

## MANAGEMENT AGREEMENTS

<p><b>The purpose of this Guidance Note</b></p>	<ul style="list-style-type: none"> <li>• To assist listed entities to understand how ASX applies Listing Rules 1.1 condition 1 and 12.5 in relation to management agreements</li> <li>• To assist investment entities to understand the additional requirements that apply to their management agreements under Listing Rules 4.10.20 and 15.16</li> </ul>
<p><b>The main points it covers</b></p>	<ul style="list-style-type: none"> <li>• What is a management agreement?</li> <li>• The reasons why listed entities and managers might enter into a management agreement</li> <li>• The general requirement under the Listing Rules for a management agreement to be appropriate for a listed entity and the powers ASX may exercise if it is not</li> <li>• Examples of where a management agreement might not be appropriate for a listed entity</li> <li>• ASX's approach to determining whether a management agreement is appropriate for a listed entity and the impact that security holder approval has in that regard</li> <li>• The information investors should be given about a management agreement</li> <li>• ASX's approach to amendments to a management agreement</li> <li>• The additional requirements that apply to management agreements entered into by investment entities under Listing Rules 4.10.20 and 15.16</li> </ul>
<p><b>Related materials you should read</b></p>	<ul style="list-style-type: none"> <li>• Guidance Note 1 <i>Applying for Admission – ASX Listings</i></li> <li>• Guidance Note 6 <i>Trusts</i></li> <li>• Guidance Note 17 <i>Waivers and In-Principle Advice</i></li> </ul>

**History:** Guidance Note 26 amended 30/04/15. A previous version of this Guidance Note was issued on 08/08.

**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 to assist:

- entities admitted to the ASX official list in the ASX Listing category<sup>1</sup> to understand how ASX applies Listing Rules 1.1 condition 1 and 12.5 in relation to management agreements; and
- "investment entities"<sup>2</sup> to understand the additional requirements that apply to their management agreements under Listing Rules 4.10.20 and 15.16.

## 2. What is a management agreement?

The term "management agreement" is not defined in the Listing Rules. When used in the Listing Rules and in this Guidance Note, it is intended to capture any agreement<sup>3</sup> that an entity may enter into, directly or indirectly,<sup>4</sup> with an external party (the manager) to manage all or a substantial part of its assets or business.

The manager may be a third party unrelated to the entity or it may be someone who is or was a promoter<sup>5</sup> or related party<sup>6</sup> of the entity, or an associate.<sup>7</sup> The appointment of the manager may be for a fixed or indeterminate

<sup>1</sup> The Listing Rules that regulate management agreements (Listing Rules 1.1 condition 1, 4.10.20, 12.5 and 15.16) do not apply to entities admitted to the ASX Official List in the ASX Debt Listing category (Listing Rule 1.10) or the ASX Foreign Exempt Listing category (Listing Rule 1.15). Accordingly, unless the context otherwise requires, references in this Guidance Note to an "entity" are to an entity admitted, or applying to be admitted, to the ASX Official List in the ASX Listing category.

<sup>2</sup> The meaning of "investment entity" is explained in note 28 below.

<sup>3</sup> The reference to an "agreement" is intended to capture any agreement, arrangement or understanding, whether or not in writing.

<sup>4</sup> The reference to "indirectly" is intended to capture management agreements that an entity may enter into in the name of a child entity rather than in its own name (eg, an operating subsidiary that owns the assets or business to be managed by the manager).

<sup>5</sup> "Promoter" is defined in Listing Rule 19.12 to mean: (a) a person who has had a material involvement in, or who has provided a service to the entity or to a related party of the entity in relation to, either the entity's promotion or listing or the entity's initial public offering; (b) unless ASX decides otherwise, a substantial holder in the entity, if the person and the person's associates have a relevant interest in at least 10% of the voting securities at any time in the 12 months before the date of the application for admission to the official list; or (c) a person whose relationship with the entity or a person referred to in (a) or (b) is, in ASX's opinion, such that the person should be considered to be a promoter of the entity.

