entity in connection with its re-admission (ie pre-existing holdings will not be counted); and
 - in the case of emerging market issuers, 100% (rather than the current 75%) of spread must come from residents of Australia or other jurisdictions acceptable to ASX.
- The conditions to receiving the '2-cent waiver' in section 8.8 (*The 20 cent rule*) have been modified to eliminate an emerging area of abuse, where entities were issuing shares at 2 cents to promoters and their associates at or shortly before the time of re-admission but then raising capital from investors at more than 2 cents. In addition to the offer price for any securities being issued or sold as part of, or in connection with, the transaction being not less than two cents, the conditions now require either that:
 - the price at which the entity's securities traded on ASX over the last 20 trading days on which the entity's securities have actually traded on ASX preceding the date of the announcement of the proposed transaction (or, if the entity was already suspended at the time of the announcement, the last 20 trading days on which the entity's securities have actually traded on ASX prior to its suspension) was not less than the offer price; or
 - the entity announces at the same time that it announces the proposed transaction that it intends to consolidate its securities at a specified ratio that will be sufficient, based on the lowest price at which the entity's securities traded over the 20 trading days referred to previously, to achieve a market value for its securities of not less than the offer price.

In addition, a condition has been added disqualifying an entity from receiving the waiver if it has undergone a deed of company arrangement or a creditors' scheme of arrangement in the two years preceding the date of the announcement of the proposed transaction and been continuously suspended since the deed or scheme was effectuated.

- The conditions to receiving a waiver from the minimum option exercise price rule in section 2.9 (*Minimum option exercise price*) likewise have been amended to disqualify an entity from receiving the waiver if it has undergone a deed of company arrangement or a creditors' scheme of arrangement in the two years preceding the date of the announcement of the proposed transaction and been continuously suspended since the deed or scheme was effectuated.
- A number of other sections have been amended to include additional guidance and/or to improve their drafting, including in particular sections 2.8 (*When must a notification be given under listing rule 11.1?*), 4.7 (*Other listing rule issues*), 5.1 – 5.5 (*listing rule 11.3: suspension of quotation*), 7.3 (*The requirement to give a draft notice to ASX for review*) and 8.2 (*Processing time*).

Guidance Note 19, formerly called '*Performance Shares*' but now called '*Performance Securities*', has been substantially amended to address emerging areas of concern with performance securities. The changes include:

- Expanding the Guidance Note to cover performance options and performance rights, as well as performance shares.
- Adding a new section 3 (*The different types of performance securities*) with commentary that some "contingent consideration agreements" and "deferred consideration agreements" are in substance and effect performance rights and regulated by ASX under the listing rules accordingly.
- Adding a new section 7 (*Performance securities covered by sections 8 to 15 of this Guidance Note*) noting that the substantive provisions of the Guidance Note (sections 8 – 15) do not apply to:
 - cash-settled performance rights;
 - an issue of performance shares, performance options or deliverable performance rights pursuant to a takeover bid under Chapter 6, or a merger by way of scheme of arrangement under Part 5.1, of the Corporations Act; or
 - an issue of performance shares, performance options or deliverable performance rights by an entity under an employee incentive scheme or as part of the remuneration package of a director or employee, where the issue has been made in the ordinary course of business of the entity and not in connection with a new or re-compliance listing and has been approved:
 - if listing rule 10.11 applies, by security holders under listing rule 10.11;
 - if listing rule 10.14 applies, by security holders under listing rule 10.14; or
 - if listing rules 10.11 and 10.14 do not apply, by the board or a remuneration committee of the board.
- Amending what is now section 8 (*Applying for in-principle advice about performance securities*) to expand the information an entity must give to ASX in an application for in-principle advice on whether performance securities satisfy listing rule 1.1 condition 1 or listing rules 6.1 and 12.5.
- In light of the changes in section 13 mentioned below, removing the previous constraint on 'change of control' provisions in what is now section 9 (*Base requirements for performance securities*) that the securities converted on a change of control be limited to 10% of the ordinary share capital.
- Substantially expanding the guidance in what is now sections 10 (*Appropriate and equitable numbers of performance securities*) and 11 (*Appropriate and equitable performance milestones*) on the matters to which ASX will have regard in determining whether performance securities satisfy the requirement in listing rule 6.1 that their terms are 'appropriate and equitable'.
- Adding a new section 13 (*ASX's requirement for an independent expert's report in some cases*) requiring an independent expert to opine on whether an issue of performance securities is fair and reasonable to non-participating security holders where:
 - the entity is already listed, it is proposing to issue performance securities covered by sections 8 to 15 of Guidance Note 19 and the number of ordinary shares into which those performance securities will convert in aggregate if the applicable milestone is achieved is greater than 10% of the number of

ordinary shares the entity proposes to have on issue at the date the performance securities are proposed to be issued (taking into account any ordinary shares that the entity may be issuing in connection with the same transaction); or

- the entity is applying to be listed, it has or proposes to have performance securities covered by sections 8 to 15 of Guidance Note 19 on issue at the date of its admission to quotation and the number of ordinary shares into which those performance securities will convert in aggregate if the applicable milestone is achieved is greater than 10% of the number of ordinary shares the entity proposes to have on issue at the date of its admission to quotation (taking into account any ordinary shares that the entity may be issuing in connection with its listing).

