

ISSUES OF EQUITY SECURITIES TO PERSONS IN A POSITION OF INFLUENCE

<p>The purpose of this Guidance Note</p>	<ul style="list-style-type: none"> 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
<p>The main points it covers</p>	<ul style="list-style-type: none"> The requirement in Listing Rule 10.11 for an entity's security holders to approve an issue of equity securities to a related party or a person whose relationship with the entity or a related party of the entity is, in ASX's opinion, such that approval should be obtained The exceptions to Listing Rule 10.11 in Listing Rule 10.12 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 a person whose relationship with the entity or a director or associate of a director is, in ASX's opinion, such that approval should be obtained The requirements for notices of meeting proposing a resolution to approve an issue of equity securities under Listing Rule 10.11 or 10.14 The powers ASX may exercise if an entity issues equity securities in breach of Listing Rule 10.11 or 10.14
<p>Related materials you should read</p>	<ul style="list-style-type: none"> Guidance Note 17 <i>Waivers and In-Principle Advice</i> Guidance Note 21 <i>The Restrictions on Issuing Equity Securities in Chapter 7 of the Listing Rules</i> Guidance Note 22 <i>Notification of Directors' Interests</i> Guidance Note 24 <i>Acquisitions and Disposals of Substantial Assets Involving Persons in a Position of Influence</i> Guidance Note 30 <i>Applying for Quotation of Additional Securities</i>

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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 Listing¹ to understand and comply with the framework in Listing Rules 10.11 – 10.16 regulating issues of equity securities² 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 whose relationship with the entity or a related party is, in ASX’s opinion, such that approval should be obtained.

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

For convenience, the parties mentioned in Listing Rule 10.11.2 are referred to in this Guidance Note as “closely connected parties”.

Listing Rule 10.14 provides:

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

10.14.1 A director of the entity.

10.14.2 An associate of a director of the entity.

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, in ASX’s opinion, such that approval should be obtained.

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

Again, for convenience, the parties mentioned in Listing Rules 10.14.2 and 10.14.3 are also referred to in this Guidance Note as “closely connected parties”.

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,³ or agrees to issue,⁴ any equity securities⁵ to a related or other closely connected party unless:

¹ 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). References in this Guidance Note to a listed entity or entity mean an entity admitted to the ASX official list as an ASX Listing.

² 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.

³ 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.

⁴ Where an agreement to issue equity securities to a related or other closely connected 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.

⁵ As defined in note 2 above.

- 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.⁶

Listing Rules 10.11 operates side-by-side with Chapter 2E of the Corporations Act 2001 (Cth),⁷ which regulates transactions between a public company or registered managed investment scheme⁸ 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.⁹

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.¹⁰ 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 terms¹¹ and reasonable remuneration.¹²

2.2 The policy underpinning the rule

The policy that underpins Listing Rule 10.11 starts from the premise that a related or other closely connected party of an entity 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 related or other closely connected 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 entity¹³ of the trust (“RE”)) 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. Related or closely connected parties who will participate in the issue and their associates are precluded from voting on the resolution to approve it.

2.3 Who is a “related party”?

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

⁶ 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.

⁷ 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.

⁸ On its face, Chapter 2E applies to transactions between a public company and its related parties. Part 5C.7 of the Corporations Act, however, effectively 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 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.

⁹ See sections 208 and 601LA.

¹⁰ See section 229(3)(e).

¹¹ Section 210.

¹² Section 211.

¹³ “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 opinion performs a substantially equivalent role in relation to the trust as the responsible entity performs in relation to a registered managed investment scheme (see Listing Rule 19.12).

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) entities controlled by anyone referred to in (i) – (v) above unless they are 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.¹⁴

Where the listed entity is a 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 other than in its capacity as RE of the trust;
- (viii) entities controlled by anyone referred to in (ii) – (vii) above unless they are also controlled by the RE 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.¹⁵

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 a trust, of the RE) and the other entities they control are referred to as "group entities".

¹⁴ 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.

¹⁵ Paragraph (b) 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".

2.4 The responsibility for identifying related parties

It is the responsibility of a listed entity to identify whether it is issuing equity securities to a related 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 so that it can comply with Chapter 2E (or equivalent overseas legislation) and the various accounting requirements applicable to transactions with related parties.¹⁶

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 related party.

In the case of an offer under a prospectus, PDS or other offer document, the entity may not necessarily know in advance whether related parties intend to participate in the offer. In that case, if the entity is not intending to seek security holder approval to allow related parties to take up the offer, the entity should include in the offer document a condition that related parties are precluded from accepting the offer and implement processes to check that any acceptances of the offer by a related 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 that group entities, any directors of group entities, any prescribed relatives of those directors, and any 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 entity¹⁷ and to exercise due care and diligence to avoid causing the entity to breach the Listing Rules.¹⁸ 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.

¹⁶ See Accounting Standard AASB 124 *Related Party Disclosures*.

¹⁷ 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.

¹⁸ 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 *Shafroon 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.

