

## ISSUES OF EQUITY SECURITIES TO PERSONS IN A POSITION OF INFLUENCE

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| <p><b>The purpose of this Guidance Note</b></p> | <ul style="list-style-type: none"> <li>To assist listed entities to understand and comply with the framework in Listing Rules 10.11 – 10.16 regulating issues of equity securities to persons in a position of influence</li> </ul>  |
| <p><b>The main points it covers</b></p>         | <ul style="list-style-type: none"> <li>The requirement in Listing Rule 10.11 for an entity's security holders to approve an issue of equity securities to a person in a position of influence</li> <li>The exceptions to Listing Rule 10.11 in Listing Rule 10.12</li> <li>The requirement in Listing Rule 10.14 for an entity's security holders to approve an issue of equity securities under an employee incentive scheme to a director, an associate of a director or other closely connected party</li> <li>The requirements for notices of meeting proposing a resolution to approve an issue of equity securities under Listing Rule 10.11 or 10.14</li> <li>The powers ASX may exercise if an entity issues equity securities in breach of Listing Rule 10.11 or 10.14</li> </ul> |
| <p><b>Related materials you should read</b></p> | <ul style="list-style-type: none"> <li>Guidance Note 17 <i>Waivers and In-Principle Advice</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 22 <i>Notification of Directors' Interests</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 30 <i>Notifying an Issue of Securities and Applying for Their Quotation</i></li> <li>Guidance Note 35 <i>Security Holder Resolutions</i></li> </ul>  |

**History:** Guidance Note 25 introduced 01/12/19. It replaced a withdrawn Guidance Note entitled *The Exercise of ASX Discretions*.

**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 admitted to the ASX official list as an ASX Listing<sup>1</sup> to understand and comply with the framework in Listing Rules 10.11 – 10.16 regulating issues of equity securities<sup>2</sup> to persons in a position of influence.

Listing Rule 10.11 provides:

*“Unless one of the exceptions in rule 10.12 applies, an entity must not issue or agree to issue equity securities to any of the following persons without the approval of the holders of its ordinary securities.*

10.11.1 *A related party.*

10.11.2 *A person who is, or was at any time in the 6 months before the issue or agreement, a substantial (30%+) holder in the entity.*

10.11.3 *A person who is, or was at any time in the 6 months before the issue or agreement, a substantial (10%+) holder in the entity and who has nominated a director to the board of the entity (in the case of a trust, to the board of the responsible entity of the trust) pursuant to a relevant agreement which gives them a right or expectation to do so.*

10.11.4 *An associate of a person referred to in rules 10.11.1 to 10.11.3.*

10.11.5 *A person whose relationship with the entity or a person referred to in rules 10.11.1 to 10.11.4 is such that, in ASX’s opinion, the issue or agreement should be approved by security holders.*

*The notice of meeting to obtain approval must comply with rule 10.13.”*

In this Guidance Note, for convenience, the parties mentioned in Listing Rules 10.11.1 – 10.11.5 are collectively referred to as “10.11 parties”, while the parties mentioned in Listing Rule 10.11.5 are referred to as “closely connected parties”.

Listing Rule 10.14 provides:

*“An entity must not permit any of the following persons to acquire equity securities under an employee incentive scheme without the approval of the holders of its ordinary securities.*

10.14.1 *A director of the entity (in the case of a trust, a director of the responsible entity of the trust).*

10.14.2 *An associate of a person referred to in rule 10.14.1.*

10.14.3 *A person whose relationship with the entity or a person referred to in rule 10.14.1 or 10.14.2 is such that, in ASX’s opinion, the acquisition should be approved by security holders.*

*The notice of meeting to obtain approval must comply with rule 10.15.*

*An approval under this rule ceases to be valid if there is a material change to the terms of the scheme from those set out in the entity’s notice of meeting.”*

Again, for convenience, the parties mentioned in Listing Rule 10.14.3 are also referred to in this Guidance Note as “closely connected parties”.

<sup>1</sup> Listing Rules 10.11 and 10.14 do not apply to entities admitted to the official list as an ASX Debt Listing or as an ASX Foreign Exempt Listing (see Listing Rules 1.10 and 1.15.1). Unless otherwise indicated, references in this Guidance Note to a listed entity or entity mean an entity admitted to the ASX official list as an ASX Listing.

<sup>2</sup> The term “equity security” is defined in Listing Rule 19.12 as: (a) a share; (b) a unit; (c) an option over an issued or unissued share or unit; (d) a right to an issued or unissued share or unit; (e) an option over, or right to, a security referred to in (c) or (d); (f) a convertible security; and (g) any security that ASX decides to classify as an equity security; but not (h) a security ASX decides to classify as a debt security.

## 2. Listing Rule 10.11

### 2.1 The scope of the rule

Listing Rule 10.11 effectively requires an entity to obtain the approval of the holders of its ordinary securities before it issues,<sup>3</sup> or agrees to issue,<sup>4</sup> any equity securities<sup>5</sup> to a 10.11 party unless:

- the securities are issued under an employee incentive scheme with the approval of holders of ordinary securities under Listing Rule 10.14 (Listing Rule 10.12 exception 8); or
- another exception in Listing Rule 10.12 applies.

Listing Rule 10.11 does not apply to an issue of debt securities.<sup>6</sup>

Listing Rule 10.11 operates side-by-side with Chapter 2E of the Corporations Act 2001 (Cth),<sup>7</sup> which regulates transactions between a public company or registered managed investment scheme<sup>8</sup> on the one hand and its related parties on the other. Chapter 2E seeks to protect the interests of members by requiring the company or scheme to obtain approval from its members before it gives a financial benefit to a related party unless an exception applies.<sup>9</sup>

Listing Rule 10.11, however, is different in scope to Chapter 2E. Listing Rule 10.11 only applies to an issue of equity securities, whereas Chapter 2E applies to all forms of financial benefits, including an issue of securities.<sup>10</sup> Conversely, Listing Rule 10.11 extends to a broader range of “connected” parties than just related parties and also does not include the broad exclusions that Chapter 2E has for transactions on arm’s length terms<sup>11</sup> and reasonable remuneration.<sup>12</sup>

### 2.2 The policy underpinning the rule

The policy that underpins Listing Rule 10.11 starts from the premise that a 10.11 party is likely to be in a position to influence whether the entity issues, or agrees to issue, equity securities to them, as well as the terms on which the issue or agreement is made. The harm it seeks to protect against is that the 10.11 party will exercise that influence to favour themselves at the expense of the entity.

To address the potential conflicts involved and to minimise the risk of this harm occurring, Listing Rule 10.11 displaces the general rule that the board of directors (or, in the case of a listed trust, the responsible entity<sup>13</sup> (“RE”)

<sup>3</sup> Where options or other convertible securities are issued with the approval of the holders of ordinary securities under Listing Rule 10.11, the subsequent issue of the underlying securities when the options are exercised, or convertible securities are converted, does not require any further approval by security holders: see Listing Rule 10.12 exception 7.

<sup>4</sup> Where an agreement to issue equity securities to a 10.11 party is approved by the holders of ordinary securities under Listing Rule 10.11, the subsequent issue of the equity securities pursuant to that agreement does not require any further approval by security holders: see Listing Rule 10.12 exception 10.

<sup>5</sup> As defined in note 2 above.

<sup>6</sup> The term “debt security” is defined in Listing Rule 19.12 as: (a) a bond, certificate of deposit, debenture, note or other instrument evidencing a debt owing by an entity to the holder that is negotiable or transferrable and that is not a convertible security; (b) any security that ASX decides to classify as a debt security; but not (c) a security ASX decides to classify as an equity security.

<sup>7</sup> 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>8</sup> On its face, Chapter 2E only applies to transactions between a public company and its related parties. Part 5C.7 of the Corporations Act, however, extends Chapter 2E to transactions between a registered managed investment scheme and its related parties, with some modifications.

It should be noted that Chapter 2E and Part 5C.7 of the Corporations Act only apply to public companies established, and managed investment schemes registered, in Australia under that Act. Related party transactions by companies and trusts formed elsewhere may be subject to additional regulation in their country of formation, over and above Chapter 10 of the Listing Rules.

<sup>9</sup> See sections 208 and 601LA.

<sup>10</sup> See section 229(3)(e).

<sup>11</sup> Section 210.

<sup>12</sup> Section 211.

<sup>13</sup> “Responsible entity” means: (a) in relation to a managed investment scheme registered under the Corporations Act, the responsible entity of that scheme under that Act; or (b) in relation to a trust that is not a registered managed investment scheme, the entity that in ASX’s

of the trust) is responsible for managing the business of the entity to the exclusion of its security holders and requires the issue or agreement to be approved by the holders of ordinary securities in the entity. 10.11 parties who will participate in the issue and their associates are precluded from voting on the resolution to approve it.

### 2.3 Listing Rule 10.11.1 – related parties

Listing Rule 10.11.1 applies to an issue of equity securities to a related party.

The term “related party” is defined in similar terms under the Listing Rules as it is under the Corporations Act.

Where the listed entity is a body corporate, its related parties include:

- (i) an entity that controls the listed entity;
- (ii) if the listed entity is controlled by an entity that is not a body corporate, the persons making up that entity;
- (iii) directors of the listed entity or of an entity that controls the listed entity;
- (iv) spouses and de facto spouses of anyone referred to in (ii) and (iii) above;
- (v) parents and children of anyone referred to in (ii), (iii) and (iv) above;
- (vi) an entity controlled by anyone referred to in (i) – (v) above unless it is also controlled by the listed entity;
- (vii) anyone who has fallen within (i) – (vi) above within the past 6 months;
- (viii) anyone who believes or has reasonable grounds to believe that they are likely to fall within (i) – (vi) at any time in the future; and
- (ix) anyone acting in concert with someone referred to in (i) – (viii) above.<sup>14</sup>

Where the listed entity is an internally managed<sup>15</sup> trust, its related parties include:

- (i) an entity that controls the trust;
- (ii) if the trust is controlled by an entity that is not a body corporate, the persons making up that entity;
- (iii) directors of the RE of the trust or of an entity that controls the trust;
- (iv) spouses and de facto spouses of anyone referred to in (ii) and (iii) above;
- (v) parents and children of anyone referred to in (ii), (iii) and (iv) above;
- (vi) an entity controlled by anyone referred to in (i) – (v) above unless it is also controlled by the RE of the trust in its capacity as RE of the trust;
- (vii) anyone who has fallen within (i) – (vi) above within the past 6 months;
- (viii) anyone who believes or has reasonable grounds to believe that they are likely to fall within (i) – (vi) above at any time in the future; and
- (ix) anyone acting in concert with someone referred to in (i) – (viii) above.<sup>16</sup>

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opinion performs a substantially equivalent role in relation to the trust as the responsible entity performs in relation to a registered managed investment scheme (Listing Rule 19.12).

<sup>14</sup> Paragraph (a) of the definition of “related party” in Listing Rule 19.12. This is essentially the same definition as in section 228 of the Corporations Act.

<sup>15</sup> As defined in Listing Rule 19.12.

<sup>16</sup> Paragraph (b) of the definition of “related party” in Listing Rule 19.12.

Where the listed entity is an externally managed<sup>17</sup> trust, its related parties include:

- (i) the RE of the trust;
- (ii) an entity that controls the RE;
- (iii) if the RE is controlled by an entity that is not a body corporate, the persons making up that entity;
- (iv) directors of the RE or of an entity that controls the RE;
- (v) spouses and de facto spouses of anyone referred to in (iii) and (iv) above;
- (vi) parents and children of anyone referred to in (iii), (iv) and (v) above;
- (vii) an entity controlled by the RE of the trust other than in its capacity as RE of the trust;
- (viii) an entity controlled by anyone referred to in (ii) – (vii) above unless it is also controlled by the RE of the trust in its capacity as RE of the trust;
- (ix) anyone who has fallen within (ii) – (viii) above within the past 6 months;
- (x) anyone who believes or has reasonable grounds to believe that they are likely to fall within (ii) – (viii) above at any time in the future; and
- (xi) anyone acting in concert with someone referred to in (i) – (x) above.<sup>18</sup>

For convenience, a person's spouse or de facto spouse, their parents and children, and the parents and children of their spouse or de facto spouse, are referred to in this Guidance Note as "prescribed relatives". Controllers of the entity (or in the case of an externally managed trust, of the RE) and the other entities they control are referred to as "group entities".

#### 2.4 Listing Rule 10.11.2 – substantial (30%+) holders

Listing Rule 10.11.2 applies to an issue of equity securities to a person who is, or was at any time in the 6 months before the issue, a "substantial (30%+) holder" in the entity.<sup>19</sup>

The Listing Rules define a "substantial (30%+) holder" to mean:

- in relation to an Australian company<sup>20</sup> or a trust which is a registered managed investment scheme, a person who would have a "substantial holding" in the company or scheme under paragraph (a) of the definition of that term in section 9 of the Corporations Act<sup>21</sup> if the reference in that paragraph to 5% was 30%;
- in relation to a trust which is not a registered managed investment scheme or which is a foreign trust,<sup>22</sup> a person who would have a "substantial holding" in the trust under paragraph (a) of the definition of that term

<sup>17</sup> As defined in Listing Rule 19.12.

<sup>18</sup> Paragraph (c) of the definition of "related party" in Listing Rule 19.12. This is largely the same definition as in section 228 of the Corporations Act, as modified by section 601LA of the Corporations Act, but with the addition of paragraphs (i) and (vii), and the qualification of paragraph (viii) by the addition of the words "in its capacity as RE of the trust".

<sup>19</sup> Listing Rule 10.11.2 was introduced on 1 December 2019. Prior to that date ASX had a general practice of applying Listing Rule 10.11 to issues of equity securities to substantial (30%+) holders. It did so by exercising its discretion in that regard under Listing Rule 10.11.5 (then Listing Rule 10.11.2). ASX deemed it appropriate to change this practice to a rule in 2019 for better transparency.

