

## Guidance Note 25

## Exercise of discretions

**Issued:** March 2011

### Key topics

1. Applying for the exercise of discretion
2. ASX exercise of discretion
3. Publication of the exercise of discretion
4. Reviewing the exercise of discretion

### Listing Rules

1. Introduction to Listing Rules
2. Listing Rule 19.2

### Cross-reference

Guidance Note 8  
Guidance Note 11  
Guidance Note 12  
Guidance Note 16  
Guidance Note 24

### Guidance Note History

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### Introduction

- 1 This Guidance Note is published to assist entities understand how ASX exercises some of the discretion it has in the Listing Rules. Not every discretion is addressed in this Guidance Note.

### The Listing Rules

- 2 The Listing Rules give ASX discretion, consistent with them as a principles-based code that articulates responsive principles of regulation.
- 3 Some discretion is exercised by ASX without a request. Some discretion is exercised by ASX at the request of an entity.
- 4 To apply for the exercise of discretion, an entity must write to ASX and give it all relevant information, including information that may not assist the entity but which ASX ought to be made aware of.
- 5 So that an application can be processed quickly, an entity should provide ASX all the information required at the time it applies. If there is information the entity cannot provide at the time (eg, a list of the top 20 security holders that is not available), it should provide it immediately it is available.

### Exercise of discretion

- 6 ASX exercises discretion having regard to the listing rules, its licence obligations and its policies on regulatory decision-making (notably, that the interests of supervision of the market take priority over ASX's own commercial interests). ASX also seeks to ensure

that it meets its obligations to provide natural justice and take into account only relevant considerations.

- 7 In exercising its discretion, ASX takes into account the principles on which the Listing Rules are based. These are set out in the Introduction to the Listing Rules (see also paragraph 15 below).

### **Publication of discretion**

- 8 If the exercise of discretion involves the grant of a waiver, ASX's usual policy will normally apply. Rule 18.1.2 says that ASX will publish waivers.

### **Types of discretion**

- 9 The Listing Rules contemplate two types of discretion:
  - Discretion to apply a rule. In this case ASX considers criteria for the exercise of its discretion to apply the rule.
  - Discretion to remove the operation of a rule. In this case the applicant (normally the listed entity) must satisfy the relevant criteria for ASX to exercise its discretion.
- 10 For convenience, ASX divided the subject matter of the discretions into one of four categories –
  - Admission.
  - Information.
  - Security holder protection.
  - Orderly market.

### **General principles**

- 11 Each application of discretion depends on the facts of the case. The factors identified in this Guidance Note are not exhaustive. The Guidance Note, drawn from internal ASX policy, does not define the limit of ASX's discretion or dictate the exercise of discretion in a particular way. It is published to help entities understand the way that ASX considers the exercise of its discretion.
- 12 Precedent is important. ASX takes into account any previous similar applications of discretion and the effect of exercising the discretion on future potential applications. However, ASX is not bound to exercise its discretion in a particular way because it has previously done so.
- 13 Consideration of the regulatory burden is important. The burden of compliance (such as for investor protection) must be balanced against the need of the listed entity to achieve its objectives and the need to maintain a market of high integrity. Imposing conditions with the exercise of the discretion (eg, disclosure or voting) may be a way to strike the right balance.
- 14 ASX will take into account the interests of the market. While ASX does not consider its own commercial interests when exercising its supervisory powers, it

does consider the risks of the proposal to the market and to the market's reputation. ASX also believes that the interests of the market are best served if there is a market wherever possible.

- 15 The principles on which the Listing Rules are based guide the application of the rule and the exercise of discretion. There is some overlap, but generally the principles can be identified as applicable to one or more of the four categories. Thus:

Category	Admission	Information	Sec/holder protection	Orderly market
<b>Principle</b>				
Minimum standards of quality, size, operations and disclosure must be satisfied.	✓			
Sufficient investor interest must be demonstrated to warrant an entity's participation in the market by having its securities quoted.	✓			
Securities must be issued in circumstances which are fair to new and existing security holders.	✓		✓	
Securities must have rights and obligations attaching to them that are fair to new and existing security holders.	✓		✓	
Timely disclosure must be made of information which may affect security values or influence investment decisions, and information in which security holders, investors and ASX have a legitimate interest.	✓	✓		✓
Information must be produced according to the highest standards and, where appropriate, enable ready comparison with similar information.	✓	✓		
The highest standards of integrity, accountability and responsibility of entities and their officers must be maintained.	✓		✓	✓
Practices must be adopted and pursued which protect the interests of security holders, including ownership interests and the right to vote.	✓		✓	
Security holders must be consulted on matters of significance.	✓		✓	
Market transactions must be commercially certain.		✓	✓	✓

## **Admission discretions**

### *Rule 1.1 Condition 1*

16 Rule 1.1 Condition 1 requires an entity's structure to be appropriate for a listed entity. Entities and investors are attracted by the quality and integrity of ASX's market and this rule supports that quality and integrity. In any system of principles-based rules it is impossible to anticipate all the structures that might be put forward, so a general discretion is essential (this is one of a number of rules containing a general discretion; eg, Rule 6.1). ASX will consider the structure proposed, its transparency, the impact on any class of securities, the reasons for the structure, and how the market will perceive it.

### *Rule 1.8 Condition 2*

17 Rule 1.8 Condition 2 allows, apart from set categories of persons, a debt listing applicant to be any person approved by ASX. This discretion provides flexibility to the rule. ASX will consider the person proposed, the security involved, how the security is likely to be valued and trade (ie, price or yield), industry practice, whether equity or debt rules are better suited to the circumstances, and information requirements of the market.

### *Rule 1.10*

18 Rule 1.10 establishes the continuing obligations for debt listings on the basis that this type of instrument requires only limited obligations to apply unless circumstances need more. Thus the rule allows ASX to specify additional compliance obligations. ASX will consider the protection afforded by the additional rules and the cost of compliance with the additional rules compared to the benefit.

### *Rule 1.15*

19 Rule 1.15 establishes the continuing obligations for Foreign Exempt listings on the basis that home jurisdiction oversight and the size of the entity involved allow ASX to impose only limited compliance obligations unless circumstances need more. Thus the rule allows ASX to specify additional compliance obligations. While it is rare to impose additional rules, ASX will consider whether any essential requirement is missing from the home jurisdiction obligations, the cost of additional rule compliance compared to benefit for the entity to list here, and the opportunity the listing presents to Australian investors.

### *Rule 1.17*

20 Under rule 1.17, ASX may seek additional information in relation to an application for listing. The rule overcomes technical objections to providing additional information (eg, third party confidentiality). It benefits the applicant not simply to have the application rejected but to provide the requested information pursuant to a rule requirement. In asking for additional information, ASX will consider what useful information is added to the application, the ease and cost of meeting the request, and the reasonableness of the request in the circumstances.

### *Rule 1.19*

21 Rule 1.19 says that ASX has absolute discretion regarding an entity's listing. This absolute discretion applies, notwithstanding compliance with the specific requirements in the rules, and is consistent with the discretion in Rule 1.1

Condition 1. It supports principles-based rules. ASX will consider what is fair to security holders, and the potential impact on a fair, orderly and transparent market.

*Rule 2.9*

- 22 Rule 2.9 says that ASX has absolute discretion regarding quotation of an entity's securities. It is similar to rule 1.19.

*Rule 6.1*

- 23 Rule 6.1 says the terms of equity securities must, in ASX's opinion, be appropriate and equitable. This, too, is a general discretion, which applies notwithstanding compliance with specific requirements. It allows flexibility and supports principles-based rules. Recognising that ASX should not discourage flexibility for capital structures, ASX will consider what is fair to security holders, entrenchment and what is efficient for the marketplace.

*Rule 11.1.2*

- 24 Rule 11.1.2 says that when an entity makes a significant change in its activities ASX may require the entity to seek security holder approval for the change. ASX seeks to take a commercial approach, and considers whether the change in activities is enough to make the entity different (eg, refer to Guidance Note 12, Changes to Activities, which discusses transaction based comparisons), and how long and how widely the entity may have been flagging its plans to change.

*Rule 11.1.3*

- 25 Rule 11.1.3 says that when an entity makes a significant change in its activities, ASX may require the entity to meet the requirements for admission. The rule prevents 'backdoor listings' getting an advantage over initial listings. ASX will consider if the proposal is a significant change and is designed to avoid admission requirements, and the information available to security holders about the new entity.

*Rule 12.1*

- 26 Rule 12.1 says the level of an entity's operations must be, in ASX's opinion, sufficient to warrant continued quotation and listing. The rule seeks to ensure that a listed entity has a proper business that justifies listing. It is a continuing obligation, linked to the admission requirement in Rule 1.1 Condition 8, which preserves the quality of listing. ASX will consider what ownership interest and pricing signals exist, the potential impact of rumours or an uninformed market, the loss to security holders of a market, and the maintenance of listing standards.

*Rule 12.2*

- 27 Rule 12.2 says an entity's financial condition must be, in ASX's opinion, sufficient to warrant continued quotation and listing. Similar to rule 12.1, the rule seeks to ensure that a listed entity has sufficient financial size and strength to justify listing. It is a continuing obligation that matches entry requirements and preserves the quality of listing and quotation. Orderly trading is supported when market participants expect the entity to continue in existence and they are not simply gambling on its solvency. ASX will consider whether there is likely to be mispricing signals, rumours trading, security holder dissatisfaction, and the maintenance of listing standards.

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*Rule 12.3*

28 Rule 12.3 says ASX may suspend an entity's securities if half or more of the entity's total assets are in cash. It is a continuing obligation, linked to the admission requirement in Rule 1.3.2, which preserves the quality of listing. ASX will consider the market cycle, sectoral differences, cash reserves needed for some types of business or stages of business, opportunities the entity is seeking to create, the time needed to invest the cash, and the potential for a disorderly market from an unexpected change in the direction of the entity.

*Rule 12.5*

29 Rule 12.5 says an entity's structure and operations must be appropriate for a listed entity. This is a continuing obligation that matches the entry requirement in Rule 1.1 Condition 1. It is similar to Rule 1.1 Condition 1.

*Rule 17.11*

30 Under Rule 17.11 ASX may remove (ie, de-list) an entity at the request of the entity. The discretion in this rule gives ASX an ability to manage a removal in the most efficient and most suitable way. ASX will consider what is reasonable to security holders as an exit mechanism, what the entity wants, and the information in the market.

*Rule 17.12*

31 Under Rule 17.12 ASX may remove (ie de-list) an entity if (among other reasons) in ASX's opinion it is appropriate. This ground, additional to those captured by specific grounds, is linked to Rule 17.3. ASX will consider the entity's compliance culture, risks to security holders, the impact on other entities, and market expectations.

*Rule 17.16*

32 Rule 17.16 says ASX has discretion when to remove an entity after a decision has been made to remove it. This is an administrative provision to manage the timing of a removal and is linked to Rules 17.11 and 17.12. ASX will consider fairness to security holders and the entity, efficiency and orderliness for the marketplace, commercial implications for the entity of the date chosen, and the reasonableness of the time frame.

*Rule 18.1*

33 Rule 18.1 says ASX may at any time waive a listing rule, or part of a rule, and in granting waivers may impose conditions. Such a rule is essential to a principles-based code as it creates the power to alter the operation of the rules to suit individual circumstances. In assessing the balance between protective regulation and commercial advantage to the entity, ASX will consider what is fair to security holders, what is efficient for the marketplace, what information is in the marketplace, the regulatory burden compared to the advantages to the entity if the waiver is granted, and the effect of a waiver on the operation of the rule generally and on the principles of the Listing Rules.

*Rule 18.5*

34 Rule 18.5 says ASX may decide to take no action in relation to a breach of a rule. It allows ASX additional compliance flexibility. ASX may decide not to deal with a matter, but at the same time ASX has not removed the ability of a third party (eg, a security holder) to take action (eg, in court). ASX will consider what is efficient

and transparent for the marketplace, whether uncertainty will exist if it takes no action, and what other enforcement (ie, other than ASX) might be likely.

*Rule 18.9*

- 35 Rule 18.9 says ASX may at any time change an entity's admission category. The rule allows ASX to administer the official list and place entities in the correct category. ASX will consider efficiency and transparency for the market, the types of securities, the potential index, what rules attach to entities in the category, and the likely retail/ professional investor split of security holders in the entity.

## **Information discretions**

*Rule 3.1A.2*

- 36 Rule 3.1A.2 is one limb of the exception to the requirement in Rule 3.1 to disclose information. It is concerned with information that is confidential and that ASX has not formed the view is no longer confidential. The exception operates to avoid information asymmetry in the market (eg, by a 'leak'). Rule 3.1 is core to the maintenance of a fair, orderly and transparent market and enables the Corporations Act disclosure obligation. In exercising this discretion ASX will consider what information is in the market, what the other information is and how it came to be available, to whom it might be available, and the market's reaction. If ASX exercises its discretion resulting in the need for disclosure, ASX will consider how to balance the regulatory burden that detailed disclosure might impose with the level of specificity that adequately addresses the information asymmetry. For further information on listing rule 3.1, see Guidance Note 8 Continuous Disclosure.

*Rule 3.1B*

- 37 Rule 3.1B requires an entity to provide information to correct a false market if ASX asks. It supports a fair, orderly and transparent market. ASX will consider what information is circulating but is not formally in the market, what information is already in the market that supports the circulating information, the level of transparency, and the market's reaction.

*Rule 4.7B*

- 38 Rule 4.7B says that an entity must provide a quarterly report (Appendix 4C) if ASX asks. The discretion is exercised if cash flow information is needed in ASX's opinion, such as in cases where the entity's financial situation may be in doubt and other, more specific, requirements do not assist. ASX will consider what information is already in the market, the level of transparency in the stock (including about its financial condition), the ability of investors to value the stock without the information and the regulatory burden of imposing the obligation, including the potential advantage to a competitor of sensitive disclosure (eg margins).

*Rule 4.9*

- 39 Rule 4.9 says that, if an asset is an investment in an unlisted entity, the entity must provide the latest accounts of the unlisted entity if ASX asks. The rule assists transparency of financial information. ASX will consider what information is already in the market, the importance of the unlisted entity to the listed entity, the completeness of the information and its impact on the ability to value the listed

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entity, and the regulatory burden (eg, how difficult is it to procure the information and the impact of releasing unlisted entity accounts).

*Rule 18.7*

40 Rule 18.7 requires an entity to give ASX such information as it asks for to ensure that the Listing Rules are being complied with, and to submit information to an expert for scrutiny. It supports ASX's compliance efforts. In exercising this discretion ASX will consider the culture of compliance in the entity, the circumstances of the event (if a specific event) that gave rise to the request, and the regulatory burden that will be imposed (eg, the cost of experts).

*Rule 18.7A*

41 Rule 18.7A says ASX may publish correspondence between it and an entity. The rule should be read in conjunction with Rule 15.9. ASX will consider whether there has been a discussion between it and an entity that the market would benefit by knowing (eg, because assumptions have been made in the market), what information is already in the market, and what the impact of disclosure might be.

## **Security holder protection discretions**

*Rule 6.2*

42 Rule 6.2 allows an entity only one class of ordinary securities unless ASX approves an additional class. The rule derives from the 'one share one vote' concept and is based on the Corporations Act. It has the advantage of reducing transaction costs in the market. ASX recognises that entities should be able to structure their capital flexibly and attract new capital, and that the market benefits by choice, although not by complexity or uncertainty. ASX will consider the effect of the proposed additional class on standardisation, transparency, class rights, risks to security holders' understanding, control, and the categorisation of securities issued on ASX (eg, debt or equity).

*Rule 6.10.5*

43 Rule 6.10.5 says ASX may approve a limitation on security holders' right to vote or receive dividends as appropriate and equitable. The rule recognises that security holder protection must be balanced against the need for an entity to manage a restriction (eg, foreign shareholdings) forced on it by a licence or legislation. ASX will consider the reasonableness of the provision in the circumstances, how else the entity might enforce the restriction, what security holders might be expected to understand, and arrangements for disclosure, consultation and sunset.

*Rule 6.12.3*

44 Rule 6.12.3 says ASX may approve a provision allowing a security holder to be divested as appropriate and equitable. It is linked to Rule 6.10.5 and like that rule provides flexibility by allowing for forced divestment in circumstances that do not offend the principles underlying the Listing Rules. The factors include the same ones as for Rule 6.10.5.

*Rule 7.17*

45 Rule 7.17 says that offers of securities in another entity must be pro rata or in another way that, in ASX's opinion, is fair in all the circumstances. Among other things, the rule protects security holders' 'existing ownership' in a spin-off. ASX will consider how the asset is being exchanged, how large a percentage of the asset

base it is, whether security holders should be asked to approve the proposal, and what effect the disposal might have on the core competency of the entity.

*Rule 7.18*

- 46 Rule 7.18 requires entities to consult with ASX prior to undertaking a reorganisation of capital. The rule protects security holders and the efficiency of the market. ASX will consider the effect of the reorganisation on existing values, timetabling, ratios involved and the possibility of mispricing.

*Rule 7.36*

- 47 Rule 7.36 requires an entity not subject to the Corporations Act that is conducting an on-market buy back to consult with ASX and comply with any conditions ASX imposes. Similarly to Rule 7.18, the rule protects security holders and the efficiency of the market. It has been used to create an equivalent regime to the Corporations Act, for managed investments in particular. ASX will consider whether conformity between different listed structures is desirable, the regulatory burden that is created for an entity that is not otherwise required to comply with the Corporations Act, and what security holders might be expected to understand and approve.

*Rule 9.13*

- 48 Rule 9.1.3 requires an entity that issues restricted securities to apply the escrow restrictions in Appendix 9B or other restrictions as ASX in its discretion decides. The rule prevents exploitation of the market by transferring share value before asset value is established. ASX will consider the level of protection needed, the disclosure of information about valuation, pricing issues for the asset and the securities, and the burden of having restricted securities. See also Guidance Note 11.

*Rule 9.2*

- 49 Rule 9.2 says a restriction agreement must be in accordance with Appendix 9A or as ASX requires in a particular case. It is linked to Rule 9.1.3. The rule recognises the value in the usual case of standardisation through the use of pro forma documents, which simplifies both meeting and checking of the obligation. ASX will consider the need for variation and balance it against the burden imposed by departing from uniform provisions, including the effect on transparency of rights and obligations.

*Rule 9.17*

- 50 Rule 9.17 says ASX may consent to the sale of restricted securities in a takeover bid or scheme of arrangement. The rule prevents unfairness to a holder of restricted securities where sufficient independent holders have agreed with the offer price. ASX will consider if other ways to achieve the same result exist, the advantage of certainty in the takeover or scheme, whether there will be any confusion as to rights during the takeover or scheme, and if the position will be returnable should the takeover or scheme ultimately not go ahead.

*Rule 10.1.5*

- 51 Rule 10.1 requires that an entity obtain the approval of security holders if a transaction is entered into with a person in a position of influence. ASX may deem a person to be a person of influence under Rule 10.1.5. