

Listed@ASX Compliance Update no. 05/20

1 May 2020

1. ASX relief on annual listing fees

ASX is mindful of the challenges currently faced by listed entities due to the COVID-19 pandemic.

To provide some relief, annual listing fees for FY 2021 will be staggered over six months and payable by all listed entities in two equal instalments (instead of the usual one) – the first due at the end of July 2020 and the second due at the end of January 2021.

2. Minor changes to temporary emergency capital raising relief

ASX announced in section 3 of [Listed@ASX Compliance Update no 03/20](#) dated 31 March 2020 that it had introduced two class order waivers (“Class Waivers”) implementing temporary emergency capital raising measures to help listed entities affected by the COVID-19 pandemic to raise urgently needed capital.

ASX announced a number of changes to the Class Waivers in section 1 of [Listed@ASX Compliance Update no 04/20](#) dated 22 April 2020 to clarify certain matters and to improve their overall operation.

ASX subsequently identified some minor drafting issues in the 22 April 2020 versions of the Class Waivers and published slightly amended versions of the Class Waivers on 23 April 2020. The changes were:

- Resolution 1.1.6 of the Temporary Extra Placement Capacity Class Waiver (the obligation to provide a detailed allocation spreadsheet in electronic format to ASIC and ASX within 5 business days of completing the placement) has been amended to clarify the information required in the spreadsheet;
- Resolution 3 of the Temporary Extra Placement Capacity Class Waiver (the obligation to notify ASX in advance that the entity is relying on the Class Waiver) has been amended to change the words ‘*before making the Placement*’ to ‘*before offering any securities in the Placement*’.
- Resolution 2 of the Non-renounceable Offers Class Waiver (the obligation to notify ASX in advance that the entity is relying on the Class Waiver) has also been amended to change the words ‘*before making the non-renounceable offer*’ to ‘*before announcing to the market the non-renounceable offer*’.

The 23 April 2020 versions of the Class Waivers apply to all capital raisings announced on or after that date. They can be downloaded at: [Temporary Extra Placement Capacity Class Waiver](#) and [Non-renounceable Offers Class Waiver](#).

All of the different versions of the Class Waivers are also now available in the Listed Entities section of the ASX Compliance Downloads page (<https://www.asx.com.au/regulation/compliance/compliance-downloads.htm>) under the heading ‘*Class Waiver Decisions - Temporary Emergency Capital Raising Relief*’.

3. The need to engage early with ASX on capital raisings proposing to rely on the Class Waivers

To have the advantage of either Class Waiver, a listed entity must notify ASX that it intends to rely on the Class Waiver and explain the circumstances in which it is doing so, including whether the Class Waiver is proposed to be used to raise urgently needed capital to address issues arising in relation to the COVID-19 health crisis and/or its economic impact or for some other purpose.

ASX has experienced some entities first notifying ASX of their intention to rely on the Class Waivers the evening before proposing to announce and launch a capital raising relying on the Class Waivers.

This is a risky strategy, especially for entities where the purpose of the capital raising is not directly related to raising urgently needed capital to address the financial effect on the entity of the COVID-19 health crisis.

To be clear, the Class Waivers are not specifically limited to capital raising being made solely or predominantly for this purpose. ASX recognises that any listed entity that needs capital in the current market environment will face significant challenges in attracting that capital and the Class Waivers can appropriately extend to them.

However, where a capital raising is not COVID-19 related and not urgently needed (for example where it is being pursued solely or predominantly to raise capital for “growth opportunities” or unidentified potential future acquisitions), questions will arise as to whether it is appropriate for the entity to have the benefit of the Class Waivers or whether the capital raising should be made in accordance with the existing limitations in listing rule 7.1 or else submitted to security holders for approval under that rule.

Each Class Waiver empowers ASX, by notice in writing to a listed entity, to withdraw the benefit of the Class Waiver from that entity at any time and for any reason.

In addressing whether ASX should exercise this power in relation to a particular capital raising, ASX will need to understand the structure and purpose of the total capital raising, including the intended recipients of, and proposed allocation policy for, any placement. This is especially the case where the capital raising appears to ASX to be neither COVID-19 related nor urgently needed. Where a capital raising appears to ASX to have been structured equitably from the stance of existing security holders, ASX is unlikely to withdraw the benefit of the Class Waiver even where the capital raising is not specifically COVID-19 related or urgently needed, recognising that this is a challenging time for all listed entities to raise capital. However, where a capital raising appears to ASX to have inequitable features from the stance of existing security holders, ASX is likely to withhold the benefit of the Class Waivers for that capital raising, especially (but not only) where the capital raising is not specifically COVID-19 related and not urgently needed.