<sup>20</sup> "Australian company" means a body corporate that is formed or established in Australia (Listing Rule 19.12).

<sup>21</sup> Paragraph (a) of the definition of "substantial holding" in section 9 of the Corporations Act (as modified by ASIC Class Order 13/520) effectively provides that a person has a substantial holding in a company or a listed registered managed investment scheme if the total votes attached to voting shares in the body, or voting interests in the scheme, in which they or their associates have a relevant interest, or would have a relevant interest but for sections 609(6) (market traded options and derivatives), 609(7) (conditional agreements) or 609(11) (restricted securities), is 5% or more of the total votes attached to the voting shares in the company or the voting interests in the scheme.

<sup>22</sup> "Foreign trust" means a trust or similar overseas entity that is not formed or established in Australia and that is not a registered managed investment scheme under the Corporations Act (Listing Rule 19.12).

in section 9 of the Corporations Act if the references in that paragraph to a scheme and interests in the scheme were references to the trust and units in the trust and the reference to 5% was 30%; and

- in relation to a foreign company,<sup>23</sup> a person who would have a “substantial holding” in the company under paragraph (a) of the definition of “substantial holder” in section 9 of the Corporations Act if the references in that paragraph to a company and its securities were references to the foreign company and its securities and the reference to 5% was 30%.<sup>24</sup>

### 2.5 Listing Rule 10.11.3 – substantial (10%+) holders with board representation

Listing Rule 10.11.3 applies to an issue of equity securities to a person who is, or was at any time in the 6 months before the issue, a substantial (10%+) holder in the entity and who has nominated a director to the board of the entity (or, in the case of a trust, to the board of the responsible entity of the trust) pursuant to a relevant agreement which gives them a right or expectation to do so.<sup>25</sup>

The Listing Rules define a “substantial (10%+) holder” in the same terms as a “substantial (30%+) holder” above, but with the references to 30% changed to 10%.

“Relevant agreement” has the same meaning as in section 9 of the Corporations Act.<sup>26</sup> 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.

### 2.6 Listing Rule 10.11.4 – associates

Listing Rule 10.11.4 applies to an issue of equity securities to an associate of a person referred to in Listing Rules 10.11.1, 10.11.2 or 10.11.3.

Under the Listing Rules, a person’s associates include:

- if the person is a natural person, any entity<sup>27</sup> the person controls;
- if the person is an entity:<sup>28</sup>
  - any entity the person controls;
  - any entity that controls the person;
  - any entity that is controlled by an entity that controls the person;

<sup>23</sup> “Foreign company” means a body corporate that is not formed or established in Australia (Listing Rule 19.12).

<sup>24</sup> Listing Rule 19.12.

<sup>25</sup> Listing Rule 10.11.3 was introduced on 1 December 2019. Prior to that date ASX had a general practice of applying Listing Rule 10.11 to issues of equity securities to substantial holders with board representation and with approximately 25%+ shareholdings. It did so by exercising its discretion in that regard under Listing Rule 10.11.5 (then Listing Rule 10.11.2). ASX deemed it appropriate to change this practice to a rule in 2019 for better transparency and to extend it to substantial (10%+) holders with board representation. ASX considered that a substantial (10%+) holding along with board representation was sufficient to give a person influence over any equity raisings the entity may undertake. This change also aligned Listing Rule 10.11.3 more closely with Listing Rule 10.1.3.

<sup>26</sup> Listing Rule 19.3.

<sup>27</sup> “Entity” in this context means a body corporate, partnership, unincorporated body or a trust and includes, in the case of a trust, the RE of the trust (see the definition of “associate” in Listing Rule 19.12).

<sup>28</sup> See note 27 above.

- any person with whom the person has, or proposes to enter into, a relevant agreement<sup>29</sup> for the purpose of controlling or influencing the composition of the listed entity's board<sup>30</sup> or the conduct of the listed entity's affairs; and
- any person with whom the person is acting, or proposing to act, in concert in relation to the listed entity's affairs.<sup>31</sup>

Where the person is a natural person, their related parties are taken to be their associates unless the contrary is established. 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>32</sup>

### 2.7 Listing Rule 10.11.5 – ASX's discretion to apply Listing Rule 10.11 to other parties

Listing Rule 10.11.5 applies where equity securities are issued to a person whose relationship to the entity or a person referred to in Listing Rules 10.11.1 to 10.11.4 is such that, in ASX's opinion, the issue should be approved by security holders.

<sup>29</sup> See the text accompanying note 26 above.

<sup>30</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 RE. 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 RE.

<sup>31</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 27 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 Listing Rules definition also includes a provision deeming a related party of a natural person to be their associate unless the contrary is proven. As mentioned in the text, this is intended to put the evidentiary burden on a person who asserts that they do not control and are not acting in concert with a related party to prove that is so.

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 had 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>32</sup> Paragraph (d) of the definition of "related party" in Listing Rule 19.12.

Listing Rule 10.11.5 effectively gives ASX a discretion to require that security holders approve an issue of equity securities to someone who is not one of the parties referred to in Listing Rules 10.11.1 to 10.11.4 but, in ASX's opinion, is nonetheless in a position to exert influence over the entity's decision to issue the securities.

Given the breadth of the parties captured by Listing Rules 10.11.1. to 10.11.4, this is not a discretion that ASX is often called upon to exercise and not one that it exercises lightly, since it imposes additional costs and delays on an entity in having to hold a meeting of security holders to approve an issue of securities that would otherwise be within the authority of the entity's board (or, in the case of a listed trust, its RE). Nevertheless, it is a discretion that ASX can exercise at any time, including after the securities in question have been issued.

Examples of where ASX may apply Listing Rule 10.11.5 to an issue of securities include where the recipient of the securities is:

- a person or entity who has a close connection to a person referred to in Listing Rules 10.11.1 – 10.11.3 but who is not technically a related party (and therefore is not an assumed associate<sup>33</sup>) of that person and ASX suspects that the transaction may have been deliberately structured in this way to avoid the operation of Listing Rule 10.11;<sup>34</sup>
- someone, or a person or entity that has a close connection with someone, who has not been formally appointed as a director of the entity but who ASX suspects is acting as a de facto director;<sup>35</sup> and
- someone who the entity is arguing is not a party referred to in Listing Rules 10.11.1 – 10.11.4 but ASX has a contrary view – in which case, ASX may resolve that argument by applying Listing Rule 10.11.5 to the person.

Ordinarily, ASX would not exercise its discretion to apply Listing Rule 10.11.5 to someone who is the chief executive officer ("CEO") of an entity and who is not a director and not otherwise a 10.11 party, simply because of his or her position as CEO. This is on the premise that since the CEO is not a member of the board, the CEO is not in a position to influence the board's determination on whether or not to issue securities to the CEO and the board, acting in accordance with its statutory and common law duties,<sup>36</sup> can be presumed to have exercised an independent judgement on the appropriateness of any such issue. However, there may be circumstances where this premise does not hold true and where ASX will consider applying Listing Rule 10.11.5 to an issue of equity securities to a CEO or to someone closely connected with a CEO. These include where:

- a close relative of the CEO or someone with whom the CEO has close business or personal ties is a director of the entity;

<sup>33</sup> See the discussion of the provisions in the Listing Rules deeming an individual's related parties to be their associates in '2.6 Listing Rule 10.11.4 – associates' on page 7.

<sup>34</sup> An example would be where the recipient of the securities is a brother or sister of a director. A sibling is not a "prescribed relative" and therefore not a related party of a director who would be deemed to be an associate of the director in the absence of proof to the contrary. Nevertheless, if the entity is not able to give ASX a compelling commercial justification as to why the securities are being issued to the sibling and compelling evidence that the sibling is not in fact an associate of the director, ASX is likely to apply Listing Rule 10.11.5 to the sibling. In this scenario, ASX considers it not unreasonable to assume, in the absence of evidence to the contrary, that the issue is intended indirectly to benefit the director and that it has been deliberately structured in this way in an attempt to avoid Listing Rule 10.11.

<sup>35</sup> In this context, "de facto director" means a person who acts in the position of director even though they have not been formally appointed to the role and any other person whose instructions or wishes are customarily followed by the board of the entity.

An example ASX has encountered in a related area is a person who was the largest shareholder in a company applying to list on ASX who had been appointed as the company secretary but not as a director of the company. Another example involved the largest investor in a company the subject of a back door listing who was known to have issues with his fame and character and who was being appointed as a consultant to the board when two other investors with smaller shareholdings were being appointed as directors. In each case, ASX considered this a fairly transparent attempt to circumvent ASX's good fame and character requirements for directors of a new listing (Listing Rule 1.1 condition 20) but to allow the individual to attend board meetings in an official capacity and act as a de facto director.

<sup>36</sup> In common with all other powers exercisable by directors, the power to issue securities must be exercised by the directors in accordance with their statutory and common law duties to act with due care and diligence, in good faith, in the best interests of the entity and for a proper purpose. See, for example, sections 180 and 181 (officers of listed companies) and 601FD (officers of responsible entities of listed trusts) of the Corporations Act.

- ASX suspects that the CEO is acting as a de facto director; or
- the terms of the issue are so uncommercial as to call into question whether the board has properly exercised an independent judgement.

### 2.8 ASX's approach to giving in-principle advice on the application of Listing Rule 10.11.5

ASX is sometimes approached to give in-principle advice that it will not apply Listing Rule 10.11.5 in relation to an issue of equity securities to a particular person.

For ASX to give that advice, it has to be satisfied that there is no reasonable prospect of the person influencing the terms of the issue to favour themselves at the expense of the entity. The entity seeking the advice must disclose candidly the full extent of the relationship between the person and their related parties on the one hand and the entity and its 10.11 parties on the other, and any influence that the recipient may have over the entity's board (or, in the case of a listed trust, over the RE of the trust).

Any in-principle advice that ASX provides in this regard will be expressed to be non-binding and based on the facts known at the time. If the entity omits or misrepresents material facts in its application for in-principle advice, or if other material facts come to light after ASX provides its advice, ASX may withdraw or change its advice.

If ASX decides that it will not apply Listing Rule 10.11.5 in relation to an issue of equity securities to a particular person, it may impose conditions and, if it does so, the entity must comply with the conditions.<sup>37</sup> An example of a condition that ASX may impose is a condition that the entity disclose to the market the nature and extent of the relationship between the recipient of the securities and the entity or its 10.11 parties and the steps the board of the entity (or, in the case of a listed trust, the RE of the trust) has taken to satisfy itself that the issue of the securities is being made on arm's length terms and is fair and reasonable from the perspective of the holders of the entity's ordinary securities.

### 2.9 The responsibility for identifying 10.11 parties

It is the responsibility of a listed entity to identify whether it is issuing equity securities to a 10.11 party in circumstances that require security holder approval under Listing Rule 10.11 and, if so, to seek that approval ahead of the issue being made.

This should not prove unduly onerous. First, an entity should already have arrangements in place to identify its related parties and their associates so that it can comply with Chapter 2E (or equivalent overseas legislation) and the various accounting requirements applicable to transactions with related parties.<sup>38</sup> It should also be aware of the identity of substantial holders of its securities and their associates through the substantial shareholding notices they will have given to the entity under section 671B of the Corporations Act (or equivalent overseas legislation).

Secondly, a number of the more common types of security issues, such as acquisitions under pro rata offers, dividend or distribution reinvestment plans, security purchase plans and approved employee incentive schemes, are specifically excepted from the requirement for security holder approval by Listing Rule 10.12. Listing Rule 10.11 will therefore only come into play where the entity is proposing to make an issue outside of those exceptions. Generally speaking, the most common instances of this will be placements and offers of securities under a prospectus, PDS or other offer document.

In the case of a placement, the identity of the placee should be known and it should be a relatively straight forward task for the entity to determine whether the placee is a 10.11 party.

In the case of an offer under a prospectus, PDS or other offer document, the entity may not necessarily know in advance whether 10.11 parties intend to participate in the offer. In that case, if the entity is not intending to seek security holder approval to allow 10.11 parties to take up the offer, the entity should include in the offer document

<sup>37</sup> Listing Rule 18.5A provides that ASX may exercise, or decide not to exercise, any power or discretion conferred under the Listing Rules in its absolute discretion. It may do so on any conditions and, if it does so, the entity must comply with the conditions.

<sup>38</sup> See Accounting Standard AASB 124 *Related Party Disclosures*.

a condition that 10.11 parties are precluded from accepting the offer and implement processes to check that any acceptances of the offer by a 10.11 party are identified and rejected.

The entity should also take appropriate steps to alert:

- its directors that they, their prescribed relatives, and entities controlled by them or their prescribed relatives; and
- any controllers of the entity that those controllers and all other group entities, directors of group entities, prescribed relatives of those directors, and entities controlled by those directors or their prescribed relatives,

are not able to take up the offer.

Directors of a listed entity (or, in the case of a listed trust, of the RE of the trust) have obligations to disclose any material personal interests they have in a matter that relates to the affairs of the entity<sup>39</sup> and to exercise due care and diligence to avoid causing the entity to breach the Listing Rules.<sup>40</sup> This includes, whenever they are considering a placement, an offer of securities under a prospectus, PDS or other offer document, or any other issue of securities that falls outside of the exceptions in Listing Rule 10.12, carefully considering whether they, any of their prescribed relatives, or any entities controlled by them or their prescribed relatives, may participate in the issue. If so, they should alert the entity to that fact so that it can seek security holder approval or take other action to avoid breaching Listing Rule 10.11.

### 2.10 The application of Listing Rule 10.11 to externally managed listed trusts

Listing Rule 10.11 potentially has a wider application to externally managed listed trusts than listed companies or internally managed listed trusts by dint of the fact that the related parties of an externally managed trust include its RE, any entities that control its RE (“controllers”), any entities controlled by its controllers (other than those controlled by the RE in its capacity as the RE of the listed trust), and any entities that its RE controls other than in its capacity as the RE of the listed trust.