<sup>6</sup> "Related party" is defined in Listing Rule 19.12 to have the meaning in section 228 of the Corporations Act 2001 (Cth). That Act is referred to in this Guidance Note as the Corporations Act". Unless stated otherwise, references in this Guidance Note to a section of an Act are to a section of the Corporations Act.

period.<sup>8</sup>

For the avoidance of doubt, the term “management agreement” is not intended to capture:

- the arrangements between a listed trust and its responsible entity for managing of the affairs of the trust;<sup>9</sup> or
- agreements that a life insurance, superannuation, funds management or similar entity may enter into in the ordinary course with an asset manager to manage assets it holds in a fiduciary capacity rather than in its own right.

### 3. The reasons for entering into a management agreement

There are a variety of good commercial reasons why an entity and a manager might enter into a management agreement. From the entity’s perspective, these include:

- to secure the benefit of the manager’s experience and expertise in running assets or businesses similar to those of the entity;
- to align the expenses the entity will incur in running its business with the performance of the business;
- to incentivise the manager to achieve a higher than normal return on the entity’s assets or business; and
- in some cases, to comply with legislative requirements that a particular asset or business must be managed by a person with a particular qualification.

From the manager’s perspective, these include:

- to provide the manager with a defined revenue stream;
- to give the manager a fixed term over which to prove its management skills and to achieve a return for the entity and its investors;
- to free the manager from the distraction of a possible loss of management rights and allow it to focus on managing the entity’s assets or business; and
- where the manager is, or is an associate of, a promoter of the entity, to recompense the promoter for the time, trouble and costs it has incurred in acquiring and managing the entity’s portfolio of assets ahead of its listing.

Whether an entity chooses to enter into a management agreement and, if so, on what terms, are primarily matters for the entity’s board of directors,<sup>10</sup> the body charged with the legal responsibility for managing its business with due care and diligence.<sup>11</sup> The board must be satisfied that any management agreement it proposes to enter into is an appropriate and beneficial one for the entity and its security holders, and includes appropriate safeguards to protect its and their interests. This includes being satisfied that potential conflicts of interests are appropriately addressed in the management agreement.

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<sup>7</sup> “Associate” is defined in Listing Rule 19.12 to have the meaning given in sections 12 and 16 of the Corporations Act. Section 12 is to applied as if paragraph 12(1)(a) included a reference to the Listing Rules and on the basis that the entity is the “designated body” for the purposes of that section.

<sup>8</sup> For example, some management agreements operate until terminated by either party giving a notice to that effect to the other party. This Guidance Note applies to all management agreements, regardless of whether they are for a fixed or indeterminate period.

<sup>9</sup> These arrangements are internal to the trust and are usually set out in the constitution of the trust rather than in a separate management agreement. For ASX’s policy in relation to listed trusts, see Guidance Note 6 *Trusts*.

<sup>10</sup> References in this Guidance Note to the board of an entity mean, in the case of a listed company, the board of directors of the company and, in the case of a listed trust, the board of directors of the responsible entity of the trust.

<sup>11</sup> For companies and trusts established in Australia, see sections 180 and 601FD respectively of the Corporations Act. Companies and trusts established elsewhere are likely to be subject to similar laws in the jurisdictions where they are established.

In some cases, entering into a management agreement may require the approval of an entity's security holders.<sup>12</sup>

#### 4. A management agreement must be appropriate for a listed entity

When an entity enters into a management agreement, it affects the structure and operations of the entity, including the role of its board of directors. The board effectively devolves its ultimate responsibility for the day-to-day management of the assets or business in question to the manager for the term of the agreement and instead becomes ultimately responsible for supervising the performance of the manager under the agreement.<sup>13</sup>

Management agreements are therefore subject:

- in the case of an entity seeking admission to the official list, to the general requirement in Listing Rule 1.1 condition 1 that ASX is satisfied the entity's structure and operations are appropriate for a listed entity; and
- in the case of an entity already listed, to the general requirement in Listing Rule 12.5 that the entity's structure and operations continue to be appropriate for a listed entity.