2.5 When will ASX apply Listing Rule 10.11.2 to other closely connected parties?

ASX has a general discretion under Listing Rule 10.11.2 to require that security holders approve an issue of equity securities to someone who is not a related party of the entity but whose relationship with the entity or a related party of the entity is, in ASX's opinion, such that approval should be obtained.

Given the breadth of the definition of "related party", 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.

One common circumstance where ASX will consider applying Listing Rule 10.11.2 to an issue of securities is where the recipient of the securities and/or its related parties hold a sufficiently large percentage of the ordinary securities in the entity that they can be presumed to exercise significant influence over its affairs. For these purposes, ASX will generally treat an aggregate holding of:

- 30% or more of an entity's ordinary securities; or
- any lesser percentage of an entity's ordinary securities where the holder(s) have nominated a director to the board of the entity pursuant to an agreement, arrangement or understanding with the entity (whether legally enforceable or not) which gives them a right or expectation to do so,

as giving its holder(s) significant influence over the affairs of the entity.

Other examples of where ASX may apply Listing Rule 10.11.2 to an issue of securities include where the recipient of the securities is:

- a person or entity who has a close connection to a related party but who is not necessarily an associate of that related party and ASX suspects that the transaction may have been deliberately structured in that way to avoid the operation of Listing Rule 10.11;¹⁹
- 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;²⁰ and
- someone who the entity is arguing is not a related party but ASX has a contrary view – in which case, ASX may resolve that argument by applying Listing Rule 10.11.2 to the person.

Ordinarily, ASX would not exercise its discretion to apply Listing Rule 10.11.2 to someone who is the chief executive officer ("CEO") of an entity and who is not a director or otherwise a related party of the entity, 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,

¹⁹ 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 10.11.2 to the sibling. In this scenario, ASX considers it not unreasonable to assume 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.

²⁰ 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.

acting in accordance with its statutory and common law duties,²¹ can be presumed to have exercised an independent judgment 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 10.11.2 to an issue of equity securities to a CEO or to someone closely connected with a CEO. These include where:

- the CEO and his or her related parties²² have a sufficiently large percentage of the ordinary securities in the entity that they can be presumed to exercise significant influence over its affairs;²³
- a close relative of the CEO or someone with whom the CEO has close business or personal ties is a director of the entity; or
- the terms of the issue are so uncommercial as to call into question whether the board has properly exercised an independent judgement.

2.6 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 scheme²⁴ or a dividend or distribution plan²⁵ or as a consequence of the conversion of any convertible securities.²⁶ 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 10.11,²⁷ therefore, will likely have to be notified to ASX under Listing Rule 3.10.3 immediately if it is “proposed”.

ASX interprets the word “immediately” in the leader to Listing Rule 3.10.3 as having the same meaning as in Listing Rule 3.1 – that is, “promptly and without delay”.²⁸

ASX also interprets the reference to a “proposed issue of securities” in Listing Rule 3.10.3 as meaning an issue of securities that the entity is committed to proceeding with, and not merely an issue of securities that it may be contemplating.²⁹

Bringing these two concepts together, ASX considers that an entity will be obliged to notify ASX of a proposed issue of securities under Listing Rule 3.10.3 promptly and without delay after:

- if the issue is a placement, the entity has entered into a legally binding agreement with the placee for the placement;

²¹ 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.

²² The list of persons and entities who are related parties of an individual is set out in paragraph (c) of the definition of “related party” in Listing Rule 19.12. That list, in so far as it applies to a director, is set out in the text accompanying note 102 below. The same list applies to a CEO (with references to a director replaced by references to the CEO).

²³ As noted in the text above, in the absence of proof to the contrary, ASX will generally treat an aggregate holding by the CEO and his or her related parties of 30% or more of an entity’s ordinary securities as giving the CEO significant influence over the affairs of the entity.

²⁴ 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.

²⁵ A proposed issue under a dividend or distribution plan is notified to ASX via an Appendix 3A.1.

²⁶ 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.

²⁷ 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.

²⁸ See section 4.5 of Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B*.

²⁹ This is consistent with the manner in which ASX interprets the phrase “incomplete proposal” in Listing Rule 3.1A (see section 5.4 of Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B*) and the phrase “proposes to make a significant change ... to the nature or scale of its activities” in Listing Rule 11.1 (see section 2.12 of Guidance Note 12 *Significant Changes to Activities*).

- if the issue will arise from an underwritten offer of securities, the entity has entered into an underwriting agreement with the underwriter;³⁰
- if the issue will arise from a non-underwritten offer of securities, the board or any other organ of the entity (such as a board committee) to which the board has delegated the power to decide to make the offer, formally resolves to proceed with the offer;³¹ or
- the entity is otherwise committed to proceeding with the issue.³²

Guidance Note 30 *Applying for Quotation of Additional Securities* 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”³³ of a director, the entity must also give ASX an Appendix 3Y within 5 business days of the change occurring.³⁴

2.7 The application of Listing Rule 10.11 to listed trusts

Listing Rule 10.11 potentially has a wider application to listed trusts than listed companies by dint of the fact that the related parties of a 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 a listed trust to:

- the RE in its personal capacity;
- a related body corporate of the RE;
- another trust³⁵ 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 and will require security holder approval unless an exception in Listing Rule 10.12 applies.