For the avoidance of doubt, an issue of equity securities by an externally managed listed trust to:

- the RE in its personal capacity;
- a related body corporate of the RE;
- another trust<sup>41</sup> with the same RE; or
- another trust that has a related body corporate of the RE as its RE,

is plainly caught by Listing Rule 10.11.1 and will require security holder approval unless an exception in Listing Rule 10.12 applies or ASX grants a waiver.

<sup>39</sup> See section 191 of the Corporations Act. While this section only applies to companies formed in Australia under that Act, companies formed in other jurisdictions are likely to be subject to an equivalent requirement under the governing legislation where they are formed or under the constitution of the company.

<sup>40</sup> See *ASIC v Macdonald (No 11)* [2009] NSWSC 287, where the court found that the non-executive directors, CEO, CFO and company secretary/general counsel of a listed company all breached their duties to the company under section 180(1) as a result of their involvement in a failure by the company to announce certain information in breach of Listing Rule 3.1 and section 674 and in the company making a misleading announcement about other information in breach of section 1041H. The decision against the non-executive directors and the company secretary/general counsel was ultimately affirmed on appeal by the High Court in *ASIC v Hellicar* [2012] HCA 17 and *Shafron v ASIC* [2012] HCA 18 respectively. The decision against the CFO was affirmed on appeal by the NSW Court of Appeal in *Morley v ASIC*, [2010] NSWCA 331). The CEO did not appeal the decision at first instance.

<sup>41</sup> References to an issue of equity securities to a trust include an issue of securities to the RE of the trust in that capacity or to a trustee, custodian or sub-custodian holding the securities on trust for the beneficiaries of the trust.

### 2.11 ASX's approach to granting waivers of Listing Rule 10.11

ASX regards Listing Rule 10.11 as one of the fundamental protections afforded to investors under the Listing Rules. While ASX may consider procedural and other minor waivers of the rule,<sup>42</sup> ASX will only waive the central requirement for security holders to approve an issue of equity securities to a 10.11 party, where it is clear to ASX that the harm Listing Rule 10.11 seeks to protect against is not present. The onus is firmly on the entity seeking the waiver to establish this to ASX's satisfaction.

Hence, to receive such a waiver, an entity must establish to ASX's satisfaction that there is no reasonable prospect of the recipient of the securities influencing the terms of the issue to favour themselves at the expense of the entity.

The mere fact that a director excuses himself or herself from participating in the discussion and decision at a board meeting concerning a proposed issue of securities to them or to someone connected to them will not be sufficient to establish an absence of influence.

ASX would note that, prior to 1 December 2019, it had previously granted waivers from Listing Rule 6.18, which prohibits a listed entity from granting anyone an option that is exercisable over a percentage of its capital, to permit an entity to give an anti-dilution right to a strategic security holder. The anti-dilution right allowed the strategic security holder and its related bodies corporate to maintain a particular percentage security holding in the entity. Typically, that percentage security holding was more than 10%, but less than 30%, of the entity's ordinary securities. Typically also, the strategic security holder was given a right to appoint one or more representatives to the entity's board.

The introduction on 1 December 2019 of Listing Rule 10.11.3 extending Listing Rule 10.11 to substantial (10%+) holders with board representation cuts across the operation of these waivers. Most strategic security holders with the benefit of these waivers will now fall within Listing Rule 10.11.3 and therefore, in the absence of a further waiver from ASX, each new issue of equity securities under the anti-dilution right to the strategic security holder or its related bodies corporate will require security holder approval under Listing Rule 10.11.

In ASX's view, a security holder in a strategic relationship with a listed entity and with board representation is likely to have considerable influence over the types of capital raisings the entity undertakes. If the entity undertakes a non-pro rata capital raising that may potentially dilute the strategic security holder, it always has the option to buy securities on-market to top up its holding and therefore it should not need a separate anti-dilution right.

Accordingly, from 1 December 2019, ASX will no longer grant these types of waivers from Listing Rule 6.18.

Entities that had the benefit of a Listing Rule 6.18 waiver prior to 1 December 2019 should approach ASX to discuss its preparedness to grant a concurrent waiver of Listing Rule 10.11.3 to allow issues of equity securities to a strategic security holder and its related bodies corporate to continue to be made under their anti-dilution right without security holder approval. Before granting a concurrent Listing Rule 10.11.3 waiver, ASX will need to be satisfied that the basis for the original Listing Rule 6.18 waiver still holds true and that there is still a genuine strategic relationship between the entity and the security holder and that the security holder and its related bodies corporate have maintained their holding in the entity at the agreed percentage throughout the life of their anti-dilution right.<sup>43</sup> ASX will also need to be satisfied that the terms of the anti-dilution right continue to be appropriate and equitable.<sup>44</sup>

<sup>42</sup> Guidance Note 17 *Waivers and In-Principle Advice* sets out some standard waivers that ASX will grant in relation to issues of securities that require security holder approval under Listing Rule 10.11. These include limited waivers of Listing Rule 14.7 to permit the securities to be issued more than one month after the date of the meeting granting that approval in cases where the issue is part of a transaction (such as a back door listing) requiring re-compliance with ASX's admission and quotation requirements under Listing Rule 11.1.3 or a recapitalisation pursuant to a deed of company arrangement, and the entity is not practically able to meet the one month deadline. They also include a waiver effectively extending exception 4 in Listing Rule 10.12 to issues under a share purchase plan to which that exception would otherwise have applied but for the fact that the number of securities to be issued under the plan is greater than 30% of the number of fully paid ordinary securities already on issue or because the issue price of the securities is less than 80% of the average market price for securities in that class. In this latter case, the issue must be approved by security holders under Listing Rule 7.1 in accordance with a concurrent waiver granted by ASX to Listing Rule 14.11.1 that permits security holders to vote on the resolution approving the issue despite them being able to participate in the issue.

<sup>43</sup> In ASX's view, these anti-dilution rights should operate on a "use it or lose it" basis.

<sup>44</sup> Listing Rule 6.1.

Any concurrent Listing Rule 10.11.3 waiver ASX may grant may be subject to conditions<sup>45</sup> and may be varied or revoked by ASX at any time.<sup>46</sup>

### 2.12 Notification obligations

An entity is required under Listing Rule 3.10.3 to notify ASX immediately of any proposed issue of securities, other than a proposed issue to be made under an employee incentive scheme<sup>47</sup> or a dividend or distribution plan<sup>48</sup> or as a consequence of the conversion of any convertible securities.<sup>49</sup> The notification must be in the form of, or accompanied by, an Appendix 3B *Announcement of Proposed Issue of Securities*.

Any issue of equity securities that attracts Listing Rule 10.11,<sup>50</sup> therefore, will likely have to be notified to ASX under Listing Rule 3.10.3 immediately after it is “proposed”.

Guidance Note 30 *Notifying an Issue of Securities and Applying for Their Quotation* has detailed guidance on the meaning of “proposed issue”, when ASX must be notified of a proposed issue of securities under Listing Rule 3.10.3 and what information must be included in the notification.

Where a proposed issue of equity securities requires security holder approval under Listing Rule 10.11, the entity’s Appendix 3B should disclose that fact and the proposed timetable for seeking that approval.

Where an issue of securities leads to a change in the “notifiable interests”<sup>51</sup> of a director, the entity must also give ASX an Appendix 3Y within 5 business days of the change occurring.<sup>52</sup>

## 3. Permitted issues under Listing Rule 10.12

### 3.1 The policy underpinning the exceptions in Listing Rule 10.12

Listing Rule 10.12 lists different types of security issues to which Listing Rule 10.11 does not apply.

Some of these exceptions reflect the underlying nature of the issue and the fact that all security holders have an equal opportunity to participate in the issue on the same terms. They therefore do not present an opportunity for 10.11 parties to acquire securities on more favourable terms than other security holders. Others are of a technical nature to ensure that the framework regulating issues of equity securities to 10.11 parties operates as intended.

### 3.2 Exception 1 – pro rata issues

Listing Rule 10.12 exception 1<sup>53</sup> excludes from Listing Rule 10.11 an issue to holders of ordinary securities made under a pro rata issue,<sup>54</sup> as well as an issue to holders of other equity securities to the extent that the terms of issue of those other equity securities permit participation in the pro rata issue.

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<sup>45</sup> Listing Rule 18.1.

<sup>46</sup> Listing Rule 18.3.

<sup>47</sup> An issue under an employee incentive scheme must be notified to ASX within 5 business days of the issue under Listing Rule 3.10.3A.

<sup>48</sup> A proposed issue under a dividend or distribution plan is notified to ASX via an Appendix 3A.1.

<sup>49</sup> An issue made as a consequence of the conversion of any convertible securities must be notified to ASX within 5 business days of the issue under Listing Rule 3.10.3B. An exercise of options is treated as a conversion of convertible securities for these purposes.

<sup>50</sup> A proposed issue to be made under an employee incentive scheme typically is not caught by Listing Rule 10.11 because of exceptions 8 and 9 in Listing Rule 10.12. A proposed issue to be made under a dividend or distribution plan typically is not caught by Listing Rule 10.11 because of exception 3 in Listing Rule 10.12. A proposed issue to be made as a consequence of the conversion of any convertible securities typically is not caught by Listing Rule 10.11 because of exception 7 in Listing Rule 10.12.

<sup>51</sup> As defined in Listing Rule 19.12.

<sup>52</sup> Listing Rule 3.19A. See also Guidance Note 22 *Notification of Directors’ Interests*.

<sup>53</sup> There is an equivalent exception in Listing Rule 7.2 exception 1, meaning that pro rata issues that meet the requirements above are not subject to the placement limits in Listing Rules 7.1 and 7.1A.

<sup>54</sup> A pro rata issue must comply with Listing Rule 7.11. The issue can be renounceable or non-renounceable, although if the theoretical rights price for the issue is less than 0.1 cents, the lowest price point at which securities can be traded on ASX, as a practical matter, it will have to be non-renounceable. An issue is not precluded from being a pro rata issue for the purposes of the Listing Rules because security holders with addresses outside Australia and New Zealand are excluded from the issue under Listing Rule 7.7.1 or because security holders

A pro rata issue is excluded from the restrictions in Listing Rule 10.11 as all security holders have an equal opportunity to participate in the issue on the same terms.<sup>55</sup>

It should be noted that exception 1 only applies to securities taken up directly as part of a pro rata issue. It does not apply to a person taking up all or part of the shortfall of a pro rata issue.<sup>56</sup> For example, a director who has taken up their entitlement in a pro rata issue cannot take up shortfall securities under this exception, even if the shortfall is allocated on a pro rata basis to those participating in the shortfall.<sup>57</sup>

### 3.3 Exception 2 – underwritings of pro rata issues

Listing Rule 10.12 exception 2<sup>58</sup> excludes from Listing Rule 10.11 an issue of securities to an underwriter under an agreement to underwrite the shortfall<sup>59</sup> on:

- a pro rata issue to holders of ordinary securities; or
- a pro rata issue to holders of ordinary securities and to holders of other equity securities to the extent that the terms of issue of the equity securities permit participation in the pro rata issue.

These issues are excluded from the restrictions in Listing Rule 10.11 since the pro rata nature of the underlying issue ensures that all security holders have had an equal opportunity to participate in the issue on the same terms.<sup>60</sup>

To qualify for this exception, the entity must have disclosed:

- the name of the underwriter;
- the extent of the underwriting;<sup>61</sup>
- the fee, commission or other consideration payable to the underwriter;<sup>62</sup> and
- a summary of the material circumstances that could lead to the underwriting being terminated,

in the Appendix 3B lodged under Listing Rule 3.10.3 in relation to the pro rata issue or, if the underwriting was entered into after the Appendix 3B was lodged with ASX, by market announcement as soon as practicable following the entry of the underwriting agreement.

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are allowed to subscribe for a greater number of securities than their entitlement under Listing Rule 7.11.4 (see the note to Listing Rule 10.12 exception 1 and the definition of “pro rata issue” in Listing Rule 19.12).

<sup>55</sup> Australian listed companies and managed investment schemes should note the guidance by the Takeovers Panel in Takeovers Panel Guidance Note 17 *Rights Issues* on its approach to rights issues which have, or are likely to have, an effect on control or the acquisition of a substantial interest in the company or scheme.

<sup>56</sup> In this regard, there is no exception in Listing Rule 10.12 equivalent to the one in Listing Rule 7.2 exception 3 dealing with issues to make up the shortfall on a pro rata issue.

<sup>57</sup> See also the note to Listing Rule 10.12 exception 1.

<sup>58</sup> There is an equivalent exception in Listing Rule 7.2 exception 2, meaning that issues under an agreement to underwrite the shortfall on a pro rata issue that meet the requirements above are not subject to the placement limits in Listing Rules 7.1 and 7.1A.

<sup>59</sup> Where security holders with addresses outside Australia and New Zealand are excluded from an issue under Listing Rule 7.7.1, ASX regards the securities that would otherwise have been issued to them as forming part of the shortfall.

<sup>60</sup> Australian listed companies and managed investment schemes again should note the guidance by the Takeovers Panel in Takeovers Panel Guidance Note 17 *Rights Issues* on its approach to rights issues which have, or are likely to have, an effect on control or the acquisition of a substantial interest in the company or scheme, including the comment in paragraph 21 of that Guidance Note that:

“For many companies, a related party or major shareholder is the only realistic source of underwriting (sub-underwriting). Underwriting (sub-underwriting) by a related party or major shareholder does not, of itself, give rise to unacceptable circumstances. However, greater care is needed to mitigate the potential control effects if a related party or major shareholder underwrites (sub-underwrites). The failure of directors to properly canvass professional underwriters or seek out alternatives to a related party or major shareholder underwriter (sub-underwriter) may increase the likelihood of unacceptable circumstances.”

<sup>61</sup> The reference to the “extent of the underwriting” means the amount or proportion of the issue that is underwritten or sub-underwritten, as the case may be (see the note to Listing Rule 10.12 exception 2).

<sup>62</sup> The reference to the “fee, commission or other consideration payable” includes any applicable discount the underwriter or sub-underwriter receives to the issue price payable by participants in the issue (see the note to Listing Rule 10.12 exception 2).