#### 5. The powers ASX may exercise if a management agreement is not appropriate

If ASX forms the view that a management agreement, or a particular term of a management agreement, is not appropriate for a listed entity and:

- the entity is applying for admission to the official list, ASX may simply refuse the entity's application for admission or:
  - if the entity has not yet entered into the agreement, approve the application on the condition that the entity not enter into the agreement, or not to enter into the agreement with that particular term included; or
  - if the entity has already entered into the agreement, approve the application on the condition that the entity cancel the agreement, or amend the agreement to remove or modify that particular term;<sup>14</sup>
- the entity is already listed, ASX may give a direction to the entity:
  - if it has not yet entered into the agreement, not to enter into the agreement, or not to enter into the agreement with that particular term included; or
  - if it has already entered into the agreement, to cancel the agreement, or to amend the agreement to remove or modify that particular term.<sup>15</sup>

#### 6. Examples of where a management agreement might not be appropriate

There are a variety of reasons why a management agreement might not be appropriate for a listed entity. Some examples are:

- if the manager plainly does not have any experience or expertise in managing assets or businesses of the relevant kind;

<sup>12</sup> For example, under the statutory provisions regulating related party transactions (for companies and trusts established in Australia, Part 2E.1 of the Corporations Act) or under the general law regulating conflicts of persons occupying a fiduciary position.

<sup>13</sup> It is not uncommon for a management agreement to empower the manager to present investment opportunities to the entity to acquire further assets or businesses. In those cases, the board of the entity will typically have the final say over whether the entity proceeds with the acquisition. However, once the acquisition is approved by the board, the assets or businesses acquired will be managed by the manager under the management agreement.

<sup>14</sup> Through a combination of its powers under Listing Rules 1.1 condition 1 and 1.19.

<sup>15</sup> Through a combination of its powers under Listing Rules 12.5 and 18.8.

- if the agreement has an excessively long fixed term;
- if the agreement does not permit the entity to terminate the agreement in circumstances where the entity plainly should have that right (for example, where the manager is insolvent or is grossly derelict in its duties); and
- if the agreement requires the entity to make excessive payments to, or confers inappropriate rights or benefits on,<sup>16</sup> the manager if the agreement is terminated.<sup>17</sup>

### 7. ASX's approach to determining appropriateness

ASX's approach to determining whether a management agreement is appropriate for a listed entity varies, depending on whether or not the agreement has been approved by security holders with full disclosure of all material terms.

Where an entity's management agreement has not been approved by its security holders with full disclosure of all material terms, ASX will examine the terms of the agreement carefully to determine whether, in its opinion, the agreement is appropriate for a listed entity and, if it is not, what action ASX should take in that regard under Listing Rule 1.1 condition 1 or Listing Rule 12.5.

Where an entity's management agreement has been approved by its security holders with full disclosure of all material terms, ASX's general policy is not to second-guess their judgment as to the appropriateness of the agreement. It would therefore be highly unusual for ASX to take issue with a management agreement under Listing Rule 1.1 condition 1 or Listing Rule 12.5 where it has been approved by security holders.

For these purposes, security holder approval to a management agreement can be demonstrated in one of two ways:

- if the entity is not yet listed and is undertaking an initial public offering (IPO), by setting out all material information about the management agreement in the prospectus or product disclosure statement for the IPO and then attracting sufficient investor subscriptions to satisfy ASX's minimum spread requirement<sup>18</sup> and any minimum subscription condition that the entity has attached to its IPO;<sup>19</sup> or
- if the entity is already listed, by an ordinary resolution of security holders approving the management agreement, where all material information about the management agreement has been included in the notice convening the meeting of security holders and the manager and its associates have been the subject of a voting exclusion statement.<sup>20</sup>

In the former case, investors tacitly approve the management agreement through their support for the IPO.

In view of the powers that ASX may exercise if it considers a management agreement not to be appropriate for a listed entity, ASX would strongly encourage any entity that is already listed and that is proposing to enter into a management agreement either to seek security holder approval to the agreement or else to approach ASX before it enters into the agreement for in-principle advice as to the approach ASX is likely to take to the agreement under Listing Rule 12.5. This may help the entity to avoid the difficulties and embarrassment that it might otherwise face if ASX requires it to cancel or amend the agreement after it has been entered into on the basis that it was not appropriate for a listed entity.

<sup>16</sup> For example, a right to acquire the assets under management at price less than their fair value.