³⁰ Where an underwritten offer is being made under a disclosure document, PDS or information memorandum, as a practical matter, the entity will need to enter into the underwriting agreement before it lodges its disclosure document or PDS for the offer with ASIC or issues its information memorandum to prospective investors. Accordingly, the very latest an entity should be notifying ASX of the proposed issue is immediately upon lodging the disclosure document or PDS with ASIC or issuing the information memorandum to prospective investors.

³¹ Where a non-underwritten offer is being made under a disclosure document, PDS or information memorandum, as a practical matter, the board or its delegate will need to formally approve the making of the offer before the entity lodges its disclosure document or PDS for the offer with ASIC or issues its information memorandum to prospective investors. Accordingly, the very latest an entity should be notifying ASX of the proposed issue is immediately upon lodging the disclosure document or PDS with ASIC or issuing the information memorandum to prospective investors.

³² The references in the text to an entity otherwise being committed to proceeding with an issue of securities is intended to capture those situations where an entity may become legally bound to proceed with the issue without having signed a legally binding agreement (eg, through the principles of estoppel). It is also intended to capture those situations where an entity enters into an arrangement or understanding committing itself to proceed with an issue of securities without having signed a legally binding agreement. Once the entity is so committed, the transaction is no longer an incomplete proposal.

³³ As defined in Listing Rule 19.12.

³⁴ Listing Rule 3.19A. See also Guidance Note 22 *Notification of Directors’ Interests*.

³⁵ 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.

2.8 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,³⁶ ASX will only waive the central requirement for security holders to approve an issue of equity securities to a related or closely connected party in exceptional circumstances, 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, either itself or through its connections to the board or a controlling security holder (or, in the case of a listed trust, to the RE of the trust) influencing the terms of the issue to favour themselves at the expense of the entity. The bar in this regard is high.

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 securities to them or to someone connected to them will not be sufficient to establish an absence of influence.

2.9 ASX's approach to giving in-principle advice on the application of Listing Rule 10.11.2

ASX is sometimes approached to give in-principle advice that it will not apply Listing Rule 10.11.2 in relation to an issue of equity securities to a particular person.

For ASX to give that advice, it again has to be satisfied that there is no reasonable prospect of the recipient of the securities, either itself or through its connections to the board or a controlling security holder (or, in the case of a listed trust, to the RE of the trust) influencing the terms of the issue. 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 related 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 10.11.2 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.³⁷ 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 related 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.

³⁶ 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 the 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.

³⁷ 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.

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 related or other closely connected 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 related and other closely connected parties operates as intended.

3.2 Exception 1 – pro rata issues

Listing Rule 10.12 exception 1³⁸ excludes from Listing Rule 10.11 an issue to holders of ordinary securities made under a pro rata issue,³⁹ 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.

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.⁴⁰

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.⁴¹ 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.⁴²

3.3 Exception 2 – underwritings of pro rata issues

Listing Rule 10.12 exception 2⁴³ excludes from Listing Rule 10.11 an issue of securities to an underwriter under an agreement to underwrite the shortfall⁴⁴ 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.

³⁸ 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.

³⁹ 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 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).

⁴⁰ 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.

⁴¹ 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.

⁴² See also the note to Listing Rule 10.12 exception 1.

⁴³ 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.

⁴⁴ 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.

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.⁴⁵

To qualify for this exception, the entity must have disclosed in the Appendix 3B lodged under Listing Rule 3.10.3 in relation to the pro rata issue:

- the name of the underwriter;
- the extent of the underwriting;
- the fee or commission payable to the underwriter; and
- a summary of the material circumstances where the underwriter has the right to avoid or change their obligations.

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.⁴⁶ If a related or other closely connected party is sub-underwriting, rather than underwriting, a pro rata issue, then to fit within this exception the details disclosed in the Appendix 3B lodged under Listing Rule 3.10.3 in relation to the pro rata issue 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 where they have the right to avoid or change their obligations as sub-underwriter.⁴⁷

To fit within this exception, the arrangement with the underwriter must constitute a genuine 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

⁴⁵ 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.”

⁴⁶ See the definition of “underwrite” in section 9 of the Corporations Act and Listing Rule 19.3.

⁴⁷ See the note to Listing Rule 10.12 exception 2. The Appendix 3B asks whether a party referred to in Listing Rule 10.1.1 to 10.1.5 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.

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.”⁴⁸

It should be noted that exception 2 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 related or other closely connected party if security holder approval is first obtained under Listing Rule 10.11.

3.4 Exception 3 – DRPs

Listing Rule 10.12 exception 3⁴⁹ 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.

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 related or other closely connected party will not qualify under exception 3 and will therefore require security holder approval 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.⁵⁰ Accordingly, a related or other closely connected 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 4⁵¹ 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 price⁵² 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.

