



Guidance Note 24

Issued: June 2005

Key topics

1. Acquisition and disposal of assets between related parties

Listing Rules

1. Listing rules 10.1 - 10.10

Guidance Note History

First issued: June 2005

Acquisition and disposal of assets between related parties: Listing Rules 10.1 - 10.10

Introduction

1. This Guidance Note is published to assist listed entities in gauging whether listing rule 10.1 applies to a transaction that they propose entering into.

The Listing Rule

2. Listing rule 10.1 states:

"An entity (in the case of a trust, the responsible entity) must ensure that neither it, nor any of its child entities, acquires a substantial asset from, or disposes of a substantial asset to, any of the following persons without the approval of holders of the entity's ordinary securities.

10.1.1 *A related party.*

10.1.2 *A subsidiary.*

10.1.3 *A substantial holder, if the person and the person's associates have a relevant interest, or had a relevant interest at any time in the 6 months before the transaction, in at least 10% of the total votes attached to the voting securities.*

10.1.4 *An associate of a person referred to in rules 10.1.1 to 10.1.3.*

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10.1.5 *A person whose relationship to the entity or a person referred to in rules 10.1.1 to 10.1.4 is such that, in ASX's opinion, the transaction should be approved by security holders.*

If any entity breaks this rule, ASX may require it to take the corrective action set out in rule 10.9."

Corporations Act

3. Chapter 2E of the Corporations Act requires a public company to obtain the approval of its shareholders before the public company may give a financial benefit to one of its related parties.
4. Listing rule 10.1 is different in scope in the sense that it does not apply to all kinds of financial benefit but only to acquisitions or disposals of substantial assets by a listed entity (or a child entity) to any of the persons described in listing rules 10.1.1 - 10.1.4 inclusive (the "Influential Persons") or any other person whose relationship with the listed entity or the Influential Persons is such that the transaction should be approved by shareholders.
5. Although the kind of transaction to which listing rule 10.1 applies is different from the financial benefits targeted in Chapter 2E of the Corporations Act, the listing rule applies to a broader range of "related parties" than the parallel concept in the Corporations Act. Also, importantly, there is no exception for benefits provided on "arm's length terms".
6. While the Corporations Act applies only where financial benefits are given to a related party of the public company, listing rule 10.1 applies not only to an acquisition by or disposal from a related party but also to such transactions with:
 - a subsidiary of the listed entity;
 - a substantial holder of the listed entity if that person and the person's associates have a relevant interest, or have a relevant interest at any time in the 6 months before the transaction, in at least 10% of the listed entity's total votes;
 - an associate of a related party or of a subsidiary or substantial holder with at least 10% of votes in the entity, and
 - a person whose relationship to the entity or to a related party, subsidiary or substantial holder of the listed entity or one of their associates is such that, "in ASX's opinion, the transaction should be approved by security holders".

Persons in a position of influence

7. The explanatory note at the beginning of Chapter 10 of the listing rules states that the purpose of the chapter is to deal with transactions between an entity and persons in a position to influence the entity. It is, above all, a rule about the potential that arises for the transfer of value from a listed entity (or an acquisition of an asset to the detriment of the listed entity) in the circumstances of related party dealings. It is this purpose which has guided ASX's policy in identifying those persons, dealings with whom trigger the application of the rule.

Related party

8. Listing rule 10.1.1 applies to an acquisition or disposal of a substantial asset by an entity (or one of its child entities) to a related party. "Related party" is defined in the listing rules by reference to section 228 of the Corporations Act. Section 228 is set out in an attachment to this Guidance Note.
9. The Act, and therefore also listing rule 10.1, deems a person or entity to still be a related party of the company even if they ceased being a related party within 6 months before the relevant acquisition or disposal. They also extend to any entity or person if that entity or person believes it is likely they will become a related party of the company at any time in the future. Entities are also deemed to be related parties if they act in concert with a related party.

A subsidiary

10. Listing rule 10.1.2 requires security holder approval of an acquisition or disposal of a substantial asset by a listed entity (or one of its child entities) to a subsidiary of the listed entity.
11. However listing rule 10.3 provides that this does not apply to transactions between the listed entity and one of its wholly owned subsidiaries or to a transaction between wholly owned subsidiaries of the listed entity.