<sup>17</sup> These types of payments, rights or benefits tend to act as a "poison pill" and entrench the position of the manager.

<sup>18</sup> Listing Rule 1.1 condition 7. Note that the minimum spread requirement cannot be met using "artificial means". Guidance Note 1 *Applying for Admission – ASX Listings* has further guidance on what this means.

<sup>19</sup> ASX places no store in a security holder resolution approving a management agreement ahead of an IPO since that reveals nothing about the acceptability of the management agreement to investors at large. This is especially so where the manager is a promoter or an associate of a promoter of the entity.

<sup>20</sup> Listing Rule 14.11.

Guidance Note 17 *Waivers and In-Principle Advice* has further guidance on how to apply for in-principle advice. The application for in-principle advice should be accompanied by a copy of the proposed management agreement so that ASX can consider the matter in context.

## 8. Disclosure requirements

### 8.1 The initial disclosures that should be made to IPO investors or security holders

ASX would generally expect an entity applying for admission to the official list that has entered into, or proposes to enter into, a management agreement to include a summary of the material terms of the management agreement in its listing prospectus, product disclosure statement or information memorandum<sup>21</sup> and also to lodge a copy of the management agreement with ASX with its admission application.<sup>22</sup>

ASX would also generally expect an entity that is already listed and that is seeking approval to a management agreement via a security holder resolution, to disclose all material terms of the management agreement in the notice convening the requisite meeting of security holders or in an accompanying explanatory memorandum.<sup>23</sup> Since such a resolution is not technically an approval under the Listing Rules, the notice of meeting proposing the resolution and any accompanying explanatory memorandum are not required to be given in draft to ASX for examination under Listing Rule 15.1.7. However, in view of the consequences that may follow if the notice of meeting and any accompanying explanatory memorandum do not disclose all material terms of the management agreement to ASX's satisfaction, ASX is happy to receive drafts of those documents for review and will tell the entity within 5 business days whether it objects or that it needs more time to examine the documents, in the same manner as if they were lodged under Listing Rule 15.1.7.

In ASX's experience, prospective IPO investors and security holders are likely to find the following information about a management agreement material:

#### *Services:*

- A summary of the services to be provided by the manager, including a description of:
  - any investment mandate that the manager must follow in performing the agreed services; and
  - any performance benchmark that the manager must endeavour to meet, or will be measured against, in performing the agreed services and the consequences (if any) of that benchmark not being met.

#### *Term:*

- The duration of the agreement.

<sup>21</sup> Listing Rule 1.1 condition 3 requires an entity applying for admission to the official list to have lodged a prospectus or product disclosure statement (PDS) with ASIC or, if ASX agrees, an information memorandum instead of a prospectus or PDS. A prospectus for securities must set out all the information that investors and their professional advisers would reasonably require, and reasonably expect to find in the prospectus, to make an informed assessment of the rights and liabilities attaching to the securities and of the issuer's assets and liabilities, financial position and performance, profits and losses and prospects (section 710 of the Corporations Act). A PDS for other financial products must include all information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to acquire the product (section 1013E of the Corporations Act). An information memorandum must include the same information as a prospectus or PDS (Listing Rules 1.4.1 and 1.4.2).

In ASX's view, information about a management agreement of the type referred to in this Guidance Note is likely to be material information for investors and therefore required to be included in an entity's prospectus, PDS or information memorandum.

<sup>22</sup> An entity applying for admission as an ASX Listing must lodge a copy of all material contracts referred to in its listing prospectus, PDS or information memorandum (see item 40 of the 'Information Form and Checklist – ASX Listing' that must accompany an Appendix 1A application for admission, available for download on the ASX website at <http://www.asx.com.au/regulation/compliance/compliance-downloads.htm>). ASX would generally expect a management agreement to be included in the material contracts disclosed in its listing prospectus, PDS or information memorandum.

<sup>23</sup> A notice of meeting must include such material as will fully and fairly inform security holders of the matters to be considered at the meeting and enable them to make a properly informed judgment on those matters (see *Bulfin v Bebarfalds Ltd* (1938) 38 SR (NSW) 423 and *Chequepoint Securities Ltd v Claremont Petroleum NL* (1986) 11 ACLR 94).