⁴⁸ 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.

⁴⁹ 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.

⁵⁰ 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.

⁵¹ 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.

⁵² “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

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 \$15,000 cap imposed by ASIC (see below).

An SPP is defined to have the same meaning as a “purchase plan” in ASIC Class Order CO 09/425 *Share and interest purchase plans*.⁵³ This Class Order allows ASX listed companies and managed investment schemes to offer securities to existing members without a prospectus or PDS provided they meet certain conditions 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.⁵⁴

For an entity to qualify for the relief in Class Order CO 09/425, the following conditions must be satisfied:⁵⁵

- 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 \$15,000 worth of securities under the class order 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; 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 class order relief (excluding securities applied for by the custodian on behalf of a beneficiary but not issued) is not more than \$15,000;
- 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 Class Order CO 09/425 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 Class Order CO 09/425 and will therefore have to prepare a prospectus or PDS for the offer under the SPP.

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.

⁵³ Listing Rule 19.12. See also ASIC Regulatory Guide 125 *Share purchase plans*.

⁵⁴ See paragraph (a) of the definition of “purchase plan” in ASIC Class Order CO 09/425. [ASX notes that this Class Order is due to be replaced shortly.]

⁵⁵ This is a summary only of the conditions that must be satisfied to qualify for the relief provided in ASIC Class Order CO 09/425. Entities wishing to rely on that relief should read that Class Order in full.

Exception 4 does not apply to an issue of securities under an agreement to underwrite the shortfall on an SPP. Accordingly, a related or other closely connected 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.

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 7.3.9⁵⁶ 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.⁵⁷

3.6 Exception 5 – takeovers and mergers

Listing Rule 10.12 exception 5⁵⁸ 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 related or other closely connected 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.⁵⁹ ASX

⁵⁶ 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.

⁵⁷ 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.

⁵⁸ 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).

⁵⁹ 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

will also consider granting a waiver to extend exception 5 to an entity making a takeover offer for, or merging with, 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.⁶⁰

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 arrangement⁶¹ and there is no exception to Listing Rule 10.1 comparable to Listing Rule 10.12 exception 5.⁶² Listing Rule 10.1 will apply if someone who is a related or other closely connected party of the entity 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 Rules⁶³). 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 6⁶⁴ 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 10.11⁶⁵ 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.⁶⁶ 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.⁶⁷

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.

⁶⁰ ASX has granted such waivers in relation to takeovers or mergers under the laws of the US, UK, New Zealand, Canada, Papua New Guinea, Singapore and Canada.

⁶¹ See generally Guidance Note 24 *Acquisitions and Disposals of Assets Involving Persons in a Position of Influence*.

⁶² The third bullet point of Listing Rule 10.3 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.

⁶³ See Listing Rule 10.2.

⁶⁴ There is an equivalent exception in Listing Rule 7.2 exception 8.

⁶⁵ 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.

⁶⁶ 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*.

⁶⁷ Listing Rule 4.10.21.

3.8 Exception 7 – conversion of convertible securities

Listing Rule 10.12 exception 7⁶⁸ excludes from Listing Rule 10.11 an issue of securities resulting from the conversion of convertible securities.⁶⁹ 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 Rules⁷⁰ or result in the entity not having an appropriate structure for a listed entity,⁷¹ or it is otherwise appropriate for ASX to exercise its discretion to refuse the application.⁷²

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:⁷³

- the name of the person to whom the entity issued the convertible securities;
- which category in rules 10.11.1 – 10.11.2 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.

⁶⁸ 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.

⁶⁹ 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).

⁷⁰ 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.

⁷¹ Listing Rule 1.1 condition 1. See also section 3.1 of Guidance Note 1 *Applying for Admission – ASX Listings*.

⁷² Listing Rule 1.19. See also section 2.8 of Guidance Note 1 *Applying for Admission – ASX Listings*.

⁷³ 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,⁷⁴ 7.6 or 7.9.⁷⁵

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

Listing Rule 10.12 exception 8⁷⁶ 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,⁷⁷ 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 9⁷⁸ 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 scheme⁷⁹ 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 10⁸⁰ 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 Listing Rules, any subsequent issue of securities in accordance with the agreement does not require security holder approval under Listing Rule 10.11.

⁷⁴ 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.

⁷⁵ See Guidance Note 21 *The Restrictions on Issuing Equity Securities in Chapter 7 of the Listing Rules*.

⁷⁶ 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.

⁷⁷ 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.

⁷⁸ There is an equivalent exception in Listing Rule 7.2 exception 15. See also Listing Rule 10.16.

⁷⁹ 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).

⁸⁰ There is an equivalent exception in Listing Rule 7.2 exception 16.

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 discretion to refuse the application.⁸¹

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:⁸²

- the name of the person to whom the entity has agreed to issue the securities;
- which category in rules 10.11.1 – 10.11.2 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,⁸³ 7.6 or 7.9.⁸⁴

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

Listing Rule 10.12 exception 11⁸⁵ 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 related or other closely connected 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 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.

