



Reverse Takeovers

Final Listing Rule Amendments

20 October 2017



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Introduction

On 12 April 2017, ASX released its [Response to Consultation: Reverse Takeovers – Shareholder Approval Requirements – Exposure Draft Listing Rule Amendments](#) which outlined feedback received on ASX’s earlier consultation [Reverse Takeovers – Consultation on Shareholder Approval Requirements for Listed Company Mergers](#) and sought comments on an [exposure draft of proposed Listing Rule amendments](#) to require shareholder approval for reverse takeovers.

The submissions received and ASX’s response

ASX received 4 submissions in relation to its [Response to Consultation](#). ASX has published the non-confidential submissions on the [Public Consultations](#) page of its website. ASX thanks all those who shared their views and expertise during the consultation period.

The submissions received were broadly supportive of ASX’s proposed rule amendments, although some respondents had particular issues that they thought ASX should address, including:

- **The base on which the 100% reverse takeover threshold is calculated** – One respondent submitted that the base on which the threshold is calculated should include securities issued after the announcement of the transaction under an exception in Listing Rule 7.2. ASX considers it important that there is a bright line test for both the bidder and its shareholders and that this is best determined at the time of announcement. ASX also considers that counting post-announcement issues could increase the prospect of structuring to avoid the threshold.
- **Confining the voting exclusion to those voting in favour of the applicable resolution and allowing relevant parties to vote against** – There was mixed feedback in relation to this proposal. Nonetheless, ASX intends to proceed with this amendment for the reasons outlined below under the heading ‘*Other changes to voting exclusions*’.
- **Time within which securities must be issued** - ASX notes the feedback about the potential inconsistency between the proposed period of 6 months within which securities must be issued under the Listing Rules and the 12 month offer period for a takeover under the Corporations Act. However, ASX considers the current extension to 6 months provides an appropriate balance between the interests of entities and their shareholders.
- **The requirement for fresh approval for a material increase in consideration** – One respondent submitted that the requirement for fresh shareholder approval for a material increase in consideration should be removed. ASX considers that a material increase in consideration should require fresh shareholder approval, even though ASX acknowledges that this may have an impact on transaction structuring, flexibility and timing. ASX intends to issue guidance as to what may be a material increase in consideration. ASX will clarify in the guidance that it will use the old accounting guidance that a price increase of less than 5% will generally not be considered material, a price increase of more than 10% will generally be considered material, while a price increase between 5% and 10% may be material depending on the circumstances.

Having carefully considered the feedback received, ASX does not propose to make any amendments to the exposure draft Listing Rule amendments previously published. In due course, and as part of a broader review of Chapter 7 of the Listing Rules, ASX will issue an exposure draft of a new Guidance Note 21 *The Restrictions on Issuing Equity Securities in Chapter 7 of the Listing Rules*, which will provide guidance on some of the other issues raised in the consultation submissions. This will include guidance on the disclosures ASX expects to be made in a notice of meeting proposing a resolution to approve an issue of securities under or to fund a reverse takeover, the appropriate means and time frame for providing any necessary supplementary disclosure and the foreign jurisdictions to which ASX has extended exceptions 5 and 6 of listing rule 7.2.

Summary of proposed amendments

Currently, listing rule 7.1 generally requires a listed entity to obtain security holder approval for issues of securities in excess of 15% of its existing fully paid ordinary capital over a 12 month period unless an exception applies.

Exception 5 of listing rule 7.2 currently excludes issues of securities under a takeover bid required to comply with the Corporations Act (“takeover bid”) or a merger by way of scheme of arrangement under part 5.1 of that Act (“merger scheme”), while exception 6 currently excludes issues of securities to fund the cash consideration payable under a takeover bid or a merger scheme if the terms of the issue are disclosed in the bid/scheme documents.

Therefore, shareholder approval is not currently required under listing rule 7.1 for a bidder to issue securities under a takeover bid or merger scheme, regardless of the number of securities issued.

Changes to chapter 7 and related provisions

Listing rule 7.2 exceptions 5 and 6 will be amended so that those exceptions no longer apply to issues under, or to fund, a reverse takeover. This will have the effect that these issues will now require approval under listing rule 7.1.