- Whether the agreement may be renewed or extended at the end of its term and, if so, the procedures for that to occur.
- Whether security holder approval is required, or will be sought, before the entity renews or extends the agreement.
- How the entity proposes to manage its assets or business after the agreement expires.

### *Exclusivity:*

- Whether the entity is precluded from appointing someone else to provide services of the kind being provided by the manager.
- Whether the manager is precluded from providing management services to anyone else of a similar kind to those being provided to the entity.

### *Management fees and other consideration:*

- The consideration to be paid or provided by the entity to the manager under the agreement, however it is characterised and whether or not it is in the form of a cash payment. This includes, without limitation:
  - all fees payable to the manager, however they are characterised and whenever they are payable;
  - any right the manager may have to be issued securities of the entity<sup>24</sup> (whether in satisfaction of the amounts due under the management agreement or otherwise) including, where applicable, the number of securities in question and the basis on which the issue price will be calculated; and
  - any entitlement the manager may have to be reimbursed for out-of-pocket expenses or to have the entity pay for third party charges incurred by the manager.

In the case of fees or rights to securities that are determined by reference to the performance of the assets under management, it may be appropriate to include worked examples.

- A summary of any provisions that allow the consideration to be paid or provided by the entity to the manager under the agreement to be reviewed or varied over the term of the agreement.

### *Termination:*

- The circumstances in which the entity has the right to terminate the management agreement.
- The circumstances in which the manager has the right to terminate the management agreement.
- The procedures that must be followed by either party when terminating the agreement (for example, what period of notice must be given).
- How the entity proposes to manage its assets or business if the management agreement is terminated before its scheduled expiry?

### *Amendment:*

- The procedures for making any amendments to the management agreement.
- Whether security holder approval is required, or will be sought, for any material amendment to the management agreement.

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<sup>24</sup> Depending on the circumstances, the right to be issued with such securities may require approval from the entity's security holders under Listing Rule 10.11.

### *Powers and discretions:*

- The powers and discretions the manager will have under the management agreement (including, in particular, any powers it may have to acquire new assets for, or to dispose of assets of, the entity).
- The powers and discretions retained by the entity under the agreement (including, in particular, whether the board of the entity is required to approve any acquisition or disposal of assets proposed by the manager).

### *Management of potential conflicts:*

- If the manager is permitted to provide management services to someone else of a similar kind to those being provided to the entity, what processes will the manager have in place to protect the confidentiality of information related to the entity and its assets under management and to manage any potential conflicts that may arise between the interests of its various clients.
- If the manager is empowered to engage a related party to provide ancillary services (for example, to provide brokerage or advisory services in relation to any acquisition or disposal of assets), what processes will be in place to ensure that this power is properly exercised and that any fees charged to the entity for the provision of those ancillary services are appropriate and reasonable.
- What processes will be in place to manage the potential conflicts if the manager proposes to the entity that it acquire assets from, or dispose of assets to, the manager or an associate of the manager.<sup>25</sup>

### *Other material terms:*

- Any provisions triggered by a change of control of the entity or the manager.
- Any option, pre-emptive right, right of first refusal or other right the manager may have to acquire any of the assets under management.
- Any material right of indemnity or exclusion from liability the manager may have under the agreement.
- Any other material term of the management agreement not mentioned previously.

## **8.2 Ongoing disclosures**

Where an entity is admitted to the official list and its listing documentation indicates that it has entered into, or proposes to enter into, a management agreement, ASX will generally impose a condition<sup>26</sup> on the admission of the entity that it must disclose either an up-to-date copy of the management agreement, or an up-to-date summary of the material terms of the management agreement, on its website or in its annual report for the duration of the agreement. This is so that current and prospective investors have ready access to information about the management agreement and can factor that into their investment decisions.

ASX does not have the power to impose a condition on the admission of a listed entity after it has been admitted to the official list. ASX therefore cannot impose a similar requirement on a listed entity that enters into a management agreement after it has been admitted. Nevertheless, as a matter of good governance and transparency, ASX would strongly encourage any listed entity that enters into a management agreement after it has been listed, to disclose either an up-to-date copy of the management agreement, or an up-to-date summary of the material terms of the management agreement, on its website or in its annual report for the duration of the agreement.

