

## SPIN-OUTS OF MAJOR ASSETS

<b>The purpose of this Guidance Note</b>	<ul style="list-style-type: none"> <li>To assist listed entities to understand and comply with their obligations under Listing Rule 11.4 when undertaking a spin-out of a major asset</li> </ul>
<b>The main points it covers</b>	<ul style="list-style-type: none"> <li>The prohibition in Listing Rule 11.4 against spinning out major assets</li> <li>What is a “major asset”?</li> <li>The exclusion in Listing Rule 11.4.1(a) for pro rata and other fair offers, issues and transfers</li> <li>The matters to which ASX will have regard in determining whether a non-pro rata offer, issue or transfer is fair in all the circumstances</li> <li>The exclusion in Listing Rule 11.4.1(b) for transactions approved by security holders</li> <li>The information to be included in a notice of meeting proposing a resolution under Listing Rule 11.4.1(b)</li> <li>Notification obligations for transactions that trigger Listing Rule 11.4</li> </ul>
<b>Related materials you should read</b>	<ul style="list-style-type: none"> <li>Guidance Note 1 <i>Applying for Admission – ASX Listings</i></li> <li>Guidance Note 8 <i>Continuous Disclosure: Listing Rules 3.1 – 3.1B</i></li> <li>Guidance Note 11 <i>Restricted Securities and Voluntary Escrow</i></li> <li>Guidance Note 12 <i>Significant Changes to Activities</i></li> <li>Guidance Note 17 <i>Waivers and In-Principle Advice</i></li> <li>Guidance Note 35 <i>Security Holder Resolutions</i></li> </ul>

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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 Listing<sup>1</sup> to understand and comply with their obligations under Listing Rule 11.4 when undertaking a spin-out of a major asset.

Listing Rule 11.4 provides:

*“An entity must not:*

- (a) dispose of a major asset if, at the time of the disposal, it is aware that the person acquiring the asset intends to offer or issue securities with a view to becoming listed;*
- (b) dispose of any of its securities in a child entity that directly or indirectly holds a major asset with a view to the child entity becoming listed; or*
- (c) permit a child entity that directly or indirectly holds a major asset to offer or issue securities with a view to the child entity becoming listed.”*

These transactions are commonly referred to as “spin-outs”. The entity proposing to list is often described as the “spin-out vehicle”. For convenience, this Guidance Note uses the same terminology.

<sup>1</sup> Listing Rules 11.4 and 11.4.1 do not apply to entities admitted to the official list as an ASX Debt Listing or as an ASX Foreign Exempt Listing (see Listing Rules 1.10 and 1.15.1). Unless otherwise indicated, references in this Guidance Note to a listed entity or entity mean an entity admitted to the ASX official list as an ASX Listing.

It should be noted at the outset that Listing Rule 11.4 applies regardless of whether the spin-out vehicle is proposing to list on ASX or on another exchange. Conversely, Listing Rule 11.4 does not apply if the spin-out vehicle is already listed, be that on ASX or on another exchange.

Listing Rule 11.4 is qualified by Listing Rule 11.4.1, which provides that:

*“Rule 11.4 does not apply in either of the following cases.*

- (a) The securities, except those to be retained by the entity, are offered, issued or transferred pro rata to the holders of ordinary securities in the entity, or in another way that, in ASX’s opinion, is fair in all the circumstances.*
- (b) The holders of ordinary securities in the entity approve of the transaction without the offer, issue or transfer referred to in rule 11.4.1(a) being made. The notice of meeting must include a voting exclusion statement.”*

Listing Rule 11.4 is reinforced by Listing Rule 7.17, which provides that:

*“If an entity offers its security holders an entitlement to securities in another entity, it must meet the following requirements:*

- 7.17.1 The offers must be pro rata, or made in another way that, in ASX’s opinion, is fair in all the circumstances.*
- 7.17.2 The record date to decide entitlements must be at least 4 business days after the disclosure document, PDS or information memorandum for the offer is given to ASX.*
- 7.17.3 There must be no restriction on the number of securities which a holder must hold before the entitlement accrues. This rule does not apply if the resulting holding would be less than a holding with a value of \$500 and no facility to round up is offered.”*

## 2. The policy underpinning Listing Rule 11.4

The purpose of Listing Rule 11.4 is to ensure that a listed entity’s ordinary security holders are treated fairly in any spin-out and have an opportunity to participate in any premium that it may generate.

The rule seeks to achieve this purpose by requiring any securities issued by the spin-out vehicle in connection with its listing, other than those to be retained by the listed entity,<sup>2</sup> to be offered, issued or transferred pro rata to the holders of ordinary securities in the listed entity or in another way that, in ASX’s opinion, is fair in all the circumstances. Otherwise the entity’s ordinary security holders must approve the transaction proceeding without such an offer, issue or transfer being made.

## 3. The meaning of key terms in Listing Rule 11.4

### 3.1 “Asset”

The term “asset” is not defined in the Listing Rules. In ASX’s opinion, the term should be understood as including any tangible or intangible property or right that has value. It includes, without limitation, freehold and leasehold interests in land; interests in mining or petroleum tenements; intellectual property rights; interests in child entities; investments; loans and other receivables; plant and equipment; and inventory. It also includes the assets that make up all or part of a business.<sup>3</sup>

<sup>2</sup> If the listed entity retains securities in the spin-out vehicle, ordinary security holders in the listed entity will get to participate indirectly in any premium the spin-out generates through their continuing security holding in the listed entity.

<sup>3</sup> References in the Listing Rules to the singular include the plural: Listing Rule 19.3(c).

### 3.2 “Major asset”

Listing Rule 11.4 is only invoked where an entity disposes of a “major asset”. This term is not defined in the Listing Rules. ASX considers it to be synonymous with “important” or “significant” asset.

ASX notes that under former Australian accounting standards an amount which is equal to or greater than 10% of the applicable base amount has generally been presumed to be “material” unless there is evidence or convincing argument to the contrary.<sup>4</sup> The word “major” has a different connotation to the word “material” and imports something substantially larger. This would suggest that for something to be a major asset it would need to account for substantially more than 10% of the value of the listed entity.

For clarity and ease of application by listed entities, ASX has adopted 25% as an appropriate benchmark for determining whether or not an asset is a major asset. Applying this benchmark, ASX will generally regard an asset to be a major asset if its disposal will result in a decrease of 25% or more in any of the following measures:

- consolidated total assets;
- consolidated total equity interests;
- consolidated annual revenue or, in the case of a mining exploration entity, oil and gas exploration entity or other entity that is not earning material revenue from operations, consolidated annual expenditure;
- consolidated EBITDA; or
- consolidated annual profit before tax,<sup>5</sup>

or if the value of the consideration received by the listed entity and its security holders for disposing of the asset exceeds 25% of its consolidated total assets.

ASX may also regard an asset as a major asset if the entity has made announcements in relation to the asset which suggest that it is of strategic importance to the entity.

If a listed entity has any concerns about whether an asset that it is proposing to spin out is a major asset under the Listing Rules, it should discuss those concerns with ASX Listings Compliance at the earliest opportunity.

If ASX has concerns about whether an asset that a listed entity is proposing to spin out or has spun out is a major asset under the Listing Rules, it may require the entity to provide any information that ASX asks for to enable it to determine whether that is the case. ASX may submit, or require the entity to submit, any such information to the scrutiny of an expert selected by ASX and paid for by the entity.<sup>6</sup>

### 3.3 “Dispose” and “acquire”

Listing Rule 11.4(a) addresses the situation where an entity “disposes” of a major asset and the person “acquiring” the asset intends to offer or issue securities with a view to becoming listed.

Listing Rule 11.4(b) deals with the situation where an entity “disposes” of any of its securities in a child entity that directly or indirectly holds a major asset with a view to the child entity becoming listed.

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<sup>4</sup> See paragraph 15 of Accounting Standard AASB 1031 *Materiality* (July 2004). This Standard was effectively withdrawn on 1 January 2014 as being “unnecessary local guidance on matters covered by IFRSs”, although the Australian Accounting Standards Board did expressly note that “it would not expect the withdrawal to change practice regarding the application of materiality in financial reporting” (see Interim Accounting Standard AASB 1031 *Materiality* (December 2013)).

<sup>5</sup> This is the same threshold that ASX uses to determine whether a proposed change to the scale of a listed entity’s activities is “significant” and therefore needs to be notified to ASX under Listing Rule 11.1: see section 2.4 of Guidance Note 12 *Significant Changes to Activities*. It is also the same threshold ASX uses to determine whether an applicant for listing applying under the assets test has in the 12 months prior to applying for admission acquired, or is proposing in connection with its application for admission to acquire, another entity or business that is significant in the context of the entity and therefore needs to lodge the accounts for that entity or business: see section 3.11 of Guidance Note 1 *Applying for Admission – ASX Listings*.

<sup>6</sup> Listing Rule 18.7.

“Dispose” has a broad meaning under the Listing Rules. It means to dispose of, directly or indirectly through another person, by any means, including:

- granting, being granted or exercising an option;
- declaring a trust over an asset;
- using an asset as collateral;
- decreasing an economic interest; or
- disposing of part of an asset.<sup>7</sup>

“Acquire” likewise has a broad meaning under the Listing Rules. It means to acquire, directly or indirectly through another person, by any means, including:

- granting, being granted or exercising an option;
- being the beneficiary of a declaration of trust over an asset;
- enforcing collateral and taking an asset;
- increasing an economic interest; or
- acquiring part of an asset.<sup>8</sup>

The references to disposing of or acquiring an asset “indirectly through another person” are intended to capture the use of intermediaries in such transactions, such as where there is a pre-arrangement that a listed entity will dispose of an asset to a third party and then the third party will dispose of it to the spin-out vehicle. ASX will regard this as a disposal of the asset by the listed entity to the spin-out vehicle, and an acquisition of the asset by the spin-out vehicle from the listed entity, for the purposes of Listing Rule 11.4, notwithstanding the intervention of the third party.<sup>9</sup>

These references are also intended to capture disposals and acquisitions that occur at lower levels within a corporate group, ie where the asset is disposed of by a child entity of the listed entity rather than by the listed entity itself, or acquired by a child entity of the spin-out vehicle rather than by the spin-out vehicle itself. Again, ASX will regard this as a disposal of the asset by the listed entity to the spin-out vehicle, and an acquisition of the asset by the spin-out vehicle from the listed entity, for the purposes of Listing Rule 11.4, notwithstanding the involvement of the child entity.