⁸¹ See the Listing Rules cited in notes 70, 71 and 72 above.

⁸² 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.

⁸³ 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.

⁸⁴ See Guidance Note 21 *The Restrictions on Issuing Equity Securities in Chapter 7 of the Listing Rules*.

⁸⁵ There is an equivalent exception in Listing Rule 7.2 exception 17.

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.⁸⁶ 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,⁸⁷ can be presumed to have exercised an independent judgment 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 10.11.2 to the person. These include where:

- the person and his or her related parties⁸⁸ have a sufficiently large percentage of the ordinary securities in the entity that they can be presumed to exercise significant influence over its affairs;⁸⁹
- 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 10.11.2 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 securities⁹⁰ under an employee incentive scheme to a director or other closely connected party. This includes both options and performance rights.⁹¹

⁸⁶ See paragraph (viii) of the definition of “related party” in relation to a body corporate, and paragraph (x) of the definition of “related party” in relation to a trust set out in ‘2.3 Who is a “related party”?’ on page 5’.

⁸⁷ See note 21 above.

⁸⁸ As set out in paragraph (c) of the definition of “related party” in Listing Rule 19.12. The list of persons and entities who are related parties of a director is set out in the text accompanying note 102 below. The same list applies to any individual (with references in the text to a director replaced by references to the individual).

⁸⁹ As noted in the text in section 2.5 above, in the absence of proof to the contrary, ASX will generally treat an aggregate holding by a person and their related parties of:

- (a) 30% or more of an entity’s ordinary securities; or
- (b) any lesser percentage of an entity’s ordinary securities where the holder(s) have nominated a director to the board of the entity pursuant to an agreement, arrangement or understanding with the entity (whether legally enforceable or not) which gives them a right or expectation to do so,

as giving them significant influence over the affairs of the entity.

⁹⁰ As defined in note 2 above.

⁹¹ See the definition of “equity security” in note 2 above. Options over shares or units specifically fall within paragraph (c) of that definition. Rights over shares or units fall within paragraph (d) of that definition. Note that most performance rights are regarded by ASX as options under and for the purposes of the Listing Rules and therefore have to meet the requirements applicable to options in Chapter 6 of the Listing Rules.

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.

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) 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 Rules⁹² 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.⁹³

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.⁹⁴

4.4 Who is a “director”?

The term “director” is not defined in the Listing Rules and so takes its meaning under the Corporations Act.⁹⁵ Under that Act, a person is a director⁹⁶ 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.⁹⁷

⁹² Listing Rule 19.12.

⁹³ See the note to the definition of “employee incentive scheme” in Listing Rule 19.12.

⁹⁴ Again, see the note to the definition of “employee incentive scheme” in Listing Rule 19.12.

⁹⁵ Listing Rule 19.3.

⁹⁶ See the definition of “director” in section 9 of the Corporations Act.

⁹⁷ 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 Who are the “associates” of a director?

Under the Listing Rules, the associates of a director of a listed entity include:

- any entity⁹⁸ the director controls;
- any person with whom the director has, or proposes to enter into, a relevant agreement⁹⁹ for the purpose of controlling or influencing the composition of the listed entity’s board¹⁰⁰ or the conduct of the listed entity’s affairs; or
- any person with whom the director is acting, or proposing to act, in concert in relation to the listed entity’s affairs.¹⁰¹

A related party of a director is to be taken to be an associate of the director 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 a director and their related parties, it should be presumed that the director is able to control a related party, or that a related party is acting in concert with the director, unless the contrary is proven. Otherwise it is too easy for the director 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 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.¹⁰²

⁹⁸ “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).

⁹⁹ “Relevant agreement” has the same meaning as in section 9 of the Corporations Act (see Listing Rule 19.3). 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.

¹⁰⁰ If the listed entity is a 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.

¹⁰¹ 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 98 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 shares 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.

¹⁰² See paragraph (c) of the definition of “related party” in Listing Rule 19.12.

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 When will ASX apply Listing Rule 10.14.3 to other parties?

ASX has a general discretion under Listing Rule 10.14.3 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;¹⁰³
- 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;¹⁰⁴ 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,¹⁰⁵ can be presumed to have exercised an independent judgment 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:

- the CEO and his or her related parties¹⁰⁶ have a sufficiently large percentage of the ordinary securities in the entity that they can be presumed to exercise significant influence over its affairs;¹⁰⁷

¹⁰³ See the example in note 19 above.

¹⁰⁴ See the example in note 20 above.

¹⁰⁵ See note 21 above.

¹⁰⁶ See note 22 above.

¹⁰⁷ As noted in the text in section 2.5 above, in the absence of proof to the contrary, ASX will generally treat an aggregate holding by the CEO and his or her related parties of 30% or more of an entity's ordinary securities as giving the CEO significant influence over the affairs of the entity.

- a close relative of the CEO or someone with whom the CEO has close business or personal ties is a director of the entity; 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 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-market¹⁰⁸ by or on behalf of directors or their associates under an employee incentive scheme where the terms of the scheme¹⁰⁹ 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;¹¹⁰ 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.¹¹¹

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 8.¹¹²

¹⁰⁸ "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).