It must also make the issue to the underwriter not later than 15 business days after the close of the offer.

The reference in this exception to an underwriter includes a sub-underwriter.<sup>63</sup> If a 10.11 party is sub-underwriting, rather than underwriting, a pro rata issue, the details disclosed in the Appendix 3B or market announcement referred to in the exception must include the name of that party, the extent of their sub-underwriting, the fee or commission payable to them as sub-underwriter and a summary of the material circumstances that could lead to the sub-underwriting being terminated.<sup>64</sup>

This exception only applies where the arrangement with the underwriter constitutes a genuine underwriting or sub-underwriting. ASX agrees with the views expressed by the Australian Securities and Investments Commission (“ASIC”) in this regard:

*“A central element of underwriting is the assumption of risk by the underwriter—in particular the obligation to subscribe for, or nominate other persons to subscribe for, shares in the event of a shortfall ...*

*Where an arrangement does not, in substance, involve the assumption of this risk, we take the view that the arrangement is not underwriting. This includes arrangements:*

- (a) incorporating terms or conditions that, in the circumstances, effectively give the ‘underwriter’ a general discretion to terminate the underwriting arrangement from the outset (e.g. terms or conditions giving the underwriter a termination right if one or more events over which the underwriter has effective control occur); or*
- (b) that may otherwise be terminated in circumstances that mean that the ‘underwriter’ does not, in effect, bear the risk of the shortfall.*

*For example, arrangements that permit the underwriter to be relieved of its obligations following a default by a sub-underwriter—either entirely through termination of the agreement, or by reducing the amount of the underwriting commitment by the amount in default—seek to relieve the underwriter of their obligation to subscribe for securities in the event of a shortfall. Accordingly, we do not consider such arrangements to constitute ‘underwriting’.*

*Further, arrangements that permit the underwriter to terminate on the basis of an event that is certain, or near certain, to occur (such as a token fall in a relevant market index) are also likely to mean that the underwriter has an option to underwrite and does not, in substance, assume shortfall risk.”<sup>65</sup>*

It should be noted that exception 2 also only applies to issues of securities to make up the underwritten shortfall from a pro rata issue. It does not apply to any other issues of securities under an underwriting agreement (for example, in payment of the underwriting fee or any other amount due to the underwriter under the agreement). These other types of issues will therefore only be able to be made to a 10.11 party if security holder approval is first obtained under Listing Rule 10.11.

<sup>63</sup> See the definition of “underwrite” in section 9 of the Corporations Act and Listing Rule 19.3.

<sup>64</sup> See the note to Listing Rule 10.12 exception 2. The Appendix 3B asks whether a party referred to in Listing Rule 10.11 is sub-underwriting the proposed issue and, if this is answered in the affirmative, will call for this information to be provided in relation to the sub-underwriting.

<sup>65</sup> See ASIC Regulatory Guide 6 *Takeovers: Exceptions to the general prohibition* at paragraphs 6.148 – 6.151. *A fortiori*, someone who has given an undertaking to place securities on a “best endeavours” basis is not an underwriter for the purposes of exception 2.

### 3.4 Exception 3 – DRPs

Listing Rule 10.12 exception 3<sup>66</sup> excludes from the restrictions in Listing Rule 10.11 an issue of securities under a dividend or distribution plan (“DRP”) provided the DRP does not impose a limit on participation and security holders are able to elect to receive all of their dividend or distribution as securities.<sup>67</sup>

These types of issues again are excluded from the restrictions in Listing Rule 10.11 because all security holders have an equal opportunity to participate in the DRP and to acquire securities on the same terms.

If a DRP does impose a limit on participation – for example, a maximum dollar limit on the amount of reinvestment or a maximum limit on the number of securities that a security holder can acquire under the DRP – any issue under the DRP to a 10.11 party will not qualify under exception 3 and will therefore require security holder under Listing Rule 10.11.

It should be noted that exception 3 does not extend to an issue of securities under an agreement to underwrite the shortfall on a DRP.<sup>68</sup> Accordingly, a 10.11 party can only take up securities as an underwriter of a DRP or by way of a sub-underwriting or similar arrangement with an underwriter of a DRP, if they receive specific approval to do so under Listing Rule 10.11.

### 3.5 Exception 4 – SPPs

Listing Rule 10.12 exception 4<sup>69</sup> excludes from Listing Rule 10.11 an issue of securities made under a security purchase plan (“SPP”) provided:

- the number of securities to be issued is not greater than 30% of the number of fully paid ordinary securities already on issue; and
- the issue price of the securities is at least 80% of the volume weighted average price<sup>70</sup> for securities in that class, calculated over the last 5 days on which sales in the securities were recorded, either before the day on which the issue is announced or before the day on which the issue is made.

Exception 4 is only available once in any 12 month period.

Issues under an SPP are excluded from Listing Rule 10.11 because all security holders have an equal opportunity to participate in the issue on the same terms up to the \$30,000 cap imposed in ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547 (see below).

An SPP is defined to have the same meaning as a “purchase plan” in ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547.<sup>71</sup> This instrument allows ASX listed companies and managed investment schemes to offer securities to existing members without a prospectus or PDS provided they meet certain conditions

<sup>66</sup> There is an equivalent exception in Listing Rule 7.2 exception 4, meaning that issues under a DRP that meet the requirements above are not subject to the placement limits in Listing Rules 7.1 and 7.1A.

<sup>67</sup> A restriction on employees participating in a dividend or distribution plan in respect of securities held under an employee incentive scheme is not a limit on participation for the purposes of exception 3 (see the note to Listing Rule 10.12 exception 3).

<sup>68</sup> There is no exception in Listing Rule 10.12 equivalent to the one in Listing Rule 7.2 exception 4 for issues under an agreement to underwrite the shortfall on a DRP.

<sup>69</sup> There is an equivalent exception in Listing Rule 7.2 exception 5, meaning that issues under an SPP that meet the requirements above are not subject to the placement limits in Listing Rules 7.1 and 7.1A.

<sup>70</sup> “Volume weighted average price”, or VWAP, in relation to particular securities for a particular period, means the volume weighted average price of trading in those securities on the ASX market and the Chi-X market over that period, excluding block trades, large portfolio trades, permitted trades during the pre-trading hours period, permitted trades during the post-trading hours period, out of hours trades and exchange traded option exercises (Listing Rule 19.12). Trading on the ASX market and Chi-X market includes trades executed on those markets and trades reported to those markets (other than block trades, large portfolio trades, permitted trades during the pre-trading hours period, permitted trades during the post-trading hours period, out of hours trade and exchange traded option exercises). The terms “block trades”, “large portfolio trades”, “permitted trades during the pre-trading hours period”, “permitted trades during the post-trading hours period” and “out of hours trades” have the same meaning as in the ASIC Market Integrity Rules (Competition in Exchange Markets) 2011. These types of trades are excluded as they are not necessarily representative of market trading.

<sup>71</sup> Listing Rule 19.12. See also ASIC Regulatory Guide 125 *Share purchase plans*.

summarised below. The offer must be made to each registered holder of securities in the class in question whose address (as recorded in the register of members) is in a place in which, in the reasonable opinion of the entity, it is lawful and practical for the entity to offer and issue securities to that person.<sup>72</sup>

For an entity to qualify for the relief in ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547, the following conditions must be satisfied:<sup>73</sup>

- the entity must be in compliance with its continuous disclosure and financial reporting obligations;
- offers of securities under the SPP must only be made to registered holders of securities in the same class;
- each offer must be made on similar terms and conditions and on a non-renounceable basis;
- a registered holder who is not a custodian must not be issued more than \$30,000 worth of securities under the ASIC relief in any consecutive 12 month period;
- where a registered holder is a custodian:
  - the custodian must certify in writing to the entity that certain conditions have been met;
  - the custodian must provide the entity with particulars of the relevant beneficiary wishing to participate in the SPP offer and the existing interests of the beneficiary in the relevant securities; and
  - the entity must be reasonably satisfied that in any consecutive 12 month period, the total application price of the securities to be issued to, or in relation to, any beneficiary of that custodian under the ASIC relief (excluding securities applied for by the custodian on behalf of a beneficiary but not issued) is not more than \$30,000;
- the entity must have lodged a cleansing notice with ASX;
- the issue price must be less than the market price during a specified period (determined by the entity) in the 30 days before either the date of the offer or the date of the issue;
- the written offer document must disclose the method used to calculate the issue price, the relationship between the issue and market price, and the risk that the market price may change between the date of the offer and the date when the securities are issued; and
- the entity's securities must not have been suspended from trading on ASX for more than a total of 5 days during the 12 months before the day on which the offer is made under the SPP or, if the securities have been quoted on ASX for less than 12 months, during the period of quotation.

For an issue of securities to fall within exception 4, the entity must meet all of the conditions in ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547 apart from the last requirement above. If the entity does not meet the last requirement, it can still avail itself of exception 4 but it will not qualify for the relief in ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547 and will therefore have to prepare a prospectus or PDS for the offer under the SPP.

Exception 4 does not apply to an issue of securities under an agreement to underwrite the shortfall on an SPP. Accordingly, a 10.11 party can only take up securities as an underwriter of an SPP, or by way of a sub-underwriting or similar arrangement with an underwriter of an SPP, if they receive specific approval to do so under Listing Rule 10.11.

<sup>72</sup> See paragraph (a) of the definition of "purchase plan" in section 4 of ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547.

<sup>73</sup> This is a summary only of the conditions that must be satisfied to qualify for the relief provided in ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547. Entities wishing to rely on that relief should read that instrument in full.

It should be noted that a standard waiver is available under Guidance Note 17 *Waivers and In-Principle Advice*, where an entity is seeking approval under Listing Rule 7.1 to an issue of securities under an SPP to which exception 5 of Listing Rule 7.2 would otherwise have applied but for the fact that the number of securities to be issued under the SPP is greater than 30% of the number of fully paid ordinary securities already on issue or because the issue price of the securities is less than 80% of the average market price for securities in that class. In such a case, ASX will grant a standard waiver of Listing Rule 7.3.9<sup>74</sup> to permit a resolution in a notice of meeting approving the issue of securities under the SPP not to include a voting exclusion statement that excludes the votes of any person who may participate in the SPP or any associate of such a person, provided:

- the SPP is not underwritten; or
- if the SPP is underwritten, the entity excludes any votes cast on the resolution by any proposed underwriter or sub-underwriter of the SPP and their associates.

Where such a resolution is passed by the holders of ordinary securities, ASX will also grant a concurrent waiver from Listing Rule 10.11 to permit directors and their associates to participate in the SPP on the same terms as other security holders without the approval of the holders of ordinary securities under that rule.<sup>75</sup>

### 3.6 Exception 5 – takeovers and mergers

Listing Rule 10.12 exception 5<sup>76</sup> excludes from the restrictions in Listing Rule 10.11 an issue of securities under a takeover bid or under a merger by way of scheme of arrangement under Part 5.1 of the Corporations Act.

For these purposes, “takeover bid” has the same meaning as in section 9 of the Corporations Act – in other words, a takeover bid for an Australian company or managed investment scheme that is made in compliance with Chapter 6 of the Corporations Act.

Exception 5 therefore only applies to a takeover bid or merger by way of scheme of arrangement involving an Australian company that is regulated by the Corporations Act.

Exception 5 has been included as a concession to listed entities, in recognition of the fact that a takeover or merger by way of a scheme of arrangement could be difficult to complete in circumstances where the entity is required to seek approval from its security holders before it can issue securities under the takeover or scheme just because a 10.11 party happens to hold some securities in the takeover or merger target. Such a requirement could also put the entity at a significant competitive disadvantage to an unlisted bidder/acquirer in a contested takeover/acquisition.

Exception 5 also recognises the robust regulatory framework and the high level of regulatory and curial oversight applicable to takeovers and schemes in Australia, including the regulation of unacceptable conduct and the provision of collateral benefits in Chapter 6 of the Corporations Act.

In an appropriate case, ASX will consider granting a waiver to extend exception 5 to securities received under a merger between an entity and an Australian trust by way of a “trust scheme of arrangement”, where the scheme is approved by a special resolution of unitholders and is subject to judicial approval under trustee legislation.<sup>77</sup> ASX will also consider granting a waiver to extend exception 5 to an entity making a takeover offer for, or merging with,

<sup>74</sup> That is, the requirement for a notice of meeting proposing a resolution to approve an issue of securities under Listing Rule 7.1 to include a voting exclusion statement.

<sup>75</sup> This concurrent waiver effectively treats the offer under the SPP on the same basis as an offer falling within exception 4 of Listing Rule 10.12.

<sup>76</sup> There is an equivalent exception in Listing Rule 7.2 exception 6 (although that exception does not apply in relation to an issue of securities under a reverse takeover).

<sup>77</sup> The expression “trust scheme of arrangement” is a colloquial one that refers to an amendment to the constitution of a trust to achieve a merger of the trust with another entity. It has similar features to a scheme of arrangement under Part 5.1 of the Corporations Act in that the amendment to the constitution typically requires a special resolution of unitholders and the overall arrangement is typically subject to judicial review, usually in the form of an application for judicial advice that the constitutional amendment is an appropriate one to be made by the RE of the trust.

a foreign company or trust that can satisfy ASX that the takeover or merger is subject to an acceptable regulatory regime equivalent to the Corporations Act.<sup>78</sup>

It should be noted that Listing Rule 10.1 can apply to an acquisition of securities by an entity under a takeover bid or merger by scheme of arrangement<sup>79</sup> and there is no exception to Listing Rule 10.1 comparable to Listing Rule 10.12 exception 5.<sup>80</sup> Listing Rule 10.1 will apply if someone who is a party referred to in Listing Rules 10.1.1 to 10.1.5 is also a security holder in the takeover or merger target and the size of their holding is large enough to be a “substantial asset” (ie the value of their holding, or the value of the consideration to be paid for their holding, in the target exceeds 5% of the equity interests in the entity, as set out in the latest accounts given to ASX under the Listing Rules<sup>81</sup>). In such a case, absent a waiver from ASX, the acquisition by the entity of their holding under the bid or scheme will require security holder approval under Listing Rule 10.1, even though the issue of securities to them as consideration for the acquisition is excepted from the requirement for security holder approval in Listing Rule 10.11 by Listing Rule 10.12 exception 5.