Given the reference to options in the definition of “dispose” above, it follows that an entity granting a call option to a spin-out vehicle which will allow the vehicle to acquire a major asset from the entity, or being granted a put option by a spin-out vehicle which will allow the entity to dispose of a major asset to the vehicle, will be regarded as having disposed of that asset for the purposes of Listing Rule 11.4 as soon as the option is granted. However, applying the spirit and intent of the rule,<sup>10</sup> ASX will not treat the granting of such an option as a breach of Listing Rule 11.4 provided the exercise of the option is conditional upon the entity complying with Listing Rule 11.4.1(a) or (b) before the option is exercised and the entity duly complies with that condition.

<sup>7</sup> See the definition of “dispose” in Listing Rule 19.12.

<sup>8</sup> See the definition of “acquire” in Listing Rule 19.12.

<sup>9</sup> ASX may not take this view if: (a) there is a reasonable gap in time between the original disposal by the listed entity to the third party and the subsequent disposal by the third party to the spin-out vehicle; (b) the third party was clearly a bona fide acquirer for value from the listed entity and subsequently a bona fide disposer for value to the spin-out vehicle; and (c) there is no evidence of the parties acting in concert to achieve that outcome or of any other association between the spin-out vehicle and the third party.

<sup>10</sup> As it is required to do under Listing Rule 19.2.

### 3.4 “Aware”

For Listing Rule 14.11(a) to apply to a disposal of a major asset by a listed entity, the entity must be “aware” at the time of the disposal that the person acquiring the asset intends to offer or issue securities with a view to becoming listed. There is no time limit specified in Listing Rule 11.4(a) within which the acquirer must apply to be listed on the applicable exchange, and no requirement that the application is in fact successful. It is sufficient for Listing Rule 11.4(a) to apply that the acquirer intends to offer or issue securities and to apply to be listed in conjunction with, or following, its acquisition of the asset and the entity is aware of that intention at the time it disposes of the asset to the acquirer.

The Listing Rules provide that an entity becomes aware of information if, and as soon as, an officer of the entity (or, in the case of a trust, an officer of the responsible entity of the trust<sup>11</sup>) has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of the entity.<sup>12</sup>

The term “officer” has the same meaning as in the Corporations Act<sup>13</sup> and includes a director, secretary or senior manager of an entity.<sup>14</sup>

The extension of an entity’s awareness beyond the information its officers in fact know to information that its officers “ought reasonably have come into possession of” effectively deems an entity to be aware of information if it is known by anyone within the entity and it is of such significance that it ought reasonably to have been brought to the attention of an officer of the entity in the normal course of performing their duties as an officer. Without this extension, an entity would be able to avoid its Listing Rule obligations by the simple expedient of not bringing relevant information to the attention of its officers in a timely manner.

Where a listed entity is negotiating a disposal of a major asset to an outside party, it is possible that the entity may not be aware that the outside party is intending to offer or issue securities with a view to becoming listed following its acquisition of the asset. In that case, provided the entity continues to be unaware of that intention up to the consummation of the disposal, Listing Rule 11.4(a) will not apply.

If a listed entity disposes of a major asset to an outside party without complying with Listing Rule 11.4 and the outside party subsequently offers or issues securities and applies to list on ASX or another exchange within a relatively short period of acquiring the asset, ASX may make enquiries of the entity to ascertain whether it was aware at the time of the disposal that the outside party was intending to seek a listing and therefore should have

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<sup>11</sup> “Responsible entity” means: (a) in relation to a managed investment scheme registered under the Corporations Act, the responsible entity of that scheme under that Act; or (b) in relation to a trust that is not a registered managed investment scheme, the entity that in ASX’s opinion performs a substantially equivalent role in relation to the trust as the responsible entity performs in relation to a registered managed investment scheme (Listing Rule 19.12).

<sup>12</sup> Listing Rule 19.12.

<sup>13</sup> Listing Rule 19.3.

<sup>14</sup> See section 9. For these purposes, “senior manager” means a person:

- who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the entity;
- who has the capacity to affect significantly the corporation’s financial standing; or
- in accordance with whose instructions or wishes the directors of the entity are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person’s professional capacity or their business relationship with the directors or the entity).

The definition of “officer” in section 9 also extends to

- a receiver, or receiver and manager, of the property of the entity;
- an administrator of the entity;
- an administrator of a deed of company arrangement executed by the entity;
- a liquidator of the entity; or
- a trustee or other person administering a compromise or arrangement made between the entity and someone else.

complied with Listing Rule 11.4.<sup>15</sup> ASX may require any information provided in this regard to be verified under oath.<sup>16</sup>

## 4. The application of Listing Rule 11.4

### 4.1 The different ways of structuring a spin-out

There is a myriad of different ways in which a spin-out can be structured. Listing Rule 11.4 has been drafted with a view to capturing all forms of spin-outs, regardless of how they are structured.

For example, the spin-out vehicle could be a party unconnected to the listed entity (an *outside party*) that wishes to acquire the assets in question from the listed entity and use them as a basis for its own listing. The outside party might be a newly established entity with no material assets or liabilities specifically set up to undertake the transaction or it could be an existing entity with complementary assets that it wishes to combine with the assets being spun out prior to listing. In the former case, the outside party is likely only to have a nominal amount of capital on issue, whereas in the latter case it might well have a significant number of securities already on issue.