10% substantial holder

12. Listing rule 10.1.3 applies to the acquisition or disposal of a substantial asset by a listed entity (or one of its child entities) to a person effectively holding at least 10% of the total votes attached to the listed entity's securities. The 10% interest may consist only of the substantial holder's interest but it may also include interests held by the person's "associates". For the purposes of listing rule 10.1.3 the definition of "associate" in section 12 of the Corporations Act, is the relevant definition, whereas in listing rule 10.1.4 the definition of "associate" is to be found in sections 11 and 13 - 17 of the Corporations Act. The definition of "associate" in section 12 of the Corporations Act for the purposes of determining who is a "substantial shareholder" is summarised in the Attachment to this Note.
13. ASX does not waive this requirement simply because the substantial holder has only exceeded the 10% threshold by a small amount.

Associate

14. The potential scope of listing rule 10.1.4 is very broad. It requires security holder approval of an acquisition or disposal of a substantial asset by a listed entity or one of its child entities to an associate of any of the people or companies described above as a "related party", a "subsidiary", or a "10% substantial holder".

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15. "Associate" is defined by reference to sections 11 and 13-17 of the Corporations Act, the definitions of which are also summarised in the Attachment to this Guidance Note.

ASX's role in respect of listing rules 10.1.1 - 10.1.5

16. The facts that give rise to the application of listing rule 10.1 are primarily within the knowledge of the listed entity and ASX relies on the listed entity to comply with the rule. To assist the listed entity, ASX will, if requested, provide a written opinion on whether or not the rule applies. Any such opinion will be based on (and limited to) the factual information provided by the listed entity. If the listed entity does not have a written opinion from ASX to the contrary, or ASX determines that the opinion provided may have been different because it was based on incorrect or incomplete information, and ASX determines (at any time) that rule 10.1 applies, ASX might require the listed entity to take corrective action which could include cancelling the transaction.

ASX's discretion: listing rule 10.1.5

17. In addition to the defined situations in listing rules 10.1.1 to 10.1.4 where a listed entity must seek security holder approval before it (or a child entity) makes a substantial acquisition or disposal, a listed company may also have to seek security holder approval for an acquisition or disposal by the entity (or one of its child entities) to a person whose relationship either:

- to the entity, or
- to a person referred to in rules 10.1.1 - 10.1.4,

is such that, in ASX's opinion, the transaction should be approved by security holders.

18. ASX has rarely used its discretion under listing rule 10.1.5 to require security holder approval of a transaction that did not sit squarely within listing rules 10.1.1 to 10.1.4 – indeed only once formally in the last 5 years.

19. However, it is conceivable that ASX might exercise its discretion under rule 10.1.5 in circumstances where, even though not strictly within rules 10.1.1 to 10.1.4, ASX took the view that there was present a relationship (beyond merely of a type specified in rules 10.1.1 – 10.1.4) where material influence might be brought to bear on the listed entity's decision to conclude the transaction.

20. To an extent, the discretion is also an anti-avoidance measure, and may be used where a transaction is structured in a way that would not in itself attract the operation of the rule. However, in exercising its discretion under listing rule 10.1.5, it is not ASX's practice to substitute a lower substantial holding threshold for the one specified in listing rule 10.1.3 – not even if the substantial shareholding is only slightly below that threshold. Likewise, ASX will not redefine the boundaries of "associate" as used in listing rule 10.1.4.

21. Because it is not possible to foresee all future fact scenarios, this Guidance Note should not be taken as indicating any limitation on the circumstances in which ASX may exercise its discretion within the ambit of the rule. Each case will be dealt with on its own circumstances.

Trusts: responsible entities

22. ASX is often approached for waivers from entities, which are responsible entities of listed trusts, which are proposing to acquire or sell a substantial asset of the trust to a company which is clearly a related party, associate or subsidiary of the responsible entity.
23. The exception for trusts in listing rule 10.3 applies if the responsible entity is not acting in its capacity as responsible entity of the listed trust on either the acquisition or the disposal. In other words, if the transaction will not have any effect on the assets of the listed trust, the exception in listing rule 10.3 should apply.
24. However ASX receives requests for waivers where the party seeking the waiver argues that the responsible entity is “only” acting in its capacity as responsible entity of the trust, and not in its own capacity. However, this is when listing rule 10.1 is meant to apply. If the responsible entity of a listed trust is selling a substantial asset belonging to the trust to a related party, the related party is in no less a position to influence or control the actions of a responsible entity, than related parties of other listed entities. Nor is the fact that the responsible entity is often not a beneficiary of the trust or a unitholder relevant to 10.1 concerns. As an analogy, often directors of listed entities are not shareholders in their companies. Listing rule 10.1 nevertheless applies to transactions between a listed entity and related parties of a director because a director is believed to be in a position of control of the listed entity and its assets. Similarly, the applicability of listing rule 10.1 to responsible entities of listed trusts does not depend on whether the responsible entity has units in the listed trust.
25. In situations however, where the responsible entity can demonstrate that neither it nor its related party on the other side of a substantial asset transaction derives any direct financial benefit (whether as unitholders of the listed trust or shareholders/unitholders of the related party, or by way of extra fees generated for either of them as a result of the transaction) ASX may consider giving the listed entity a waiver.