In these circumstances, ASX has typically received a request from the entity in question for a waiver of Listing Rule 10.1. Guidance Note 24 *Acquisitions and Disposals of Substantial Assets Involving Persons in a Position of Influence* has guidance on when ASX may be prepared to grant such a waiver.

### 3.7 Exception 6 – issues approved under item 7 of section 611

Listing Rule 10.12 exception 6<sup>82</sup> excludes from the restrictions in Listing Rule 10.11 an issue of securities that is approved under item 7 of section 611 of the Corporations Act. These issues are excluded on the basis that the security holder approval requirements under item 7 of section 611 are more extensive than those under Listing Rule 10.11<sup>83</sup> and it would be an unnecessary duplication to require an additional security holder approval under Listing Rule 10.11.

Item 7 of section 611, and therefore exception 6, only applies to an Australian company or registered managed investment scheme that is subject to the takeover provisions in Chapter 6 of the Corporations Act.

In an appropriate case, ASX will consider granting a waiver to extend exception 6 to an acquisition of securities in a foreign entity or trust that is approved under equivalent legislation in its place of establishment.

It should be noted that, unlike issues made with security holder approval under Listing Rule 10.11, issues made with approval under item 7 of section 611 are not constrained by any time limit.<sup>84</sup> An entity must include a summary in its annual report of any issues of securities approved for the purposes of item 7 of section 611 of the Corporations Act which have not been completed as at the date of the annual report.<sup>85</sup>

<sup>78</sup> ASX has granted such waivers in relation to takeovers or mergers under the laws of the US, UK, Canada, New Zealand, Papua New Guinea and Singapore.

<sup>79</sup> See generally Guidance Note 24 *Acquisitions and Disposals of Assets Involving Persons in a Position of Influence*.

<sup>80</sup> Listing Rule 10.3(d) excludes from Listing Rule 10.1 an issue of securities by an entity for cash. That exclusion plainly does not apply to an issue of securities in exchange for securities in the target of a takeover bid or in an entity being acquired or merged with under a scheme of arrangement.

<sup>81</sup> See Listing Rule 10.2.

<sup>82</sup> There is an equivalent exception in Listing Rule 7.2 exception 8.

<sup>83</sup> Among other things, to comply with ASIC’s regulatory guidance on item 7, an entity must obtain an independent expert’s report opining on whether the issue is fair and reasonable to non-participating security holders.

<sup>84</sup> Although, an item 7 approval may need to be renewed if there is a material change in circumstances after the approval has been given and before the transaction is completed and may not be available for an acquisition that will complete in the distant future: see paragraphs 87 and 89 of ASIC Regulatory Guide 74 *Acquisitions approved by members*.

<sup>85</sup> Listing Rule 4.10.21.

### 3.8 Exception 7 – conversion of convertible securities

Listing Rule 10.12 exception 7<sup>86</sup> excludes from Listing Rule 10.11 an issue of securities resulting from the conversion of convertible securities.<sup>87</sup> The entity must have issued the convertible securities:

- (a) before it was listed and disclosed the existence and material terms of the convertible securities in the prospectus, PDS or information memorandum lodged with ASX under Listing Rule 1.1 condition 3; or
- (b) after it was listed and complied with the Listing Rules when it did so.

This is a technical exception intended to ensure that the Listing Rules deal appropriately with convertible securities. The time at which an issue of convertible securities is tested to determine whether it requires security holder approval under Listing Rule 10.11 is when they are issued, not when they are converted. If at the time they are issued they comply with the Listing Rules, any subsequent conversion in accordance with their terms does not require security holder approval under Listing Rule 10.11.

In the case of (a) above, the Listing Rules effectively treat the fact that security holders have agreed to invest in the entity after it has disclosed the existence and material terms of the convertible securities in its listing prospectus, PDS or information memorandum as an implicit approval by security holders to the issue of the convertible securities. However, this does not mean that the entity has carte blanche to issue whatever convertible securities it wants to directors and their associates pre-listing. ASX may refuse to admit the entity to the official list and to quote its securities if ASX considers that the convertible securities breach Chapter 6 of the Listing Rules<sup>88</sup> or result in the entity not having an appropriate structure for a listed entity,<sup>89</sup> or it is otherwise appropriate for ASX to exercise its absolute discretion to refuse the entity's application for admission.<sup>90</sup>

To meet the requirement in (a) above that the entity disclose the existence and material terms of the convertible securities in its listing prospectus, PDS or information memorandum, the entity should include in that document:<sup>91</sup>

- the name of the person to whom the entity issued the convertible securities;
- which category in rules 10.11.1 – 10.11.5 the person falls within and why;
- the number of convertible securities that were issued to the person;
- a summary of the material terms of the convertible securities;
- the date or dates on which the convertible securities were issued;
- the price or other consideration the entity received for the issue; and
- the purpose of the issue, including the use or intended use of any funds raised by the issue.

<sup>86</sup> There is an equivalent exception in Listing Rule 7.2 exception 9, meaning that the conversion of convertible securities that meet the conditions set out above are not subject to the placement limits in Listing Rules 7.1 and 7.1A.

<sup>87</sup> An option is a convertible security for the purposes of this exception (see the notes to Listing Rule 7.2 exception 9 and the definition of "convertible security" in Listing Rule 19.12). Reflecting this, the term 'convertible' is defined to include 'exercisable' (see the definition of that term in Listing Rule 19.12).

<sup>88</sup> Listing Rule 2.1 condition 1. This includes the requirement in Listing Rule 6.1 that the terms applying to the convertible securities are, in ASX's opinion, appropriate and equitable.

<sup>89</sup> Listing Rule 1.1 condition 1. See section 3.1 of Guidance Note 1 *Applying for Admission – ASX Listings* for examples of when ASX may determine that an entity does not have a structure or operations appropriate for a listed entity.

<sup>90</sup> Listing Rule 1.19. See section 2.9 of Guidance Note 1 *Applying for Admission – ASX Listings* for examples of when ASX may exercise this discretion.

<sup>91</sup> By analogy with the information required to be disclosed under Listing Rule 10.13 in a notice of meeting seeking security holder approval under Listing Rule 10.11.

To meet the requirement in (b) above that the entity must have complied with the Listing Rules when it issued the convertible securities, the issue must not only be made in compliance with the requirements of Listing Rule 10.11, it also must not breach the prohibitions in Listing Rule 7.1, 7.1A,<sup>92</sup> 7.6 or 7.9.<sup>93</sup>

### 3.9 Exception 8 – issues under employee incentive schemes approved by security holders

Listing Rule 10.12 exception 8<sup>94</sup> excludes from the restrictions in Listing Rule 10.11 an issue of equity securities under an employee incentive scheme made, or taken to have been made,<sup>95</sup> with the approval of holders of ordinary securities under Listing Rule 10.14.

These issues are excluded from Listing Rule 10.11 on the basis that they have already been approved by security holders and to require a separate approval under Listing Rule 10.11 would therefore be an unnecessary duplication.

### 3.10 Exception 9 – issues of certain options and rights under employee incentive schemes

Listing Rule 10.12 exception 9<sup>96</sup> excludes from the restrictions in Listing Rule 10.11 a grant of options or other rights to acquire securities under an employee incentive scheme, where the securities to be acquired on the exercise of the options or in satisfaction of the rights are required by the terms of the scheme<sup>97</sup> to be purchased on-market.

These issues are excluded from Listing Rule 10.11 on the basis that they are effectively remuneration arrangements that properly fall to the directors for approval. Since the securities to be acquired on the exercise of the options or in satisfaction of the rights must be purchased on-market, there is also no dilution to existing security holders.

### 3.11 Exception 10 – agreements to issue securities

Listing Rule 10.12 exception 10<sup>98</sup> excludes from Listing Rule 10.11 an issue under an agreement to issue securities. The entity must have entered into the agreement:

- (a) before it was listed and disclosed the existence and material terms of the agreement in the prospectus, PDS or information memorandum lodged with ASX under Listing Rule 1.1 condition 3; or
- (b) after it was listed and complied with the Listing Rules when it did so.

This is a technical exception intended to ensure that the Listing Rules deal appropriately with agreements to issue securities. The time at which an agreement to issue securities is tested to determine whether it requires approval under Listing Rule 10.11 is the time the agreement is entered into. If at that time the agreement complies with the

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<sup>92</sup> Note that Listing Rule 7.1A only permits an issue of convertible securities if they are in a class of securities that is already quoted on ASX.

<sup>93</sup> See Guidance Note 21 *The Restrictions on Issuing Equity Securities in Chapter 7 of the Listing Rules*.

<sup>94</sup> There is an equivalent exception in Listing Rule 7.2 exception 14 for issues made with the approval of holders of ordinary securities under Listing Rule 10.14. There is also an exception in Listing Rule 7.2 exception 13, allowing issues to be made under an employee incentive scheme if, within 3 years before the issue date, either: (a) in the case of a scheme established before the entity was listed – a summary of the terms of the scheme were set out in the prospectus, PDS or information memorandum lodged with ASX under Listing Rule 1.1 condition 3; or (b) holders of ordinary securities have approved the issue of securities under the scheme as an exception to Listing Rule 7.2.

<sup>95</sup> The reference to an issue “taken to be made” with the approval of holders of ordinary securities under Listing Rule 10.14 is intended to pick up an issue of securities under the exception to Listing Rule 10.14 in Listing Rule 10.16(c)(i). That exception applies to an issue of equity securities pursuant to options or other rights to acquire securities granted to directors or their associates under an employee incentive scheme where the entity issued the options or other rights before it was listed and disclosed the information referred to in rules 10.15.1 – 10.15.9 in relation to the issue in the prospectus, PDS or information memorandum lodged with ASX under rule 1.1 condition 3. The issue of the options or other rights is taken to have been made with approval under Listing Rule 10.14, meaning that the issue of equity securities will also be exempt from Listing Rule 10.11 under exception 8 of Listing Rule 10.12.

<sup>96</sup> There is an equivalent exception in Listing Rule 7.2 exception 15. See also Listing Rule 10.16.

<sup>97</sup> The phrase “terms of the scheme” includes terms, conditions, rules, regulations or guidelines formulated to introduce or administer an employee incentive scheme (Listing Rule 19.12).

<sup>98</sup> There is an equivalent exception in Listing Rule 7.2 exception 16.

Listing Rules, any subsequent issue of securities in accordance with the agreement does not require security holder approval under Listing Rule 10.11.

In the case of (a) above, the Listing Rules effectively treat the fact that security holders have agreed to invest in the entity after it has disclosed the existence and material terms of the agreement to issue securities in its listing prospectus, PDS or information memorandum as an implicit approval by security holders of the agreement. Again, however, this does not mean that the entity has carte blanche to enter into whatever agreements to issue securities it wants with directors and their associates pre-listing. ASX may refuse to admit the entity to the official list and to quote its securities if ASX considers that the securities the subject of the agreement breach Chapter 6 of the Listing Rules or result in the entity not having an appropriate structure for a listed entity, or it is otherwise appropriate for ASX to exercise its absolute discretion to refuse the entity's application for admission.<sup>99</sup>

To meet the requirement in (a) above that the entity disclose the existence and material terms of the agreement in its listing prospectus, PDS or information memorandum, the entity should include in that document:<sup>100</sup>

- the name of the person to whom the entity has agreed to issue the securities;
- which category in rules 10.11.1 – 10.11.5 the person falls within and why;
- the number and class of the securities the entity has agreed to issue;
- if the securities are not fully paid ordinary securities, a summary of the material terms of the securities;
- the date or dates on which the securities will be issued;
- the price or other consideration the entity has received or will receive for the issue;
- the purpose of the issue, including the intended use of any funds raised by the issue; and
- a summary of any other material terms of the agreement.

To meet the requirement in (b) above that the entity must have complied with the Listing Rules when it entered into the agreement, the agreement must not only be made in compliance with the requirements of Listing Rule 10.11, it also must not breach the prohibitions in Listing Rules 7.1, 7.1A,<sup>101</sup> 7.6 or 7.9.<sup>102</sup>

### **3.12 Exception 11 – issues conditional on prior approval by security holders**

Listing Rule 10.12 exception 11<sup>103</sup> excludes from Listing Rule 10.11 an agreement to issue equity securities that is conditional on holders of ordinary securities approving the issue under the latter rule before the issue is made. If an entity relies on this exception, it must not issue the equity securities without such approval.

This too is a technical exception to address the point that Listing Rule 10.11 applies to an agreement to issue securities and requires security holders to approve the agreement before it is entered into. This exception allows an entity to enter into an agreement to issue equity securities to a 10.11 party on condition that the issue of the securities is approved by the holders of ordinary securities before it is made.

### **3.13 Exception 12 – future related parties**

Listing Rule 10.12 exception 12 excludes from the restrictions in Listing Rule 10.11 an issue of equity securities under an agreement or transaction between the entity and a person who would not otherwise be a related party but

<sup>99</sup> See the Listing Rules and Guidance Notes cited in notes 88, 89 and 90 above.

<sup>100</sup> By analogy with the information required to be disclosed under Listing Rule 10.13 in a notice of meeting seeking security holder approval under Listing Rule 10.11.

<sup>101</sup> Note that Listing Rule 7.1A only permits an agreement to issue securities if they are in a class of securities that is already quoted on ASX.

<sup>102</sup> See Guidance Note 21 *The Restrictions on Issuing Equity Securities in Chapter 7 of the Listing Rules*.

<sup>103</sup> There is an equivalent exception in Listing Rule 7.2 exception 17.

for the fact that they believe, or have reasonable grounds to believe, that they are likely to become a related party in the future because of the agreement or transaction.