In either case, the spin-out could be achieved by the outside party acquiring the assets in question<sup>17</sup> in return for an issue of securities to the listed entity, some or all of which are then distributed on a pro rata basis to the security holders in the listed entity by way of an *in specie* dividend or capital return. Or the outside party could issue the securities on a pro rata basis directly to the security holders in the listed entity at the direction of the listed entity or pursuant to a scheme of arrangement or similar transaction. If the spin-out vehicle needs to raise capital to support its business, it might also conduct an initial public offering of securities ("IPO") in addition to the pro rata distribution of securities to the holders of securities in the listed entity. The IPO may or may not include some form of priority offer to the security holders in the listed entity.

Alternatively, the spin-out might not involve any form of pro rata distribution of securities in the outside party to the holders of securities in the listed entity. The outside party might instead simply acquire the assets from the entity for cash and then conduct an IPO to raise the capital needed to fund the acquisition and to support its business. The IPO again may, or may not, involve some form of priority offer to the holders of securities in the listed entity.

All of the transactions mentioned in the three previous paragraphs are caught by Listing Rule 11.4(a).

Instead, the spin-out vehicle could be an entity connected to the listed entity, such as a child entity within the listed entity group. In that case, the spin-out could be achieved by the listed company distributing some or all of the securities it owns in the child entity to its security holders by way of an *in specie* dividend or capital return or pursuant to a scheme of arrangement or similar transaction. This may or may not be done in conjunction with an IPO to raise capital for the spin-out vehicle. These types of transaction are caught by Listing Rule 11.4(b).

Alternatively, the spin-out might not involve any form of pro rata distribution of securities in the child entity to the holders of securities in the listed entity. The child entity might instead simply conduct an IPO that swamps the shares held by the listed entity in the child entity. The IPO may, or may not, involve some form of priority offer to the holders of securities in the listed entity. These types of transaction are caught by Listing Rule 11.4(c).

Where a spin-out transaction is structured as, or includes, a pro rata entitlement offer, that offer will necessarily have to be non-renounceable, given the spin-out vehicle at that point won't be listed on ASX or another market and therefore rights to its securities cannot be publicly traded.

### 4.2 Labelling the different types of spin-outs

For the purposes of this Guidance Note, ASX will adopt the following terminology to differentiate between the different types of spin-outs:

<sup>15</sup> Pursuant to Listing Rule 18.7.

<sup>16</sup> Listing Rule 18.7.

<sup>17</sup> This could be done by the outside party, either itself or through a child entity, acquiring the assets directly or acquiring an entity that (directly or indirectly) owns the assets: see the discussion of the meaning of "dispose" and "acquire" in section 3.3 above.

- “**standard spin-out**” – where the spin-out transaction involves a pro rata distribution of securities in the spin-out vehicle to the holders of securities in the listed entity – this could be either a:
  - “**standard spin-out with IPO**” – a standard spin-out which includes an associated IPO to raise capital; or
  - “**standard spin-out without IPO**” – a standard spin-out which does not include an IPO to raise capital;
- “**non-standard spin-out**” – where the spin-out transaction does not involve a pro rata distribution of securities in the spin-out vehicle to the holders of securities in the listed entity (typically this will just involve an IPO offer);
- “**full spin-out**” – where the listed entity does not retain any securities in the spin-out vehicle at the conclusion of the spin-out transaction; and
- “**partial spin-out**” – where the entity retains some securities in the spin-out vehicle at the conclusion of the spin-out transaction.

## 5. The exclusion for pro rata or other fair offers, issues or transfers

### 5.1 The terms of the exclusion

Listing Rule 11.4.1(a) provides that Listing Rule 11.4 does not apply if all of the securities in the spin-out vehicle, other than those to be retained by the listed entity, are offered, issued or transferred to the holders of the ordinary securities in the entity on a pro rata basis or in another way that, in ASX’s opinion, is fair in all the circumstances.

It should be noted that the part of the exclusion in Listing Rule 11.4.1(a) that applies to pro rata offers, issues and transfers requires all of the securities in the spin-out vehicle that are being offered, issued or transferred, other than those to be retained by the listed entity, to be offered, issued or transferred to the holders of the ordinary securities in the entity on a pro rata basis. If any securities in the spin-out vehicle are offered, issued or transferred to anyone else,<sup>18</sup> that part of the exclusion will not apply and the entity must either approach ASX for in-principle advice under the other part of the exclusion in Listing Rule 11.4.1(a) that the transaction is, in ASX’s opinion, fair in all the circumstances or else obtain an approval from its ordinary security holders under Listing Rule 11.4.1(b).

Hence a standard spin-out without IPO will qualify under the exclusion in Listing Rule 11.4.1(a) and there is no need for the entity to approach ASX for in-principle advice that the transaction is, in ASX’s opinion, fair in all the circumstances. This applies whether the spin-out is a full spin-out or a partial spin-out.

However, a standard spin-out with IPO or a non-standard spin-out will only qualify under the exclusion in Listing Rule 11.4.1(a) if the entity has received in-principle advice from ASX that the transaction is, in ASX’s opinion, fair in all the circumstances. Again, this applies whether the spin-out is a full spin-out or a partial spin-out.