Stapled securities

26. ASX is routinely asked to grant waivers of 10.1 in the context of stapled securities. Often these consist of a listed company and a listed trust whose securities are “stapled” together and are quoted and traded on ASX under a single code. It is usually a condition of stapling that all the securities of the company be stapled to all of the securities of the trust. In these situations stapled security holders have the same proportional interest in the company as they do in the trust. It is therefore indifferent to security holders’ economic interests where the assets of the stapled entities are held. The company could hold 100%, or the trust could hold 100% and the interests of the stapled security holders would be the same.

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27. In these circumstances ASX will ordinarily grant a waiver from 10.1. The same reasoning applies to more complicated stapled structures where there may be 3 entities involved. So long as all securities of all 3 entities are stapled to each other, and a stapled security holder therefore has the same proportional interest in each of the 3 entities, one entity can dispose of or acquire a substantial asset to or from one of the other 2 entities, and there will be no adverse economic effect on stapled security holders.
28. The corollary of this reasoning is that if any entity in a stapled structure has any securities on issue which are not stapled, then a 10.1 waiver cannot be granted. For example, if one of the “stapled” entities were to do a preference share issue and those preference shares weren’t similarly stapled, the transfer of substantial assets to the entity issuing the preference shares from one of the other stapled entities could potentially be to the advantage of the preference shareholders, at the expense of stapled security holders. Conversely, the transfer of substantial assets from the stapled entity issuing the preference shares to another of the stapled entities could potentially benefit the stapled security holders.

What is a substantial asset?

29. Listing rule 10.2 defines an asset as substantial if its value or the value of the consideration for it is, or in ASX's opinion is, 5% or more of the "equity interest" of the entity as set out in the latest accounts given to ASX under the listing rules.
30. “Equity interests” are defined in Chapter 19 of the listing rules. ASX has been asked to allow the calculation of the asset’s value to be done by reference to more up-to-date accounts than those which have been most recently given to ASX under the listing rules. ASX has not, and will not, accede to that kind of request. Similarly, ASX will not consider waiving the rule to allow the calculation to be made on the basis of total assets rather than equity interests.

Report from an Independent Expert

31. Only in the most exceptional circumstances has ASX waived the requirement for an Independent Experts Report as required by rule 10.10.2. The listing rule requirements are triggered by circumstances that give rise to the potential for a conflict of interest. Whether the transaction is ‘fair’, ‘reasonable’ or otherwise on ‘arm’s length terms’ is not a consideration for ASX. ASX will not attempt to undertake this type of analysis because this is the role of the Independent Expert. For the same reason, ASX has only in exceptional circumstances considered waiving the rule because the argument is made that the transaction is patently transparent, fair or on commercial arms length terms.

Attachment

Corporations Act definitions (summaries)

Section 228

The Act includes as related parties of a public company:

- a) entities that control the company;
- b) directors of the company;
- c) directors of an entity that controls the company;
- d) if the company is controlled by an entity that is not a body corporate, each of the persons making up the controlling entity;
- e) spouses and de facto spouses of the people referred to in paragraphs (b), (c) and (d),
- f) the parents and children of the people referred to in paragraphs (b), (c), (d) and (e); and
- g) entities controlled by any of the people referred to in paragraphs (a), (b), (c), (d), (e) and (f), unless they are also controlled by the company.

Section 12

Under section 12 of the Corporations Act a person would be an associate of the substantial holder if the person is:

- a body corporate controlled by the substantial holder;
- a body corporate which controls the substantial holder;
- a body corporate controlled by an entity that controls the substantial holder;
- acting, or purporting to act, in concert with the substantial holder in relation to the listed entity's affairs; or
- is a person with whom the substantial holder has, or proposes to enter into an agreement, for controlling or influencing the composition of the listed entity's board or the conduct of the entity's affairs.

Sections 11 and 13-17

Where the related party being considered is a body corporate, the “associate” reference includes:

- any director or secretary of the body corporate;
- a related body corporate, and
- a director or secretary of a related body corporate.

“Associate” may also include:

- a person in partnership with the related party;
- a trustee of a trust in which the related body benefits, or is capable of benefiting;
- a director of a body corporate of which the related party is also a director;
- a person in concert with whom the related party is acting or proposes to act, and
- a person with whom the related party is, or proposes to become associated whether formally or informally in any other way in respect of the acquisition or disposal.