This also is a technical exception to prevent Listing Rule 10.11 being triggered prematurely. The definition of “related party” extends to a person who believes, or has reasonable grounds to believe, that they are likely to become a related party in the future.<sup>104</sup> Hence, if a person is negotiating an agreement or transaction with an entity that will lead to them becoming a related party of the entity, as soon as they believe, or have reasonable grounds to believe, that the agreement or transaction is going ahead, they become a related party of the entity.

In practice, this most often arises where one of the terms of the agreement or transaction is that the person is to be appointed to the board of the entity once the agreement is concluded or the transaction has been completed.

This exception is based on the premise that because the person is not yet a related party of the entity, they have no influence over the board (or, in the case of a listed trust, the RE) of the entity and the board (or RE), acting in accordance with its statutory and common law duties,<sup>105</sup> can be presumed to have exercised an independent judgement on the appropriateness of entering into the agreement or transaction with the person. However, there may be circumstances where this premise does not hold true and where ASX will consider applying Listing Rule 10.11.5 to the person. These include where:

- a close relative of the person or someone with whom the person has close business or personal ties is a director of the entity (or of the RE); or
- the terms of the issue are so uncommercial as to call into question whether the board has properly exercised an independent judgement.

ASX interprets exception 12 as only applying to related parties caught by Listing Rule 10.11.1. Accordingly, if ASX does apply Listing Rule 10.11.5 to a person in these circumstances, exception 12 will no longer be available to them.

## 4. Listing Rule 10.14

### 4.1 The scope of the rule

Listing Rule 10.14 effectively requires an entity to obtain the approval of the holders of its ordinary securities before it issues any equity securities<sup>106</sup> under an employee incentive scheme to a director,<sup>107</sup> an associate of a director or other closely connected party. This extends to any options and performance rights that fall within the definition of “equity security” in the Listing Rules.<sup>108</sup>

### 4.2 The policy underpinning the rule

The policy that underpins Listing Rule 10.14 starts from the premise that directors and other closely connected parties are likely to be in a position to influence both the terms of the scheme and the number of securities issued to them under the scheme. The harm it seeks to protect against is that the directors or other closely connected parties will exercise this influence to favour themselves at the expense of the entity.

<sup>104</sup> See paragraph (viii) of the definition of “related party” in relation to a body corporate, paragraph (viii) of the definition of “related party” in relation to an internally managed trust and paragraph (x) of the definition of “related party” in relation to an externally managed trust set out in ‘2.3 Listing Rule 10.11.1 – related parties’ on page 5 and following’.

<sup>105</sup> See note 36 above.

<sup>106</sup> As defined in note 2 above.

<sup>107</sup> In the case of a trust, the references to a director mean a director of the responsible entity of the trust.

<sup>108</sup> See the definition of “equity security” in note 2 above. Options over issued or unissued shares or units specifically fall within paragraph (c) of that definition. Rights to issued or unissued shares or units fall within paragraph (d) of that definition. In ASX’s experience, many performance rights involve an option over, or a right to, an issued or unissued share or unit and are therefore equity securities. If they are, they must meet the requirements applicable to equity securities in Chapter 6 of the Listing Rules. If they are properly characterised as an option, they must also meet the requirements applicable to options in Chapter 6 of the Listing Rules.

To address the potential conflicts involved and to minimise the risk of this harm occurring, Listing Rule 10.14 displaces the general rule that the board of directors (or, in the case of a listed trust, the RE of the trust) is responsible for managing the business of the entity to the exclusion of its security holders and requires any issue of securities to directors and other closely connected parties under the scheme to be approved by the holders of ordinary securities in the entity. Directors and other closely connected parties who are eligible to participate in the scheme and their associates are precluded from voting on the resolution to approve the issue.

### 4.3 What is an “employee incentive scheme”?

The term “employee incentive scheme” is defined in the Listing Rules<sup>109</sup> to mean:

- a scheme for the issue or acquisition of equity securities in the entity to be held by, or for the benefit of, participating employees or non-executive directors of the entity or a related entity or their associates; or
- a scheme which, in ASX’s opinion, is an employee incentive scheme.

The reference to “participating employees” in the definition above includes executive directors who participate in the scheme.

The reference to equity securities being “held for the benefit of” participating employees or non-executive directors captures trust arrangements where securities are held by a trustee for the benefit of those persons.

The fact that an employee incentive scheme allows participating employees or non-executive directors to elect to have equity securities issued to, or held for the benefit of, a relative or an entity controlled by them or a relative (such as a private company or family trust) does not prevent it from being an employee incentive scheme for the purposes of the Listing Rules. Nor does the fact that an employee incentive scheme may also provide for the participation of consultants and contractors, as well as employees and non-executive directors.<sup>110</sup>

A scheme can be an employee incentive scheme of the purposes of the Listing Rules even if there is only one employee or non-executive director participating in the scheme.<sup>111</sup>

### 4.4 Listing Rule 10.14.1 – directors

Listing Rule 10.14.1 applies to an issue of equity securities under an employee incentive scheme to a director (or, in the case of a listed trust, a director of the RE of the trust).

The term “director” is not defined in the Listing Rules and so takes its meaning under the Corporations Act.<sup>112</sup> Under that Act, a person is a director<sup>113</sup> if:

- they are appointed to the position of director, or to the position of alternate director and acting in that capacity, regardless of the name that is given to their position;
- they are not validly appointed as a director but act in the position of a director; or
- they are not validly appointed as a director but the directors of the entity are accustomed to act in accordance with their instructions or wishes.<sup>114</sup>

<sup>109</sup> Listing Rule 19.12.

<sup>110</sup> See the note to the definition of “employee incentive scheme” in Listing Rule 19.12.

<sup>111</sup> Again, see the note to the definition of “employee incentive scheme” in Listing Rule 19.12.

<sup>112</sup> Listing Rule 19.3.

<sup>113</sup> See the definition of “director” in section 9 of the Corporations Act.

<sup>114</sup> This does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person’s professional capacity, or the person’s business relationship with the directors or the entity.

### 4.5 Listing Rule 10.14.2 – associates

Listing Rule 10.14.2 applies to an issue of equity securities under an employee incentive scheme to an “associate” of a director.

The meaning of “associate” is explained above in section 2.6.

As mentioned there, a related party of a natural person is to be taken to be an associate of the person unless the contrary is established.

The related parties of a director include:

- (i) the director’s spouse or de facto spouse;
- (ii) the parents and children of the director and the parents and children of the director’s spouse or de facto spouse;
- (iii) an entity controlled by the director 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 director or anyone referred to in (i) – (v) above.

Hence an issue of equity securities under an employee incentive scheme to be held by or for the benefit of any of the related parties of a director mentioned above will, unless the contrary is established, be taken to be an issue to be held by or for the benefit of an associate of the director and require security holder approval under Listing Rule 10.14.2. This has particular ramifications where an entity employs a prescribed relative of a director and the relative is entitled to participate in an employee incentive scheme operated by the entity. These ramifications are explored in greater detail in section 4.9 below.

### 4.6 Listing Rule 10.14.3 – ASX’s discretion to apply Listing Rule 10.14 to other parties

Listing Rule 10.14.3 applies to an issue of equity securities under an employee incentive scheme to a person whose relationship with the entity or a person referred to in Listing Rule 10.14.1 or 10.14.2 is such that, in ASX’s opinion, the issue should be approved by security holders.

Listing Rule 10.14.3 effectively gives ASX a discretion to require that security holders approve an issue of equity securities under an employee incentive scheme to someone who is not a director or an associate of a director but whose relationship with the entity or a director or an associate of a director is, in ASX’s opinion, such that approval should be obtained.

Again, given the breadth of the definition of “associate” and the fact that a director’s related parties are deemed to be an associate unless the contrary is established, this is not a discretion that ASX is often called upon to exercise and not one that it exercises lightly, since it imposes additional costs and delays on an entity in having to hold a meeting of security holders to approve an issue of securities that would otherwise be within the authority of the entity’s board (or, in the case of a listed trust, its RE). Nevertheless, it is a discretion that ASX can exercise at any time, including after the securities have been issued.

Examples of where ASX may apply Listing Rule 10.14.3 to an issue of equity securities under an employee incentive scheme include where the securities are to be held by or for the benefit of:

- an employee who is a close (but not a prescribed) relative of a director and the size of the issue seems out of proportion to their role or level in the organisation, giving rise to a possibility that it could be intended to

indirectly benefit the director rather than a bona fide issue to the employee under an employee incentive scheme,<sup>115</sup>

- an employee who has not been formally appointed as a director of the entity but who ASX suspects is acting as a de facto director;<sup>116</sup> and
- an employee who the entity is arguing is not an associate of a director but ASX has a contrary view – in which case, ASX may resolve that argument by applying Listing Rule 10.14.3 to the person.

Ordinarily, ASX would not exercise its discretion to apply Listing Rule 10.14.3 to someone who is the chief executive officer (“CEO”) of an entity and who is not a director or an associate of a director, simply because of his or her position as CEO. This is on the premise that since the CEO is not a member of the board, they are not in a position to influence the board’s determinations in relation to the employee incentive scheme and the board, acting in accordance with its statutory and common law duties,<sup>117</sup> can be presumed to have exercised an independent judgement on the appropriateness of any issue under the scheme to the CEO. However, there may be circumstances where this premise does not hold true and where ASX will consider applying Listing Rule 10.14.3 to an issue of equity securities under an employee incentive scheme to be held by or for the benefit of a CEO. These include where:

- a close relative of the CEO or someone with whom the CEO has close business or personal ties is a director of the entity;
- ASX suspects that the CEO is acting as a de facto director; or
- the terms on which the CEO is participating in the scheme are so uncommercial as to call into question whether the board has properly exercised an independent judgement.

#### **4.7 ASX’s approach to giving in-principle advice on the application of Listing Rule 10.14.3**

ASX is sometimes approached to give in-principle advice that it will not apply Listing Rule 10.14.3 in relation to an issue of equity securities to a particular person under an employee incentive scheme.

For ASX to give that advice, it again has to be satisfied that there is no reasonable prospect of the recipient of the securities influencing either the terms of the scheme, or the size of the issue to them under the scheme, to favour themselves at the expense of the entity. The entity seeking the advice must disclose candidly the full extent of the relationship between the recipient of the securities and its related parties on the one hand and the entity and its directors on the other, and any influence that the recipient may have over the entity’s board (or, in the case of a listed trust, over the RE of the trust).

Any in-principle advice that ASX provides in this regard will be expressed to be non-binding and based on the facts known at the time. If the entity omits or misrepresents material facts in its application for in-principle advice, or if other material facts come to light after ASX provides its advice, ASX may withdraw or change its advice.

If ASX decides that it will not apply Listing Rule 10.14.3 in relation to an issue of equity securities to a particular person under an employee incentive scheme, it may impose conditions and, if it does so, the entity must comply with the conditions.<sup>118</sup> An example of a condition that ASX may impose is a condition that the entity disclose to the market details of the issue, including the name of the employee/relative, the number of securities issued to them, their relationship to the director and the basis on which the entity has formed the view that Listing Rule 10.14 does not apply to the issue.

<sup>115</sup> See the example in note 34 above.

<sup>116</sup> See the example in note 35 above.

<sup>117</sup> See note 36 above.

<sup>118</sup> Listing Rule 18.5A provides that ASX may exercise, or decide not to exercise, any power or discretion conferred under the Listing Rules in its absolute discretion. It may do so on any conditions and, if it does so, the entity must comply with the conditions.

### 4.8 The exceptions in Listing Rule 10.16

Listing Rule 10.16 provides that Listing Rule 10.14 does not apply to:

- (a) a purchase of securities on-market<sup>119</sup> by or on behalf of directors or their associates under an employee incentive scheme where the terms of the scheme<sup>120</sup> permit such purchases;
- (b) the grant of options or other rights to acquire securities to directors or their associates under an employee incentive scheme, where the securities to be acquired on the exercise of the options or in satisfaction of the rights are required by the terms of the scheme to be purchased on-market;<sup>121</sup> or
- (c) an issue of equity securities pursuant to options or other rights to acquire securities granted to directors or their associates under an employee incentive scheme. The entity must have issued the options or other rights:
  - (i) before it was listed and disclosed the information referred to in Listing Rules 10.15.1 – 10.15.9 in relation to the issue in the prospectus, PDS or information memorandum lodged with ASX under rule 1.1 condition 3; or
  - (ii) after it was listed and with the approval of holders of ordinary securities under Listing Rule 10.14.

In relation to (a) and (b) above, on-market purchases of securities by or on behalf of directors or their associates under an employee incentive scheme, or to satisfy the entitlements of directors or their associates under options or other rights to acquire securities granted under an employee incentive scheme, are excluded from Listing Rule 10.14 on the basis that they do not dilute the interests of other security holders and, because they are effected at market prices, they do not raise the same concerns as an issue of securities in terms of whether they are occurring at a price that is advantageous to a director or other closely connected party.<sup>122</sup>

In relation to (c) above, these issues are excluded from Listing Rule 10.14 on the basis that the right to receive the underlying securities upon the exercise of the option or in satisfaction of the rights has effectively already been approved by security holders and to require a separate approval under Listing Rule 10.14 for the issue of the underlying securities would therefore be an unnecessary duplication. In the case of (c)(ii) above, the approval is explicit. In the case of (c)(i) above, the approval is implicit and evidenced by security holders agreeing to invest in the entity with the details of the options or other rights having been disclosed in the entity's listing prospectus, PDS or information memorandum.

Where (c) applies, the issue of the underlying securities will be taken to have been made with the approval of holders of ordinary securities under Listing Rule 10.14, meaning that the issue will also be exempt from Listing Rule 10.11 under Listing Rule 10.12 exception 8.<sup>123</sup>

### 4.9 ASX's approach to granting waivers of Listing Rule 10.14

Like Listing Rule 10.11, ASX regards Listing Rule 10.14 as one of the fundamental protections afforded to investors under the Listing Rules. While ASX may consider procedural and other minor waivers of the rule, ASX will only waive the central requirement for security holders to approve an issue of equity securities to a director or closely connected party under an employee incentive scheme, where it is clear to ASX that the harm that Listing Rule 10.14

<sup>119</sup> "On-market" has the same meaning for these purposes as it does in the definition of that term in section 9 of the Corporations Act. It is intended to exclude block trades, out of hours trades and certain other transactions effected off-market (even though they may ultimately be reported to a market operator).

<sup>120</sup> As defined in note 97 above.

<sup>121</sup> Listing Rule 10.16.

<sup>122</sup> On-market purchases of securities by or on behalf of directors or their associates under an employee incentive scheme, or to satisfy the entitlements of directors or their associates under options or other rights to acquire securities granted under an employee incentive scheme, will generally lead to an increase in the director's "notifiable interest" and therefore will need to be notified to the market via an Appendix 3Y under Listing Rule 3.19A. They will also generally form part of the remuneration of directors and therefore will need to be disclosed in an entity's remuneration report.

<sup>123</sup> See note 95 above and accompanying text.

seeks to protect against is not present. The onus is firmly on the entity seeking the waiver to establish this to ASX's satisfaction.

Hence, to receive such a waiver, an entity must establish to ASX's satisfaction that there is no reasonable prospect of the recipient of the securities, either themselves or through their connections to the board of the entity (or, in the case of a listed trust, to the RE of the trust), influencing the terms of the scheme or the size of the award to them under the scheme.

The mere fact that a director excuses himself or herself from participating in the discussion and decision at a board meeting concerning a proposed issue of securities under an employee incentive scheme to them or to someone connected to them will not be sufficient to establish an absence of influence.

One circumstance where ASX has been approached for a waiver of Listing Rule 10.14 is where an entity employs a prescribed relative of a director and the relative is entitled to participate in an employee incentive scheme operated by the entity. A director's related parties include his or her prescribed relatives and a director's related parties are assumed to be his or her associates unless the contrary is established. This has the consequence that, absent a waiver from ASX, any issue of equity securities to a prescribed relative of a director under an employee incentive scheme will require security holder approval under Listing Rule 10.14.2 unless it can be established that the relative is not an associate of the director (ie that they are not controlled by, or acting in concert with, the director).

ASX will not grant a waiver of Listing Rule 10.14.2 in these circumstances. Either the relative is an associate of a director – in which case a waiver would be inappropriate and the entity should obtain the approval of its ordinary security holders to the issue under Listing Rule 10.14.2 – or they are not – in which case Listing Rule 10.14.2 does not apply.

Rather than approach ASX for a waiver, an entity in this situation should either seek security holder approval to the issue or satisfy itself that the relative is not an associate of the director and therefore security holder approval is not required. To do the latter, it would be prudent for it to obtain a statutory declaration or similar form of certification from the relative and/or the director that they are not associates. It should also have regard to any other information in its possession that is relevant to forming a view on whether or not the relative is in fact an associate of the director.<sup>124</sup>

It should be noted that the fact that an entity obtains a statutory declaration or similar form of certification from a director and/or a relative that they are not associates will not prevent or deter ASX from deciding that, because of the relationship between them, ASX should apply Listing Rule 10.14.3 to an issue of securities to the relative under an employee incentive scheme. ASX is likely to do this if it forms the view that the size of the issue objectively seems out of proportion to the relative's role or level in the organisation,<sup>125</sup> giving rise to a possibility that it could be intended to indirectly benefit the director rather than a bona fide issue to the relative under the employee incentive scheme.

ASX would strongly encourage listed entities that follow this path to disclose details of the issue to the relative in the notice they lodge with ASX about the issue under Listing Rule 3.10.3A, including the name of the employee/relative, the number of securities issued to them, their relationship to the director and the basis on which the entity has formed the view that Listing Rule 10.14 does not apply to the issue. Not only does this serve the interests of market transparency and good governance, it may also save the entity from having to answer a query from ASX on these matters.<sup>126</sup> In ASX's experience, these matters are best disclosed up-front and tend to be perceived in a less favourable light if they are disclosed after the event as a result of an ASX query.

<sup>124</sup> As stated in the note to the definition of "associate" in Listing Rule 19.12: "One way in which a related party of a natural person may seek to establish that it is not an associate of the natural person is for the natural person or related party in question to give a statutory declaration or some other form of certification to the listed entity to that effect. The listed entity should take this and any other information known to it into account when forming a view as to whether or not the related party is in fact an associate of the natural person."

<sup>125</sup> For example, if the number of securities being issued to the relative is not consistent with the numbers issued to comparable level employees in the organisation.

<sup>126</sup> Under Listing Rule 18.7.

### 4.10 Notification obligations for issues under an employee incentive scheme

Listing Rule 3.10.3A requires an entity to notify ASX within 5 business days of any issue of equity securities under an employee incentive scheme.

If the equity securities are to be quoted immediately<sup>127</sup> on ASX, the entity must also lodge an Appendix 2A *Application for quotation of securities* within 5 business days of their issue.<sup>128</sup> In that case, the Appendix 2A will also serve as the notification under Listing Rule 3.10.3A.

If the equity securities are not intended to be quoted immediately on ASX, the notification under Listing Rule 3.10.3A must be in the form of, or accompanied by, an Appendix 3G.

Where an issue of securities under an employee incentive scheme leads to a change in the “notifiable interests”<sup>129</sup> of a director, the entity must also give ASX an Appendix 3Y within 5 business days of the change occurring.<sup>130</sup>

## 5. Requirements for notices of meeting

### 5.1 The type and terms of resolution required

The resolution required to approve an issue of securities under Listing Rule 10.11 or 10.14 is an ordinary resolution passed at a general meeting of the holders of ordinary securities.<sup>131</sup>

Listing Rules 10.11 and 10.14 do not dictate the specific terms of the resolution required under those rules. A resolution to the following effect will suffice:

“That the [*description of issue*] is approved under and for the purposes of Listing Rule [10.11/10.14].”

Generally there should be a separate resolution approving each relevant issue under Listing Rule 10.11 or 10.14. Combining multiple issues 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>132</sup>

### 5.2 Specific disclosure requirements for resolutions under Listing Rule 10.11

A notice of meeting proposing a resolution to approve an issue of equity securities to a person under Listing Rule 10.11 must include a summary of Listing Rule 10.11 and what will happen if security holders give, or do not give, the approval sought under that rule.<sup>133</sup>

A summary along the following lines will suffice for these purposes:

“[*Name of entity*] is proposing to [*insert a description of the proposed issue of securities, defining them as the “Issue” (or something similar)*].

Listing Rule 10.11 provides that unless one of the exceptions in Listing Rule 10.12 applies, a listed [company/trust] must not issue or agree to issue equity securities to:

- 10.11.1 a related party;
- 10.11.2 a person who is, or was at any time in the 6 months before the issue or agreement, a substantial (30%+) holder in the [company/trust];

<sup>127</sup> An application for quotation of securities issued under an employee incentive scheme must be made within 5 business days of their date of issue or, if they are subject to restrictions on transfer, within 5 business days after the end of the restrictions: Listing Rule 2.7 and 2.8.6.

<sup>128</sup> See note 127 above.

<sup>129</sup> As defined in Listing Rule 19.12.

<sup>130</sup> Listing Rule 3.19A. See also Guidance Note 22 *Notification of Directors’ Interests*.

<sup>131</sup> Listing Rule 14.9.

<sup>132</sup> Pursuant to Listing Rules 15.1 and 15.1.4.

<sup>133</sup> Listing Rule 14.1A.

- 10.11.3 a person who is, or was at any time in the 6 months before the issue or agreement, a substantial (10%+) holder in the [company/trust] and who has nominated a director to the board of the [company/responsible entity of the trust] pursuant to a relevant agreement which gives them a right or expectation to do so;
- 10.11.4 an associate of a person referred to in Listing Rules 10.11.1 to 10.11.3; or
- 10.11.5 a person whose relationship with the [company/trust] or a person referred to in Listing Rules 10.11.1 to 10.11.4 is such that, in ASX's opinion, the issue or agreement should be approved by its [shareholders/unitholders],
- unless it obtains the approval of its [shareholders/unitholders].

The Issue falls within Listing Rule [*insert which of rules 10.11.1 to 10.11.5 applies*] and does not fall within any of the exceptions in Listing Rule 10.12. It therefore requires the approval of [*name of entity*]'s [shareholders/unitholders] under Listing Rule 10.11.

Resolution [*nº*] seeks the required [shareholder/unitholder] approval to the Issue under and for the purposes of Listing Rule 10.11.

If resolution [*nº*] is passed, [*name of entity*] will be able to proceed with the Issue and [*outline the consequences that will follow*].

If resolution [*nº*] is not passed, [*name of entity*] will not be able to proceed with the Issue and [*outline the consequences that will follow*].”

A notice of meeting proposing a resolution to approve an issue of equity securities to a person under Listing Rule 10.11 must also include:<sup>134</sup>

- the name of the person;<sup>135</sup>
- which category in Listing Rules 10.11.1 – 10.11.5 the person falls within and why;<sup>136</sup>
- the number and class of securities to be issued to the person;<sup>137</sup>
- if the securities are not fully paid ordinary securities, a summary of the material terms of the securities;<sup>138</sup>
- the date or dates on or by which the entity will issue the securities, which must not be more than 1 month after the date of the meeting;<sup>139</sup>
- the price or other consideration the entity will receive for the issue;<sup>140</sup>

<sup>134</sup> An approval of security holders is not effective under the Listing Rules unless the notice of meeting includes everything that the Listing Rules require it to include: Listing Rule 14.6.

<sup>135</sup> Listing Rule 10.13.1.

<sup>136</sup> Listing Rule 10.13.2.

<sup>137</sup> Listing Rule 10.13.3. Where the number of securities to be issued is not fixed, this may be expressed as a maximum number or as a formula (see the note to Listing Rule 10.13.3). In the latter case, it may be appropriate for the entity to include some worked examples in the notice of meeting to show how the formula will operate in practice under different assumptions.

<sup>138</sup> Listing Rule 10.13.4.

<sup>139</sup> Listing Rule 10.13.5. This requirement is designed to strike a balance between giving entities the time practically necessary to complete an issue of equity securities, and ensuring that the securities are issued within a reasonable time frame after security holder approval so that the approval can still be considered to be current and not rendered stale by subsequent events.

<sup>140</sup> Listing Rule 10.13.6. Where the price at which the securities are to be issued is not fixed, this may be expressed as a minimum amount or as a formula (see the note to Listing Rule 10.13.6). In the latter case, it may be appropriate for the entity to include some worked examples in the notice of meeting to show how the formula will operate in practice under different assumptions.

- the purpose of the issue, including the intended use of any funds raised by the issue;<sup>141</sup>
- if the person is:
  - a director and therefore a related party under Listing Rule 10.11.1; or
  - an associate of, or person connected with, a director under Listing Rules 10.11.4 or 10.11.5,and the issue is intended to remunerate or incentivise the director, details (including the amount) of the director's current total remuneration package;<sup>142</sup>
- if the securities are issued under an agreement, a summary of any other material terms of the agreement;<sup>143</sup> and
- a voting exclusion statement.<sup>144</sup>

This information may be given in the notice itself or in an accompanying explanatory memorandum to security holders.<sup>145</sup>

ASX is sometimes approached for a waiver to allow an entity to issue securities at a date outside of the 1 month time constraint mentioned above. This constraint is designed to strike a balance between giving entities the time practically necessary to complete an issue of equity securities, and ensuring that the securities are issued within a reasonable time frame after security holder approval so that the approval can still be considered to be current and not rendered stale by subsequent events. ASX will generally only grant such a waiver where there is a clear and compelling commercial reason for the issue to be made at a later date<sup>146</sup> and security holders are in a position to know with certainty the dilutive impact the issue will have and can therefore give a meaningful approval to the issue. In the case of convertible securities, this may require the imposition of a floor price in the conversion formula so that the maximum dilutive impact can be determined at the date of the meeting approving their issue.

Otherwise ASX expects entities to arrange the date on which they seek approval to an issue under Listing Rule 10.11 to comply with the 1 month time constraint mentioned above and, if for any reason the issue is not completed within that timeframe following the approval, to seek a fresh approval under that rule.

### 5.3 Specific disclosure requirements for resolutions under Listing Rule 10.14

A notice of meeting proposing a resolution under Listing Rule 10.14 to approve an issue of equity securities to a person under an employee incentive scheme must include a summary of Listing Rule 10.14 and what will happen if security holders give, or do not give, the approval sought under that rule.<sup>147</sup>

A summary along the following lines will suffice for these purposes:

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<sup>141</sup> Listing Rule 10.13.7.

<sup>142</sup> Listing Rule 10.13.8. For these purposes, ASX agrees with and applies the guidance in Table 2 of ASIC Regulatory Guide 76 *Related party transactions*:

"Where the financial benefit is to be conferred by way of remuneration or incentive, the amount of the total remuneration package must be disclosed to the members. For example, if options are to be granted to a director, the company or responsible entity must provide a proper valuation of those options as well as give members details of other remuneration the director will receive.

Members must be able to assess the value of the overall remuneration package the director will receive when taking into account the financial benefit to be conferred. It is not usually sufficient to include only the past remuneration of directors. However, if the remuneration a director will receive is not known but is anticipated to be similar to that received in the previous year, it may be sufficient to include the previous year's remuneration and a statement to that effect."

<sup>143</sup> Listing Rule 10.13.9.

<sup>144</sup> Listing Rule 10.13.10. See also '5.5 Voting exclusions' on page 34.

<sup>145</sup> Listing Rule 14.1.

<sup>146</sup> An example would be "deferred consideration securities", that is, securities issued by an entity in consideration for an acquisition of an asset or undertaking where a future tranche of securities will be issued outside of the 1 month period mentioned in Listing Rule 10.13.5 if certain performance thresholds or other criteria are met.