### 5.2 The requirements for a pro rata offer

To qualify as a pro rata offer, the offer of securities in the spin-out vehicle must be extended to all holders of ordinary securities in the entity with registered addresses in Australia or New Zealand.<sup>19</sup> It must also be extended to holders with registered addresses outside Australia and New Zealand unless:

- the entity decides that it is unreasonable to make the offer in a particular place having regard to:
  - the number of holders in that place;
  - the number and value of securities the holders would be offered; and

<sup>18</sup> For example, under an IPO or as a fee or consideration for someone who has helped promote or facilitate the spin-out.

<sup>19</sup> Listing Rule 7.7.



- the cost of complying with the legal or regulatory requirements in that place; and
- the entity sends each holder who will not be offered securities details of the issue and advice that they will not be offered securities.

The offer must also satisfy the following requirements:

- the record date to decide entitlements must be at least 4 business days after the relevant disclosure document, PDS or information memorandum is given to ASX;<sup>20</sup> and
- there must be no restriction on the number of securities which a holder must hold before the entitlement accrues, save where the resulting holding would be less than a holding with a value of \$500 and no facility to round up is offered.<sup>21</sup>

### 5.3 Other offers that are fair

Listing Rule 11.4.1(a) permits an offer, issue or transfer of securities in a spin-out vehicle to be made in some way that is not wholly pro rata to the holders of the ordinary securities in the entity provided, in ASX's opinion, the transaction is fair in all the circumstances.

To avail itself of this option, an entity must receive in-principle advice from ASX confirming that ASX regards the transaction as fair in all the circumstances.

Guidance Note 17 *Waivers and In-Principle Advice* has guidance on how to apply for such in-principle advice.

Generally, ASX will regard a standard spin-out with IPO as fair in all the circumstances if:

- the ordinary security holders in the listed entity are able to participate in the IPO on the same or better terms as other investors;<sup>22</sup> and
- the transaction does not appear to ASX to confer benefits on related parties of the entity or their associates that are not available to other holders of ordinary securities in the listed entity (eg where related parties or their associates receive securities in the spin-out vehicle in consideration for promoting or facilitating the transaction or are given the opportunity to underwrite or sub-underwrite the IPO, allowing them both to extract an underwriting or sub-underwriting fee and potentially to participate in any shortfall).<sup>23</sup>

An entity seeking in-principle advice from ASX confirming that ASX regards a proposed standard spin-out with IPO as fair in all the circumstances should address each of the issues above in its application for that advice.

Non-standard spin-outs are looked at by ASX on a case-by-case basis to determine whether they are fair in all the circumstances. The matters ASX is likely take into account for these purposes include (without limitation):

- the reasons put forward by the entity for not proceeding by way of a standard spin-out;<sup>24</sup>
- if one of those reasons is the relatively large number of small holdings a standard spin-out would create, whether the entity is prepared to offer a "top-up facility" to permit or require the holders of ordinary securities in the listed entity to invest a minimum amount each in the spin-out vehicle;<sup>25</sup>

<sup>20</sup> Listing Rule 7.17.2.

<sup>21</sup> Listing Rule 7.17.3.

<sup>22</sup> For the avoidance of doubt, this does not require that the ordinary security holders in the listed entity receive a priority allocation in the IPO. It only requires that they are able to take up the offer on no less favourable terms than other investors.

<sup>23</sup> The structuring of a spin-out to confer benefits on related parties of the entity or their associates that are not available to other holders of ordinary securities in the listed entity would be a factor more likely to incline ASX to the view that the spin-out is not fair in all the circumstances.

<sup>24</sup> The more cogent and compelling those reasons, the more likely ASX is to form the view that the spin-out is fair in all the circumstances.

<sup>25</sup> The presence of a top-up facility would be a factor more likely to incline ASX to the view that the spin-out is fair in all the circumstances, whereas the absence of such a facility would be a factor more likely to incline ASX to the opposite view.

- whether or not the holders of ordinary securities in the listed entity are to be given an opportunity to invest in the spin-out vehicle in priority to other persons and, if so, in what amount and on what terms;<sup>26</sup>
- the percentage of the securities in the spin-out vehicle (if any) to be retained by the listed entity;<sup>27</sup>
- whether the transaction appears to favour wholesale investors over retail investors (eg where it is limited to professional and sophisticated investors only);<sup>28</sup>
- whether the transaction appears to confer benefits on related parties of the entity or their associates that are not available to other holders of ordinary securities in the listed entity (eg where related parties or their associates receive securities in the spin-out vehicle in consideration for promoting or facilitating the transaction or are given the opportunity to underwrite or sub-underwrite the spin-out vehicle's IPO, allowing them both to extract an underwriting or sub-underwriting fee and potentially to participate in any shortfall);<sup>29</sup>
- the allocation policy that the entity proposes to adopt in relation to the offer if it is over-subscribed; and
- which exchange the spin-out vehicle is proposing to list on and, if it is not the ASX, whether the holders of ordinary securities in the listed entity are likely to face:
  - any diminution in their rights or protections under the rules of that exchange compared to the ASX Listing Rules; or
  - any practical difficulties in accessing that exchange and selling their securities in the spin-out vehicle at a fair price.

An entity seeking in-principle advice from ASX confirming that ASX regards a proposed non-standard spin-out as fair in all the circumstances should address each of the issues above in its application for that advice.