These discussions are best held as early as possible with ASX and not left to the evening before the proposed capital raising.

4. Convertible notes, collateral securities and listing rule 6.1

ASX has noted an increase in smaller listed entities in need of cash raising capital by issuing convertible notes with conversion terms that are potentially highly dilutive to existing security holders or that have other unusual features. ASX has also noted instances of listed entities issuing “collateral shares” to convertible noteholders or to persons providing debt finance as a way of enhancing their collateral position (by giving them an equity interest in the entity). Often, the listed entity will concurrently enter into a deed of charge or some other form of security arrangement with the convertible noteholders or financiers.

Listing rule 6.1 provides that the terms that apply to each class of equity securities must, in ASX’s opinion, be appropriate and equitable. This requirement applies regardless of whether the securities are quoted on ASX or not. It also applies regardless of whether the issue of securities has been or will be approved by security holders (eg under listing rule 7.1 or 10.11 or under item 7 of section 611 of the Corporations Act).

Listed entities are reminded of the guidance about the application of listing rule 6.1 to convertible securities in section 5.9 of Guidance Note 21 *The Restrictions on Issuing Equity Securities in Chapter 7 of the Listing Rules*:

As with all equity securities, convertible securities are subject to the general requirement in Listing Rule 6.1 that the terms that apply to them must, in ASX’s opinion, be appropriate and equitable.

In assessing whether Listing Rule 6.1 is met, ASX has regard to the principles on which the Listing Rules are based, as set out in the introduction to the Listing Rules. One of these principles is that securities “should be issued in circumstances, and have rights and obligations attaching to them, that are fair to new and existing security holders”.

As has been noted previously, convertible securities that:

- *convert by reference to a variable other than the market price of the underlying security or the value of a foreign currency;*
- *convert into other convertible securities rather than fully paid ordinary securities; or*
- *specify that the right of conversion cannot be exercised if it would require security holder approval under the Listing Rules,*

are all likely to raise concerns under Listing Rule 6.1.

In some situations, ASX may also raise concerns under Listing Rule 6.1 if an entity proposes to issue a convertible security where the price at which it converts is determined by reference to the market price of the underlying securities at a future date or over a future period and there is no floor on the conversion price. This is especially so if the entity has a relatively low market capitalisation and its securities have a history of significant price volatility or of periods where they have suffered a sustained fall in market price. In such a case, there is a very real risk that the issue could be highly dilutive to existing security holders if the market price of the underlying securities falls substantially before the convertible securities are converted.

Listing rule 6.1 clearly applies to “collateral shares”.

Ordinary securities, preference securities and convertible notes with market-standard terms attached are unlikely to raise issues under listing rule 6.1. However, ASX strongly recommends that a listed entity proposing to issue any other type of equity securities consult with ASX at the earliest opportunity so that ASX can consider whether the terms of issue of those securities meet the requirements of listing rule 6.1.

Further, where it appears to ASX that the terms applicable to equity securities are especially favourable to the holder, ASX will expect any announcement about, and any notice of meeting seeking approval to, their issue to explain the circumstances behind the issue, including:

- why the entity needs to issue the securities in question on such terms;
- the alternative funding raising options (if any) that were considered by the entity before it decided to enter into the relevant arrangement relating to the issue;
- if alternative funding raising options were considered, the reasons why the relevant arrangement was determined by the entity to be preferable to other funding options;
- if alternative funding raising options were not considered, why not; and
- where an entity has agreed to enter into a deed of charge or some other form of security arrangement and to issue “collateral shares” to a convertible noteholder or other financier, why the collateral available under the deed of charge or other security is not sufficient to secure the debt.

5. Contacting your ASX Listings Compliance adviser

A reminder that ASX Listings Compliance managers and advisers are all presently working from home as part of ASX’s response to the COVID-19 pandemic.

Given this, it is particularly important if you need to contact ASX Listings Compliance for anything urgent – including to discuss a proposed capital raising and whether it will qualify for the Class Waivers or meet the requirements of listing rule 6.1 – and you are not able to reach them by phone, that you email both your Listings Compliance Adviser and the general email address for your ASX home branch with a general outline of the nature of your enquiry. Those email addresses are:

Sydney Home Branch:

Listingscompliancesydney@asx.com.au

Melbourne Home Branch:

Listingscompliancemelbourne@asx.com.au

Perth Home Branch:

Listingscomplianceperth@asx.com.au