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<sup>25</sup> Depending on the circumstances, such acquisitions or disposals may require approval from the entity's security holders under Listing Rule 10.1.

<sup>26</sup> Using its powers in that regard under Listing Rule 1.19.

## 9. Amendments to a management agreement

Where an entity is admitted to the official list and its listing documentation indicates that it has entered into, or proposes to enter into, a management agreement, ASX will generally impose a condition<sup>27</sup> on the admission of the entity that any material amendment to the management agreement must be approved by an ordinary resolution of security holders in relation to which the manager and its associates have been the subject of a voting exclusion statement. This is on the basis that investors will have tacitly approved the entry of the management agreement through their support of the IPO, and therefore any material amendment to the agreement should likewise be subject to their approval.

Again, ASX does not have the power to impose a condition on the admission of a listed entity after it has been admitted to the official list. ASX therefore cannot impose a similar requirement on a listed entity that enters into a management agreement after it has been admitted. Nevertheless, as a matter of good governance and transparency, ASX would strongly encourage any listed entity that enters into a management agreement after it has been listed, to submit both the agreement and any subsequent material amendment it proposes to make to the agreement to security holders for approval and to include a voting exclusion statement in relation to the manager and its associates. Entities that choose not to do so run the risk that ASX may determine that the agreement, or the amendment to the agreement, is not appropriate for a listed entity, with the consequences indicated earlier.

Some examples of amendments to a management agreement that ASX considers would be material for these purposes include any change:

- extending the term of the agreement;
- increasing the fees or other entitlements of the manager under the agreement; or
- restricting the circumstances in which the entity may terminate the agreement or expanding the circumstances in which the manager may terminate the agreement.

## 10. Additional requirements applicable to investment entities

### 10.1 What is an “investment entity”?

An “investment entity” is an entity that, in ASX’s opinion, has as its sole or principal activity investing, directly or through a child entity, in listed or unlisted securities or derivatives and whose objectives do not include exercising control over or managing any entity, or the business of any entity, in which it invests.<sup>28</sup>

An investment entity is therefore essentially a passive investor in securities or derivatives. Entities that primarily invest in other classes of assets – for example, infrastructure, energy or property funds – or that invest in securities or derivatives for the purpose of acquiring control of the entities in which they invest, are not investment entities for the purposes of the Listing Rules.

Entities that primarily invest other people’s assets rather than their own – for example, life companies, superannuation funds and fund managers – are also not investment entities for the purposes of the Listing Rules.

The Listing Rules impose a number of specific requirements for any management agreement an investment entity may enter into.<sup>29</sup> These are in addition to the general requirement mentioned previously that any management agreement an entity enters into must be appropriate for a listed entity.

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<sup>27</sup> Again, using its powers in that regard under Listing Rule 1.19.

<sup>28</sup> Listing Rule 19.12.

<sup>29</sup> There are other specific requirements that apply to an investment entity under the Listing Rules. For example, to be eligible for admission to the ASX Official List, an investment entity must have net tangible assets of at least \$15 million (after deducting the costs of fund raising) or it must be a pooled development fund and have net tangible assets of at least \$2 million (after deducting the costs of fund raising): Listing Rule 1.3.1A. An investment entity must disclose in its annual report the investments it and its child entities hold as at the balance date, the number of transactions in securities and derivatives undertaken during the reporting period and the total brokerage paid

### 10.2 Annual disclosure requirements

Listing Rule 4.10.20 requires the annual report of an investment entity to disclose:

- a summary of any management agreement that the entity has entered into; and
- the total amount paid or accrued in management fees during the reporting period.

Listing Rule 4.10.20 should be interpreted and applied in accordance with its spirit, intention and purpose.<sup>30</sup> Accordingly, if an investment entity has entered into a management agreement in the name of a child entity<sup>31</sup> rather than in its own name, it must still disclose a summary of that agreement, and the total amount paid or accrued in management fees under that agreement, in accordance with Listing Rule 4.10.20.

An investment entity can meet the requirement to disclose a summary of any management agreement that the entity has entered into in its annual report by including in its annual report a hyperlink to a page on its website where an up-to-date copy of the management agreement, or an up-to-date summary of the material terms of the management agreement, is available.