ASX notes that if the spin-out vehicle is proposing to list on ASX, it will need to satisfy the minimum spread requirement in Listing Rule 1.1.<sup>30</sup> To do this, it must have at least 300 non-affiliated security holders, each of whom holds a parcel of the entity's main class of securities<sup>31</sup> that are not "restricted securities" and that are not subject to voluntary escrow, with a value of at least \$2,000.<sup>32</sup>

In considering whether a spin-out is fair in all the circumstances, ASX will pay due regard to the fact that the creation of many small holdings of securities in the spin-out vehicle may not be of assistance in meeting ASX's minimum spread requirement. Further, the opportunity to take up only a small parcel of securities is unlikely to deliver any meaningful benefit to security holders. Accordingly, all other things being equal, an otherwise pro rata offer with restrictions attached to prevent the creation of holdings of less than \$2,000, or a reasonably sized priority offer which allows the holders of ordinary securities to apply for a minimum allocation of \$2,000, will not be regarded by ASX as being unfair in all the circumstances simply because of those restrictions.

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<sup>26</sup> The larger the size of the priority offer and the higher the number of ordinary security holders who can access it, the more likely ASX is to form the view that the spin-out is fair in all the circumstances.

<sup>27</sup> The higher the percentage of the securities in the spin-out vehicle to be retained by the listed entity, the higher the indirect interest retained by its ordinary security holders in the major asset being spun out and the more likely ASX is to form the view that the spin-out is fair in all the circumstances.

<sup>28</sup> The inclusion of retail investors in an offer would be a factor more likely to incline ASX to the view that the spin-out is fair in all the circumstances, whereas the exclusion of such investors would be a factor more likely to incline ASX to the opposite view.

<sup>29</sup> The structuring of a transaction to confer benefits on related parties of the entity or their associates that are not available to other holders of ordinary securities in the listed entity would be a factor more likely to incline ASX to the view that the spin-out is not fair in all the circumstances.

<sup>30</sup> See Listing Rule 1.1 condition 8 and Guidance Note 1 *Applying for Admission – ASX Listings*.

<sup>31</sup> If CDIs are issued over securities in the main class, holders of the CDIs are included for these purposes.

<sup>32</sup> In the case of a spin-out involving an IPO, the value of the spin-out entity's securities for spread purposes will usually be based on the offer price under the spin-out entity's prospectus or PDS for the IPO. ASX may, however, use a different value if it considers that the offer price overstates the value of the securities.

## 6. The exclusion for transactions approved by security holders

### 6.1 The terms of the exclusion

Listing Rule 11.4.1(b) provides that Listing Rule 11.4 does not apply a transaction that has been approved by an entity's ordinary security holders without the offer, issue or transfer referred to in Listing Rule 11.4.1(a) being made.

### 6.2 The form of resolution

The resolution required to approve a transaction for the purposes of Listing Rule 11.4.1(b) is an ordinary resolution passed at a general meeting of the holders of the entity's ordinary securities.<sup>33</sup>

Listing Rule 11.4.1(b) does not dictate the specific terms of the resolution required under that rule. A resolution to the following effect will suffice:

"That the *[description of transaction]* is approved under and for the purposes of Listing Rule 11.4.1(b)."

### 6.3 The information to be included in a notice of meeting

A notice of meeting proposing a resolution to approve a transaction for the purposes of Listing Rule 11.4.1(b) must include a summary of Listing Rule 11.4.1(b) and what will happen if security holders give, or do not give, the approval sought under that rule.<sup>34</sup>

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

"*[Name of entity]* is proposing to *[insert a description of the proposed spin-out, defining it as the "Transaction" (or something similar)]*.

Under Listing Rules 11.4 and 11.4.1, a listed *[company/trust]* can only spin out a major asset if:

- (a) the securities in the spin-out vehicle (other than those being retained by the company/trust itself) are being offered, issued or transferred pro rata to the holders of the ordinary *[shares/units]* in the *[company/trust]*, or in another way that, in ASX's opinion, is fair in all the circumstances; or
- (b) the *[company's shareholder/trust's unitholders]* approve the spin out.

The Transaction is regarded as a spin-out of a major asset for these purposes and paragraph (a) above does not apply, so it is a requirement for the Transaction to proceed that *[name of entity's]* *[shareholders/unitholders]* approve the Transaction under paragraph (b) above.

Resolution *[n°]* seeks the required *[shareholder/unitholder]* approval to the Transaction under and for the purposes of Listing Rule 11.4.1(b).

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

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

A notice of meeting proposing a resolution to approve the spin out of a major asset for the purposes of Listing Rule 11.4.1(b) must also include a voting exclusion statement.<sup>35</sup> Otherwise, the Listing Rules do not specify what information needs to be included in the notice of meeting.

<sup>33</sup> Listing Rule 14.9.

<sup>34</sup> Listing Rule 14.1A.

<sup>35</sup> See '6.4 Voting exclusions' on page 13.

As a matter of general law, a notice of meeting must include such material as will fully and fairly inform security holders of the matters to be considered at the meeting and enable them to make a properly informed judgment on those matters.<sup>36</sup>

Where a notice of meeting proposes a resolution of security holders approving the spin out of a major asset for the purposes of Listing Rule 11.4.1(b), ASX will expect the notice to include the following information:

- the name of the spin-out vehicle;
- how the spin-out is intended to be effected, including:
  - any consideration the spin-out vehicle is providing to the entity for the asset or assets being spun-out;
  - the number of securities the spin-out vehicle currently has on issue, the number of securities proposed to be issued in connection with its listing and the proposed issue price for those securities;
  - whether the entity's security holders will be able to participate in that issue and, if so, on what basis (for example, whether there will be a priority offer to the entity's security holders and, if so, the size and terms of that offer);
  - the timetable for completing the proposed listing;
- information about the asset or assets being spun-out, including:
  - a description of the asset or assets;
  - the value of the asset or assets reflected in the listed entity's latest financial statements lodged with ASX;
  - the entity's estimate of the current market value of the asset or assets;
- the impact the spin-out will have on the entity, including on the following measures:
  - consolidated total assets;
  - consolidated total equity interests;
  - consolidated annual revenue or, in the case of a mining exploration entity, oil and gas exploration entity or other entity that is not earning material revenue from operations, consolidated annual expenditure;
  - consolidated EBITDA; and
  - consolidated annual profit before tax;
- the impact the spin-out will have on the entity's security holders, including any dilution impacts or taxation ramifications;
- the reasons why the directors of the entity consider that effecting the spin-out without the offer, issue or transfer referred to in Listing Rule 11.4.1(a) being made is in the interests of the entity and its security holders; and
- if the transaction is occurring under an agreement, a summary of any other material terms of the agreement.

<sup>36</sup> See *Bulfin v Bebarfalds Ltd* (1938) 38 SR (NSW) 423 and *Chequepoint Securities Ltd v Claremont Petroleum NL* (1986) 11 ACLR 94.

This information may be given in the notice itself or in an accompanying explanatory memorandum to security holders.<sup>37</sup>

### 6.4 Voting exclusions

A notice of meeting proposing a resolution to approve the spin-off of a major asset under Listing Rule 11.4.1(b) must include a voting exclusion statement.<sup>38</sup>

A voting exclusion statement is a statement to the effect that the entity will disregard any votes cast in favour of the resolution by or on behalf of an excluded person or an associate<sup>39</sup> of an excluded person, save where it is cast by:

- a person as proxy or attorney for another person who is entitled to vote on the resolution, in accordance with directions given to the proxy or attorney to vote on the resolution in that way;
- the chair of the meeting as proxy or attorney for a person who is entitled to vote on the resolution, in accordance with a direction given to the chair to vote on the resolution as the chair decides; or
- a holder acting solely in a nominee, trustee, custodial or other fiduciary capacity on behalf of a beneficiary provided the following conditions are met:
  - the beneficiary provides written confirmation to the holder that they are not excluded from voting, and are not an associate of a person excluded from voting, on the resolution; and
  - the holder votes on the resolution in accordance with directions given by the beneficiary to the holder to vote in that way.

In the case of a resolution approving the spin-off of a major asset under Listing Rule 11.4.1(b), the persons to be excluded from voting in favour of the transaction are the acquirer of the asset (if any) and any other person who will obtain a material benefit as a result of the transaction.<sup>40</sup>

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

- a professional adviser or other person who will be paid a success (or similar) fee if the transaction proceeds;<sup>41</sup>
- an underwriter or sub-underwriter of any issue of securities proposed to be made by the spin-out vehicle in connection with its listing who will be paid an underwriting or sub-underwriting fee in relation to the issue; and
- a lead manager of, or broker to, any issue of securities proposed to be made by the spin-out vehicle in connection with its listing who will be paid a fee or commission on the proceeds of the issue.<sup>42</sup>

Guidance Note 35 *Security Holder Resolutions* has further guidance on voting exclusions and the procedures that should be followed at a meeting of security holders where a resolution under Listing Rule 11.4.1(b) is being considered.

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<sup>37</sup> Listing Rule 14.1.

<sup>38</sup> See the second sentence in Listing Rule 11.4.1(b) and the table in Listing Rule 14.11.1.

<sup>39</sup> Guidance Note 35 *Security Holder Resolutions* has guidance on who is an associate of an excluded person for these purposes.

<sup>40</sup> See the table in Listing Rule 14.11.1.

<sup>41</sup> This is not intended to capture normal fixed or time-based fees paid to a professional adviser advising on the transaction. It is only intended to capture fees that are directly related to the success of the transaction.

<sup>42</sup> This is not intended to capture normal handling fees payable to individual brokers who lodge acceptances or renunciations on behalf of security holders. It is only intended to capture fees and commissions payable to a lead manager of, or broker to, the issue that are directly related to the success of the transaction.

## 7. Notification obligations

### 7.1 Notification under Listing Rule 11.1 (significant change in nature or scale of activities)

A proposal to spin-out a major asset is likely to involve a significant change to the nature or scale of an entity's activities and require notification to ASX under Listing Rule 11.1.

Listing Rule 11.1 requires the notification under that rule to be given "as soon as practicable". ASX interprets this phrase as meaning "as soon as reasonably practicable after the entity commits to proceeding with the proposal".<sup>43</sup>

In the case of unilateral action by the entity (such as a decision to spin-out a child entity that holds a major asset), this will usually happen at the point when the board of directors of the entity<sup>44</sup> formally approves the proposed action and resolves to proceed with it. In the case of a transaction between the entity and another party (such as a decision to dispose of a major asset to an outside party that is proposing to list), this will usually happen at the point when the transaction agreements have been signed with the relevant party.