¹⁰⁹ As defined in note 79 above.

¹¹⁰ Listing Rule 10.16.

¹¹¹ 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.

¹¹² See note 77 above and accompanying text.

4.8 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 securities made under an employee incentive scheme. There is no prescribed form for making such a notification – a short letter or announcement will suffice. If the securities are intended to be quoted on ASX, the entity will also need to lodge an Appendix 2A application for quotation.¹¹³ In that case, provided the Appendix 2A is lodged with ASX within 5 business days after the issue of the securities, the Appendix 2A can be the notification required for these purposes.

Where an issue of securities under an employee incentive scheme leads to a change in the “notifiable interests”¹¹⁴ of a director, the entity must also give ASX an Appendix 3Y within 5 business days of the change occurring.¹¹⁵

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 in exceptional circumstances, where it is clear to ASX that the harm that Listing Rule 10.14 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 bar in this regard is high.

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.¹¹⁶

¹¹³ Listing Rules 2.7 and 2.8.

¹¹⁴ As defined in Listing Rule 19.12.

¹¹⁵ Listing Rule 3.19A. See also Guidance Note 22 *Notification of Directors’ Interests*.

¹¹⁶ 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.”

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,¹¹⁷ 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.¹¹⁸ 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.

4.10 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.¹¹⁹ 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.

5. Requirements for notices of meeting

5.1 The form of resolution

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.¹²⁰

¹¹⁷ 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.

¹¹⁸ Under Listing Rule 18.7.

¹¹⁹ 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.

¹²⁰ Listing Rule 14.9. If an entity has other securities on issue that might otherwise be entitled to vote on a resolution put to ordinary security holders at a general meeting, the notice of meeting should make it clear that, under the ASX Listing Rules, the holders of those other securities are not entitled to vote on the resolution under Listing Rule 10.11 or 10.14 (as the case may be) and that, if they do vote, their vote will be disregarded.

Listing Rules 10.11 and 10.14 do not specify the terms of the resolution required under those rules. ASX considers that 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].”

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:¹²¹

- 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;¹²²
- the name of the person;¹²³
- which category in Listing Rules 10.11.1 – 10.11.2 the person falls within and why;¹²⁴
- the number¹²⁵ and class of securities to be issued to the person;¹²⁶
- if the securities are not fully paid ordinary securities, a summary of the material terms of the securities;¹²⁷
- 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;¹²⁸
- the price¹²⁹ or other consideration the entity will receive for the issue;¹³⁰
- the purpose of the issue, including the intended use of any funds raised by the issue;¹³¹
- if the securities are issued under an agreement, a summary of any other material terms of the agreement;¹³² and
- a voting exclusion statement.¹³³

This information may be given in the notice itself or in an accompanying explanatory memorandum to security holders.¹³⁴

¹²¹ 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.

¹²² Listing Rule 14.1A.

¹²³ Listing Rule 10.13.1.

¹²⁴ Listing Rule 10.13.2.

¹²⁵ 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.

¹²⁶ Listing Rule 10.13.3.

¹²⁷ Listing Rule 10.13.4.

¹²⁸ 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.

¹²⁹ 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.

¹³⁰ Listing Rule 10.13.6.

¹³¹ Listing Rule 10.13.7.

¹³² Listing Rule 10.13.8.

¹³³ Listing Rule 10.13.9. See also ‘5.6 Voting exclusions’ on page 30.

¹³⁴ Listing Rule 14.1.

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 date¹³⁵ 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:¹³⁶

- 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;¹³⁷
- the name of the person;¹³⁸
- which category in Listing Rules 10.14.1 – 10.14.3 the person falls within and why;¹³⁹
- 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;¹⁴⁰
- the number¹⁴¹ and class of securities that may be acquired by the person under the scheme;¹⁴²
- 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;¹⁴³

¹³⁵ 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.

¹³⁶ 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.

¹³⁷ Listing Rule 14.1A.

¹³⁸ Listing Rule 10.15.1.

¹³⁹ Listing Rule 10.15.2.

¹⁴⁰ Listing Rule 10.15.3.

¹⁴¹ 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 10.15.4).

¹⁴² Listing Rule 10.15.4.

¹⁴³ Listing Rule 10.15.5.

- 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;¹⁴⁴
- the price¹⁴⁵ at which the entity will issue the securities to the person under the scheme;¹⁴⁶
- a summary¹⁴⁷ of the material terms of the scheme;¹⁴⁸
- a summary¹⁴⁹ of the material terms of any loan that will be made to the person in relation to the acquisition;¹⁵⁰
- the names of all persons referred to in Listing Rule 10.14 who received securities under the scheme since it was last approved under that rule, the number of the securities received, and the acquisition price for each security;¹⁵¹
- 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.*¹⁵²
- a voting exclusion statement.¹⁵³

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.¹⁵⁴

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 and enable them to make a properly informed judgment on those matters.¹⁵⁵ In some cases, this may require the

¹⁴⁴ Listing Rule 10.15.6.