<sup>147</sup> Listing Rule 14.1A.

*“[Name of entity] is proposing to [insert a description of the proposed issue of securities under the employee incentive scheme, defining them as the “Issue” (or something similar)].*

Listing Rule 10.14 provides that a listed [company/trust] must not permit any of the following persons to acquire equity securities under an employee incentive scheme:

- 10.14.1 a director of the [company/responsible entity of the trust];
- 10.14.2 an associate of a director of the [company/responsible entity of the trust]; or
- 10.14.3 a person whose relationship with the [company/trust] or a person referred to in Listing Rule 10.14.1 or 10.14.2 is such that, in ASX’s opinion, the acquisition should be approved by its [shareholders/unitholders],

unless it obtains the approval of its [shareholders/unitholders].

The Issue falls within Listing Rule *[insert which of rules 10.14.1 to 10.14.3 applies]* above and therefore requires the approval of *[name of entity]’s* [shareholders/unitholders] under Listing Rule 10.14.

Resolution *[n°]* seeks the required [shareholder/unitholder] approval to the Issue under and for the purposes of Listing Rule 10.14.

If resolution *[n°]* is passed, *[name of entity]* will be able to proceed with the Issue and *[outline the consequences that will follow]*.

If resolution *[n°]* is not passed, *[name of entity]* will not be able to proceed with the Issue and *[outline the consequences that will follow]*.”

A notice of meeting proposing a resolution under Listing Rule 10.14 to approve an issue of equity securities to a person under an employee incentive scheme must also include:<sup>148</sup>

- the name of the person;<sup>149</sup>
- which category in Listing Rules 10.14.1 – 10.14.3 the person falls within and why;<sup>150</sup>
- the number<sup>151</sup> and class of securities that are proposed to be issued to the the person under the scheme for which approval is being sought;<sup>152</sup>
- if the person is:
  - a director under Listing Rule 10.14.1; or
  - an associate of, or person connected with, a director under Listing Rules 10.14.2 or 10.14.3, details (including the amount) of the director’s current total remuneration package;<sup>153</sup>
- the number of securities that have previously been issued to the person under the scheme and the average acquisition price (if any) paid by the person for those securities;<sup>154</sup>

<sup>148</sup> An approval of security holders is not effective under the Listing Rules unless the notice of meeting includes everything that the Listing Rules require it to include: Listing Rule 14.6.

<sup>149</sup> Listing Rule 10.15.1.

<sup>150</sup> Listing Rule 10.15.2.

<sup>151</sup> Where the number of securities to be issued is not fixed, this may be expressed as a maximum number or as a formula (see the note to Listing Rule 10.15.3).

<sup>152</sup> Listing Rule 10.15.3.

<sup>153</sup> Listing Rule 10.15.4. Again, for these purposes, ASX agrees with and applies the guidance in Table 2 of ASIC Regulatory Guide 76 *Related party transactions*, quoted in note 142 above.

<sup>154</sup> Listing Rule 10.15.5.

- if the securities are not fully paid ordinary securities:
  - a summary of the material terms of the securities;
  - an explanation of why that type of security is being used; and
  - the value the entity attributes to that security and its basis;<sup>155</sup>
- the date or dates on or by which the entity will issue the securities to the person under the scheme, which must be no later than 3 years after the date of the meeting;<sup>156</sup>
- the price<sup>157</sup> at which the entity will issue the securities to the person under the scheme;<sup>158</sup>
- a summary<sup>159</sup> of the material terms of the scheme;<sup>160</sup>
- a summary<sup>161</sup> of the material terms of any loan that will be made to the person in relation to the acquisition;<sup>162</sup>
- a statement to the following effect:

*Details of any securities issued under the scheme will be published in the annual report of the entity relating to a period in which they were issued, along with a statement that approval for the issue was obtained under Listing Rule 10.14.*

*Any additional persons covered by Listing Rule 10.14 who become entitled to participate in the scheme after the resolution is approved and who were not named in the notice of meeting will not participate until approval is obtained under that rule.<sup>163</sup>*

- a voting exclusion statement.<sup>164</sup>

Where the securities being issued are not fully paid ordinary securities, in explaining why that type of security is being used, the entity should address any accounting, taxation or other ramifications that arise from the use of this form of remuneration compared to other forms of remuneration that might be available to the entity. In explaining the value the entity attributes to that security and its basis, the entity should disclose whether it has received an independent valuation and, if it has, what that valuation was and, if it hasn't, how it has determined the value of the securities being acquired.

Again, this information may be given in the notice itself or in an accompanying explanatory memorandum to security holders.<sup>165</sup>

#### 5.4 General disclosure requirements for a notice of meeting

As a matter of general law, a notice of meeting proposing a resolution under Listing Rule 10.11 or 10.14 must include such material as will fully and fairly inform security holders of the matters to be considered at the meeting

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<sup>155</sup> Listing Rule 10.15.6.

<sup>156</sup> Listing Rule 10.15.7.

<sup>157</sup> Where the price at which the securities are to be issued is not fixed, this may be expressed as a minimum amount or as a formula (see the note to Listing Rule 10.15.8).

<sup>158</sup> Listing Rule 10.15.8.

<sup>159</sup> The entity may instead of providing a summary include in, or annex to, the notice of meeting, a copy of the scheme (see the note to Listing Rule 10.15.9).

<sup>160</sup> Listing Rule 10.15.9.

<sup>161</sup> The entity may instead of providing a summary include in, or annex to, the notice of meeting, a copy of the loan agreement (see the note to Listing Rule 10.15.10).

<sup>162</sup> Listing Rule 10.15.10.

<sup>163</sup> Listing Rule 10.15.11.

<sup>164</sup> Listing Rule 10.15.12. See also '5.5 Voting exclusions' on page 34.

<sup>165</sup> Listing Rule 14.1.

and enable them to make a properly informed judgement on those matters.<sup>166</sup> In some cases, this may require the entity to disclose additional information over and above that specifically required under the Listing Rules summarised in sections 5.2 and 5.3 above.

If the issue also requires approval as a related party benefit under section 208 or 601LA of the Corporations Act, the notice must include or attach an explanatory statement that complies with section 219 of that Act.<sup>167</sup>

### 5.5 Voting exclusions

A notice of meeting proposing a resolution to approve an issue of equity securities under Listing Rule 10.11 or 10.14 must include a voting exclusion statement.<sup>168</sup>

A voting exclusion statement 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<sup>169</sup> of an excluded person, save where it is cast by:

- a person as proxy or attorney for another 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 they are not excluded from voting, and are 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>170</sup>

In the case of a resolution under Listing Rule 10.11, the excluded persons are the person or persons receiving the securities under the issue or agreement being approved and any other person who will obtain a material benefit as a result of the issue (except a benefit solely by reason of being the holder of ordinary securities in the entity).

For these purposes, ASX considers a “material benefit” to be one that is likely to induce the recipient of the benefit to vote in favour of the issue regardless on its impact on ordinary security holders. Examples include:

- if the issue is being made primarily for the purpose of raising cash to repay a debt or other amount owed by the entity to another person, that person;
- a professional adviser or other person who will be paid a success (or similar) fee if the transaction proceeds;<sup>171</sup>
- if the issue being approved under Listing Rule 10.11 is part of a larger issue of securities:
  - an underwriter or sub-underwriter who will be paid an underwriting or sub-underwriting fee in relation to the larger issue; and

<sup>166</sup> See *Bulfin v Bebarfalds Ltd* (1938) 38 SR (NSW) 423 and *Chequepoint Securities Ltd v Claremont Petroleum NL* (1986) 11 ACLR 94.

<sup>167</sup> See ASIC Regulatory Guide 76 *Related party transactions*.

<sup>168</sup> Listing Rules 10.13.10 and 10.15.12 and the table in Listing Rule 14.11.1.

<sup>169</sup> Guidance Note 35 *Security Holder Resolutions* has guidance on who is an associate of an excluded person for these purposes.

<sup>170</sup> Listing Rule 14.11.

<sup>171</sup> This is not intended to capture normal fixed or time-based fees paid to a professional adviser advising on the transaction. It is only intended to capture fees that are directly related to the success of the transaction.

- a lead manager of, or broker to, the larger issue who will be paid a fee or commission on the proceeds of the issue.<sup>172</sup>

In the case of a resolution under Listing Rule 10.14, the excluded persons are all persons referred to in Listing Rule 10.14.1, 10.14.2 or 10.14.3 who are eligible to participate in the employee incentive scheme.

ASX also has a general discretion to designate any other person whose votes, in ASX's opinion, should be disregarded. This discretion may be exercised both before<sup>173</sup> and after<sup>174</sup> the notice of meeting has been sent to security holders.

Where ASX exercises its discretion under Listing Rule 10.11.5 to apply Listing Rule 10.11 to a person who is closely connected to the entity or to a related party, it will usually consider whether there are any other parties that should be excluded from voting on the resolution under Listing Rule 10.11. For example, if ASX exercises its discretion to apply Listing Rule 10.11 to a person because they have a close connection with a director of the entity, ASX will usually make a determination that the director and his or her associates<sup>175</sup> are excluded from voting on the resolution.

Guidance Note 35 *Security Holder Resolutions* has further guidance on voting exclusions and the procedures that should be followed at a meeting of security holders where a resolution under Listing Rule 10.11 or 10.14 is being considered.

### 5.6 Stale resolutions

Where security holders approve an issue of or agreement to issue securities under Listing Rule 10.11, the securities must be issued within one month of that approval or else the approval will lapse.<sup>176</sup>

Guidance Note 35 *Security Holder Resolutions* has further guidance on stale resolutions and the circumstances where ASX may require an entity to seek a fresh approval from its security holders under Listing Rule 10.11 or 10.14.

## 6. ASX's enforcement powers

ASX has a range of enforcement powers it can exercise if an entity issues, or proposes to issue, securities in breach of Listing Rule 10.11 or 10.14.

ASX may:

- suspend the quotation of the entity's securities until the matter has been dealt with to ASX's satisfaction;<sup>177</sup>
- require the entity to impose a holding lock on the securities to prevent them being disposed of until the matter has been dealt with to ASX's satisfaction;<sup>178</sup>

<sup>172</sup> This is not intended to capture normal handling fees payable to individual brokers who lodge acceptances or renunciations on behalf of security holders. It is only intended to capture fees and commissions payable to a lead manager of, or broker to, the issue that are directly related to the success of the transaction.

<sup>173</sup> See the final entry in the table in Listing Rule 14.11.1. If ASX exercises this discretion, the person must be named in the voting exclusion statement in the notice of meeting.

<sup>174</sup> Listing Rule 14.11.2. If ASX exercises this discretion, it is not necessary for the entity to send a further notice of meeting naming the person in the voting exclusion statement (see the note to Listing Rule 14.11.2). However, ASX would expect the entity to make an announcement to the market of ASX's determination.

<sup>175</sup> If the voting exclusion is applied by ASX to a director under the final entry in the table in Listing Rule 14.11.1, it will automatically extend to the director's associates under Listing Rule 14.11. If the voting exclusion is applied by ASX under Listing Rule 14.11.2, ASX will generally stipulate that the director's associates are also excluded from voting in favour of the transaction.

<sup>176</sup> Listing Rule 10.13.5.

<sup>177</sup> Listing Rule 17.3.1.

<sup>178</sup> Listing Rule 18.8(h).

- if the issue has not yet taken place, direct the entity not to proceed with the issue;<sup>179</sup>
- if the issue has already taken place, direct the entity to cancel or reverse the issue;<sup>180</sup> and/or
- direct the entity to convene a meeting of security holders to approve the issue under Listing Rule 10.11 or 10.14 (as applicable).<sup>181</sup>

On the second last point above, ASX recognises that in some cases there could be legal impediments to an entity cancelling or reversing an issue of securities at the direction of ASX.<sup>182</sup> In those cases, if the securities are quoted on ASX, ASX may instead direct the entity to procure the recipient of the securities to dispose of the securities on-market and donate any profit from the sale to charity.<sup>183</sup>

On the last bullet point above, it should be noted that ASX will not generally allow an entity that has issued securities in breach of Listing Rule 10.11 or 10.14 to leave the issue on foot and seek to have it ratified by the holders of its ordinary securities at a subsequent meeting. For ASX to condone that course would open Listing Rules 10.11 and 10.14 to avoidance and abuse.<sup>184</sup> If the securities are quoted on ASX, ASX is more likely instead to direct the entity to procure the recipient of the securities to dispose of the securities on-market and donate any profit from the sale to charity.

More generally, where an entity issues securities in breach of Listing Rule 10.11 or 10.14 and ASX considers the breach to be an egregious one, ASX may:

- censure the entity for breaching the Listing Rules;<sup>185</sup>
- exercise ASX's discretion not to quote the securities;<sup>186</sup> and/or
- terminate the entity's admission to the official list.<sup>187</sup>

The type of action ASX will take will depend on the nature and severity of the breach.

Whenever ASX takes enforcement action against an entity for breaching Listing Rule 10.11 or 10.14, ASX will usually require the entity to make an announcement to the market explaining that action and why it was taken.

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<sup>179</sup> Listing Rule 18.8(c).

<sup>180</sup> Listing Rule 18.8(d).

<sup>181</sup> Listing Rule 18.8(e). Where ASX imposes such a requirement and security holders do not approve the issue, ASX may impose such further requirements as it considers appropriate under Listing Rule 18.8.

<sup>182</sup> A cancellation of an issue of shares, for example, may require approval from security holders or the court under the Corporations Act before it can be effected.

<sup>183</sup> Listing Rule 18.8.

<sup>184</sup> If ASX were to allow this, it might encourage an entity to issue equity securities without seeking the required security holder approval in the hope of not being found out and in the knowledge that, if it is, the likely consequence would simply be a direction that it seek the approval it should have sought in the first place.

<sup>185</sup> Listing Rule 18.8A.

<sup>186</sup> Listing Rule 2.9.

<sup>187</sup> Listing Rule 17.12.