### 7.2 Notification under Listing Rule 3.1 (continuous disclosure)

A proposal to spin-out a major asset is likely also to be market sensitive<sup>45</sup> and therefore require disclosure to ASX under Listing Rule 3.1. If it is market sensitive, it should be disclosed to ASX immediately the proposal is no longer incomplete or subject to negotiation.<sup>46</sup>

Again, in the case of unilateral action by the entity (such as a decision to spin-out a child entity that holds a major asset), this will usually happen at the point when the board of directors of the entity<sup>47</sup> formally approves the proposed action and resolves to proceed with it. In the case of a transaction between the entity and another party (such as a decision to dispose of a major asset to an outside entity that is proposing to list), this will usually happen at the point when the transaction agreements have been signed with the relevant party.

It should be noted, however, that information about a proposal to spin-out a major asset may need to be disclosed to ASX at an earlier point under Listing Rule 3.1 if it ceases to be confidential.<sup>48</sup> It may also be required to be disclosed at an earlier point under Listing Rule 3.1B if ASX considers that there is a need for information about the proposal to be disclosed to prevent or correct a false market in the entity's securities.

## 8. Waivers

It has not generally been the case that a listed entity has needed to approach ASX for a waiver of Listing Rule 11.4 or 11.4.1. This is because of the capacity that ASX has under Listing Rule 11.4.1(a) to approve an offer, issue or transfer being made on a non-pro rata basis if in ASX's opinion it is fair in all the circumstances.

Generally speaking, if ASX determines that an offer, issue or transfer is not fair in all the circumstances and therefore the exception in Listing Rule 11.4.1(a) is not available, ASX will expect the entity to put the transaction to its ordinary security holders for approval under Listing Rule 11.4.1(b). It is highly unlikely to grant a waiver from that requirement.

<sup>43</sup> See section 2 of Guidance Note 12 *Significant Changes to Activities*.

<sup>44</sup> In the case of a listed trust, references to the board of directors of the listed entity should be read as references to the board of directors of the responsible entity of the trust.

<sup>45</sup> In the sense that a reasonable person would expect information about the proposal to have a material effect on the price or value of the entity's securities.

<sup>46</sup> See Listing Rules 3.1 and 3.1A.1 (second bullet point) and Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1-3.1B*.

<sup>47</sup> In the case of a listed trust, references to the board of directors of the listed entity should be read as references to the board of directors of the responsible entity of the trust.

<sup>48</sup> This is by virtue of Listing Rule 3.1A.2 ceasing to apply once the information is no longer confidential.

As noted in Guidance Note 11 *Restricted Securities and Voluntary Escrow*,<sup>49</sup> where a listed entity spins out a major asset and the spin-out vehicle will be listed on ASX and is not one that is excluded from escrow by Listing Rule 9.2,<sup>50</sup> a strict application of the Listing Rules would require a fresh application of escrow restrictions to the spin-out vehicle as a new listing.

In the case of a standard spin-out,<sup>51</sup> ASX recognises that the spin-out vehicle is effectively the successor of the listed entity in relation to the assets being spun out and so a fresh application of escrow restrictions is not appropriate. If a holder of restricted securities in the listed entity receives securities in the spin-out vehicle by way of a pro rata distribution on their restricted securities, ASX will expect the spin-out vehicle to apply escrow to those securities for the balance of the escrow period applying to the holder's restricted securities in the listed entity. Subject to this requirement being met, ASX will waive the application of escrow to any other recipients of securities in the spin-out vehicle.

## 9. Enforcement

ASX has a range of enforcement powers it can exercise if an entity engages in a spin-out that breaches Listing Rule 11.4 or proposes to do so.

ASX may:

- suspend the quotation of the entity's securities until the matter has been dealt with to ASX's satisfaction;<sup>52</sup>
- if the transaction has not yet taken place, direct the entity not to proceed with the transaction;<sup>53</sup>
- if the transaction has already taken place, direct the entity to cancel or reverse the transaction;<sup>54</sup> and/or
- direct the entity to convene a meeting of security holders to approve the transaction under Listing Rule 11.4.1(b).<sup>55</sup>

More generally, where an entity engages in a spin-out in breach of Listing Rule 11.4 and ASX considers the breach to be an egregious one, ASX may:

- censure the entity for breaching the Listing Rules;<sup>56</sup> and/or
- terminate the entity's admission to the official list.<sup>57</sup>

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

Whenever ASX takes enforcement action against an entity for breaching Listing Rule 11.4, it will usually require the entity to make an announcement to the market explaining that action and why it was taken.

<sup>49</sup> See '10.5 Standard spin-outs' in Guidance Note 11.

<sup>50</sup> Listing Rule 9.2 excludes from escrow an entity is being admitted under the profit test in Listing Rule 1.2, has a track record of profitability or revenue acceptable to ASX, or in the opinion of ASX has a substantial proportion of its assets as tangible assets or assets with a readily ascertainable value, unless ASX decides otherwise.

<sup>51</sup> This applies to standard spin-outs with or without an associated IPO.

<sup>52</sup> Listing Rule 17.3.1.

<sup>53</sup> Listing Rule 18.8(c).

<sup>54</sup> Listing Rule 18.8(d).

<sup>55</sup> Listing Rule 18.8(e). Where ASX imposes such a requirement and security holders do not approve the transaction, ASX may impose such further requirements as it considers appropriate under Listing Rule 18.8.

<sup>56</sup> Listing Rule 18.8A.

<sup>57</sup> Listing Rule 17.12.