¹⁴⁵ 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 10.15.7).

¹⁴⁶ Listing Rule 10.15.7.

¹⁴⁷ 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 10.15.8).

¹⁴⁸ Listing Rule 10.15.8.

¹⁴⁹ 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 10.15.9).

¹⁵⁰ Listing Rule 10.15.9.

¹⁵¹ Listing Rule 10.15.10.

¹⁵² Listing Rule 10.15.11.

¹⁵³ Listing Rule 10.15.12. See also '5.6 Voting exclusions' on page 30.

¹⁵⁴ Listing Rule 14.1.

¹⁵⁵ See *Bulfin v Bebarfalds Ltd* (1938) 38 SR (NSW) 423 and *Chequepoint Securities Ltd v Claremont Petroleum NL* (1986) 11 ACLR 94.

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 also include or attach an explanatory statement that complies with section 219 of that Act.¹⁵⁶

5.5 The requirement to give a draft notice to ASX for review

Before a listed entity sends out a notice of meeting that includes a resolution under Listing Rule 10.11 or 10.14, it must give ASX a copy of the draft notice for review. It must not finalise the notice until ASX tells it that ASX does not object to it.¹⁵⁷

ASX may object to a draft notice of meeting¹⁵⁸ if it appears to ASX that:

- it does not include the information required under the Listing Rules summarised in sections 5.2 and 5.3 above (as applicable);
- it does not satisfy the general law disclosure obligation mentioned in section 5.4 above;
- it does not include the required voting exclusion statement; or
- the entity is trying to include multiple issues within the one approval resolution.

On this last point, including multiple issues within the one approval resolution can be coercive. Security holders should be given the opportunity to approve each issue caught by Listing Rule 10.11 or 10.14 separately.

5.6 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.

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 of an excluded person, save where it is cast:

- 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 in favour of the resolution; or
- by 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 favour of the resolution (Listing Rule 14.11).¹⁵⁹

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.

¹⁵⁶ See ASIC Regulatory Guide 76 *Related party transactions*.

¹⁵⁷ Listing Rules 15.1 and 15.1.4. The draft notice should be sent by way of email to the entity's ASX Listings Compliance adviser in accordance with Listing Rule 15.2.2. ASX generally tries to review and notify the entity whether it objects to a draft notice of meeting within 5 business days of receipt. ASX will tell an entity within 5 business days if it needs more time to examine a draft notice of meeting.

¹⁵⁸ The fact that ASX does not object to a draft notice of meeting does not prevent ASX from raising subsequently that a notice of meeting did not meet the disclosure requirements referenced in the text.

¹⁵⁹ See Listing Rules 14.11 and 14.11.1.

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.

In addition, ASX has a general discretion to designate any other person whose votes, in ASX's opinion, should be disregarded. This discretion may be exercised both before¹⁶⁰ and after¹⁶¹ the notice of meeting has been sent to security holders.

Where ASX exercises its discretion under Listing Rule 10.11.2 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, but are not necessarily an associate of, a director of the entity, ASX will usually make a determination that the director and his or her related parties should be excluded from voting on the resolution.

5.7 Persons who will receive a “material benefit” as a result of the transaction

The persons excluded from voting in favour of a resolution approving an issue of equity securities under Listing Rule 10.11 include any person who will obtain a material benefit as a result of the issue.

For these purposes, ASX considers a “material benefit” to be one that is likely to incline the recipient of the benefit to vote differently to other ordinary security holders of the entity on the Listing Rule 10.11 resolution. 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;¹⁶²
- 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
 - a lead manager of, or broker to, the larger issue who will be paid a fee or commission on the proceeds of the issue.¹⁶³

5.8 Associates excluded from voting

Where a person is expressly excluded from voting in favour of a resolution approving an issue of equity securities under Listing Rule 10.11 or 10.14, their associates are also excluded from voting in favour of the resolution.

An excluded person's associates include:

- if the excluded person is a natural person, any entity¹⁶⁴ the excluded person controls;

¹⁶⁰ 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.

¹⁶¹ 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.

¹⁶² 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.

¹⁶³ 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.

¹⁶⁴ See the definition of “entity” in note 98 above.

- if the excluded person is an entity:
 - any entity the excluded person controls;
 - any entity that controls the excluded person;
 - any entity that is controlled by an entity that controls the excluded person;
- any person with whom the excluded person has, or proposes to enter into, a relevant agreement¹⁶⁵ for the purpose of controlling or influencing the composition of the listed entity's board¹⁶⁶ or the conduct of the listed entity's affairs; or
- any person with whom the excluded person is acting, or proposing to act, in concert in relation to the listed entity's affairs.¹⁶⁷

Where the excluded person is a natural person, their related parties are taken to be their associates unless the contrary is established.¹⁶⁸

5.9 The responsibility for identifying excluded persons and their associates

It is the responsibility of a listed entity to identify all security holders who are caught by a voting exclusion statement and to ensure either that they do not vote in favour of a resolution under Listing Rule 10.11 or 10.14 or, if they do, that their votes are identified and excluded from the result of the vote.

As a practical matter, this will require the entity to conduct a poll on a resolution under Listing Rule 10.11 or 10.14. Such a resolution should not be passed on a show of hands.

ASX may require an entity to appoint its auditors, or some other person acceptable to ASX, to act as a scrutineer to decide the validity of votes cast on a resolution under Listing Rule 10.11 or 10.14 and whether the votes that should have been excluded were in fact excluded.¹⁶⁹ Whether ASX does so or not, the entity should ensure that it conducts a properly scrutineered voting process to validate that the resolution has been properly passed.

If ASX is not satisfied that an entity has conducted a properly scrutineered voting process in relation to a resolution under Listing Rule 10.11 or 10.14, ASX may require the entity to seek a fresh approval from its security holders under that rule.¹⁷⁰

5.10 Voting by employee incentive schemes

Securities held by or for an employee incentive scheme must only be voted on a resolution under Listing Rule 10.11 or 10.14 if and to the extent that:

- they are held for the benefit of a nominated participant in the scheme;
- the nominated participant is not excluded from voting on the resolution under the Listing Rules; and
- the nominated participant has directed how the securities are to be voted.¹⁷¹

¹⁶⁵ See the definition of "relevant agreement" in note 99 above.

¹⁶⁶ If the listed entity is a 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.

¹⁶⁷ See the definition of "associate" in Listing Rule 19.12 and the explanation of that term in note 101 above.

¹⁶⁸ See note 101 above.

¹⁶⁹ Listing Rule 14.8.

¹⁷⁰ ASX may do this either by treating the original resolution as not being effective for the purposes of Listing Rule 10.11 or 10.14 (as applicable) or by imposing a requirement in that regard under Listing Rule 18.8.

¹⁷¹ Listing Rule 14.10.

This limitation is separate to, and does not need to be mentioned in, the voting exclusion statement for the resolution.

5.11 Supplementary disclosures

Where materially new or different information emerges after a notice of meeting proposing a resolution under Listing Rule 10.11 or 10.14 has been sent to security holders but before the vote on the resolution, the entity may need to make supplementary disclosure to security holders. This should be done in sufficient time ahead of the meeting to allow security holders to consider, and if necessary take advice on, how the new or different information should affect their vote on the resolution.

In line with ASIC guidance on similar matters,¹⁷² ASX generally considers that security holders should receive¹⁷³ the supplementary information at least 10 days before they are required to vote. Anything less may warrant an adjournment of the meeting or the calling of a new meeting.

5.12 Notification of meeting results

Immediately after a meeting has been held to consider a resolution seeking the approval of security holders under Listing Rule 10.11 or 10.14, the entity must notify ASX of the outcome of the resolution by way of a market announcement.¹⁷⁴

5.13 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.¹⁷⁵

In addition to this time constraint, where a resolution is approved by a listed entity's security holders under Listing Rule 10.11 or 10.14 and in ASX's opinion:

- materially new or different information emerges after security holders have voted on the resolution;
- there is a material change in the terms of the transaction from those approved by security holders; or
- there is a material change in the entity's circumstances from those applicable at the time of the resolution,

ASX may require the entity to seek a fresh approval from its security holders under that rule.¹⁷⁶

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;¹⁷⁷

¹⁷² See section E of ASIC Regulatory Guide 60 *Schemes of arrangement*.

¹⁷³ Generally speaking, this information should be sent to security holders in the same manner as the original notice of meeting. However, in an appropriate case, ASX may agree to allow the information to be disseminated by a market announcement published on the ASX Market Announcements Platform.

¹⁷⁴ Listing Rule 3.13.2.

¹⁷⁵ Listing Rule 10.13.5.

¹⁷⁶ Again, ASX may do this either by treating the original resolution as not being effective for the purposes of Listing Rule 10.11 or 10.14 (as applicable) or by imposing a requirement in that regard under Listing Rule 18.8.

¹⁷⁷ Listing Rule 17.3.1.

- 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;¹⁷⁸
- if the issue has not yet taken place, direct the entity not to proceed with the issue;¹⁷⁹
- if the issue has already taken place, direct the entity to cancel or reverse the issue;¹⁸⁰ 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).¹⁸¹

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.¹⁸² 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.¹⁸³

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 abuse. 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;¹⁸⁴
- exercise ASX's discretion not to quote the securities;¹⁸⁵ and/or
- terminate the entity's admission to the official list.¹⁸⁶

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.

¹⁷⁸ Listing Rule 18.8(h).

¹⁷⁹ Listing Rule 18.8(c).

¹⁸⁰ Listing Rule 18.8(d).

¹⁸¹ 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.

¹⁸² 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.

¹⁸³ Listing Rule 18.8.

¹⁸⁴ Listing Rule 18.8A.

¹⁸⁵ Listing Rule 2.9.

¹⁸⁶ Listing Rule 17.12.