Mark-ups of the changes to the Guidance Notes are available at:

<http://www2.asx.com.au/content/dam/asx/documents/unlinked-docs/regulatory-policy/guidance-note-3-mark-up28.08.20.pdf>

<http://www2.asx.com.au/content/dam/asx/documents/unlinked-docs/regulatory-policy/guidance-note-4-mark-up28.08.20.pdf>

<http://www2.asx.com.au/content/dam/asx/documents/unlinked-docs/regulatory-policy/guidance-note-12-mark-up%2028.08.20.pdf>

<http://www2.asx.com.au/content/dam/asx/documents/unlinked-docs/regulatory-policy/guidance-note-19-mark-up28.08.20.pdf>

4. Draft notices of meetings provided to ASX must incorporate amendments made to the listing rules made on 1 December 2019

ASX provided a reminder to listed entities in [Listed@ASX Compliance Update 08/20](#) that, under listing rule 15.1.7, draft notices of general meeting (“NOMs”) that contain resolutions under the listing rules must be submitted to ASX for review before they are sent to security holders.

ASX would also like to remind listed entities that there were a number of substantial amendments to the listing rules relating to NOM requirements and voting exclusions on 1 December 2019.

Based on the draft NOMs for annual general meetings received so far by ASX from listed entities with a balance date of 30 June 2020, it appears that a number of listed entities are not aware of the changes made to the listing rules on 1 December 2019.

Before submitting a draft notice of meeting (‘NOM’) to ASX for review, please:

- note that there have been substantial changes to the various NOM requirements in the listing rules and to the voting exclusions in listing rule 14.11.1 and in related Guidance Notes;
- if the NOM includes a:
 - listing rule 7.1, 7.1A or 7.4 resolution, read GN 21 *The Restrictions on Issuing Equity Securities in Chapter 7 of the listing rules*
 - listing rule 10.1 resolution, read GN 24 *Acquisitions and Disposals of Substantial Assets Involving Persons in a Position of Influence*
 - listing rule 10.11 or 10.14 resolution, read GN 25 *Issues of Equity Securities to Persons in a Position of Influence*
 - listing rule 11.1.2 or 11.2 resolution, read GN 12 *Significant Changes to Activities*
 - listing rule 11.4.1(b) resolution, read GN 13 *Spin-outs of Major Assets*
 - resolution for approval to be removed from the official list, read GN 33 *Removal of Entities from the ASX Official List*, and
 - consider whether the opportunity should be taken to introduce the updated listing rule 15.12 escrow provisions into the constitution (this is especially important if intending to undertake a back door listing or listing rule 10.7 transaction in the near term).

Before holding the general meeting, please:

- read GN 35 *Security Holder Resolutions*;

- note ASX’s position that all listing rule resolutions must be decided by a poll rather than by a show of hands;
- update the template for disclosure of voting results to reflect the changes to listing rule 3.13.2 – a sample is available at: <https://www.asx.com.au/regulation/compliance/compliance-downloads.htm> and
- if it is an annual general meeting:
 - disclose the closing date for receipt of director nominations (listing rule 3.13.1) – this can be done by lodging with ASX a calendar of key events which includes this date, and
 - note that listing rule 3.13.3 now expressly requires a copy of the CEO’s speech (as well as Chair’s) to be lodged with ASX before the meeting.

Please also remember that listing rule 15.1 provides that ASX may take 5 business days to advise whether it objects to a draft document and may extend that deadline if it needs further time to review the document. Should an entity’s draft NOM not include matters resulting from last year’s changes to the listing rules, ASX is likely to reject it and require an updated draft to be provided that addresses the rule amendments. In that case, the 5 day review period will recommence from the time that the amended draft NOM is provided.

5. ASX Market Announcements closes one hour later during daylight saving

Daylight saving commences in New South Wales, the Australian Capital Territory, Victoria, Tasmania and South Australia at 2:00 a.m. EST on Sunday 4 October 2020, and will end at 3:00 a.m. on Sunday 4 April 2021. Daylight saving is not observed in Queensland, Western Australia or the Northern Territory.

As WA will be 3 hours behind Sydney time during daylight saving, ASX Market Announcements will stay open until 8.30 p.m. EST (5.30 p.m. WST) starting on Monday 5 October 2020. ASX Market Announcements will revert to its usual 7.30 pm EST closing time when daylight saving has ended. A further Listed@ASX Compliance Update reminding listed entities of the change will be released closer to that time.