A reverse takeover will be defined as a takeover bid or a merger by way of scheme of arrangement under Part 5.1 of the Corporations Act where an entity is proposing to acquire securities of another body and the aggregate number of equity securities issued or to be issued by the entity:

- under the takeover bid or scheme; and/or
- to fund the cash consideration payable under the takeover bid or scheme,

is equal to or greater than the number of fully paid ordinary securities on issue in the entity at the date of announcement of the takeover bid or scheme.

Separate issues will be able to be aggregated if, in ASX’s opinion, they form part of the same commercial transaction.

Listing rule 7.3.2 currently requires an issue of securities to be made within 3 months after shareholders approve the issue under listing rule 7.1. For issues under or to fund a reverse takeover this period will be extended to 6 months from the date of obtaining the requisite approval. This is designed to strike a balance between giving entities the time practically necessary to complete an issue of equity securities under or to fund a reverse takeover, 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.

A new listing rule 7.3.10 will be added requiring a notice of meeting to approve an issue of securities under or to fund a reverse takeover to disclose information “in relation to the reverse takeover”. ASX will publish guidance on the information ASX will expect to be disclosed in this regard.

The voting exclusion for listing rule 7.1 resolutions set out in listing rule 14.11.1 will be expanded to capture:

- in the case of a proposed issue under a reverse takeover, the reverse takeover target and any person who will obtain a material benefit as a result of the reverse takeover or the proposed issue (except a benefit solely by reason of being a holder of ordinary securities in the entity or the reverse takeover target); and
- in the case of a proposed issue to fund a reverse takeover, the reverse takeover target, any person who is expected to participate in the proposed issue, and any person who will obtain a material benefit as a result of the reverse takeover or the proposed issue (except a benefit solely by reason of being a holder of ordinary securities in the entity or the reverse takeover target).

Other changes to voting exclusions

Currently, the voting exclusion requirements in listing rule 14.11 apply whether an excluded person is voting for or against the relevant resolution. ASX has seen instances where parties have structured a transaction in such a way to attract a voting exclusion for persons who are opposed to the transaction.

The intent of the voting exclusion requirement is to ensure that a transaction can only proceed if it is approved by security holders who do not have a personal interest in the transaction. It is not to deny security holders who are opposed to a transaction an opportunity to vote against it.

ASX is therefore amending listing rule 14.11 so that excluded persons are only precluded from voting in favour of a resolution. They will be entitled to vote against the resolution. This change will apply to all voting exclusions under the listing rules, not just those related to security holder resolutions under listing rule 7.1 to approve an issue of securities under or to fund a reverse takeover.

ASX notes that this is consistent with the approach taken in a number of Corporations Act provisions, including section 611, item 7 approvals.

Changes to the definition of “associate”

The definition of “associate” in listing rule 19.12 currently incorporates by reference the definition of that term in sections 12 and 16 of the Corporations Act. Section 12(2)(a) addresses groups of bodies corporate that are controlled by a body corporate and deems them all to be associates of each other. However, that section fails to address groups of other types of entities and also groups that are controlled by an individual.

ASX considers that the definition of “associate” should apply to groups of entities under common control regardless of whether the controller is an individual, a body corporate or some other type of entity. ASX is therefore amending the definition of “associate” in listing rule 19.12 to have this effect.

Amendments to listing rules 1.2 and 1.3

In addition to the Listing Rule amendments mentioned above, ASX is taking the opportunity to make some minor amendments to listing rules 1.2 and 1.3 to clarify the accounts that an applicant must provide to ASX with its listing application.

Final version of rule amendments

The final version of the Listing Rule amendments discussed in this paper is available at this [link](#). It can also be accessed on the [Public Consultations](#) page of ASX’s website.

Implementation date

The Listing Rule amendments discussed in this paper come into effect on Friday 1 December 2017.

The amendments to chapter 7 will apply to reverse takeovers announced on or after that date.

The changes to the voting exclusion requirements will apply to notices of meeting despatched on or after that date.

All of the other changes will apply on and from 1 December 2017.