The term “management fees” is not defined in the Listing Rules. In ASX’s opinion, it includes any consideration paid or provided by the entity to the manager for the provision of its services under the management agreement, however it is characterised and whether or not it is in the form of a cash payment. For the avoidance of doubt, this includes, without limitation:

- any amounts the manager may receive over and above its base management fee, such as performance fees, success fees, bonuses and the like; and
- any securities of the entity the manager may be issued under the management agreement in lieu of receiving fees in cash.

### 10.3 Termination requirements

Listing Rule 15.16<sup>32</sup> requires a management agreement for an investment entity to provide that:

- (a) the manager may only end the management agreement if it has given at least 3 months’ notice;
- (b) if the term of the agreement is fixed, it must not be for more than 5 years; and
- (c) if the agreement is extended past 5 years, it will be ended on three months’ notice after an ordinary resolution is passed to end it.

The requirement in Listing Rule 15.16(b) that the fixed term of a management agreement must be no longer than 5 years recognises the importance that investors attribute to there being an active market for corporate control and is intended to prevent the entrenchment of a manager for an excessively long period.

ASX acknowledges that this 5 year limitation may be unduly constraining in some circumstances and in those cases will look favourably upon a request for a waiver from Listing Rule 15.16(b) to permit an entity to enter into a management agreement with a fixed term of up to a maximum term of 10 years, provided that longer term has

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or accrued during that period: Listing Rule 4.10.20. It must also disclose its net tangible asset backing on a monthly basis: Listing Rule 4.12.

<sup>30</sup> Listing Rule 19.2.

<sup>31</sup> For example, in the name of an operating child entity that happens to own the securities or derivatives being managed.

<sup>32</sup> Listing Rule 15.16 was introduced on 1 September 1999. Listing Rule 15.16 does not apply an investment entity admitted to the ASX Official List before 1 September 1999 where no restrictions were imposed by ASX on the term of its management agreement at the time of its admission (Listing Rule 15.16.1). As a matter of construction, ASX considers that this exclusion only applies to a management agreement that an investment entity admitted to the ASX Official List before 1 September 1999 had entered into at the time of its admission. Any management agreement entered into by such an entity after its admission and after 1 September 1999 is subject to Listing Rule 15.16.

been approved by security holders. For these purposes, security holder approval again can be demonstrated in one of two ways:

- if the entity is not yet listed and is undertaking an initial public offering (IPO), by setting out all material information about the management agreement in the prospectus or product disclosure statement for the IPO and then attracting sufficient investor subscriptions to satisfy ASX's minimum spread requirement and any minimum subscription condition that the entity has attached to its IPO; or
- if the entity is already listed, by an ordinary resolution of security holders approving the management agreement, where all material information about the management agreement has been included in the notice convening the meeting of security holders and the manager and its associates have been the subject of a voting exclusion statement.

In each case, the information disclosed about the proposed management agreement should include a reasonably prominent disclosure that the term of the agreement is longer than the 5 years permitted under Listing Rule 15.16 and give clear and cogent reasons why the entity considers the longer term is necessary.

ASX would strongly recommend that an entity intending to seek a waiver from Listing Rule 15.16(b) first apply for in-principle advice from ASX on its preparedness to grant the waiver before finalising its IPO documentation (in the first instance above) or its notice of meeting documentation (in the second instance above). By doing this, the entity can have a high degree of certainty about ASX's position and can reflect that position in the relevant documentation.

Again, Guidance Note 17 *Waivers and In-Principle Advice* has further guidance on how to apply for in-principle advice. The application for in-principle advice should be accompanied by a copy of the proposed management agreement and the disclosures to be made about it in the entity's IPO documentation (in the first instance above) or its notice of meeting documentation (in the second instance above) so that ASX can consider the matter in context.

Where ASX does grant a waiver of Listing Rule 15.16(b) to permit a management agreement to have a fixed term of longer than 5 years, it will be conditional on Listing Rule 15.16(c) applying after the expiry of that fixed term. In other words, if the agreement is extended past the fixed term, it will end on three months' notice after an ordinary resolution is passed to end it.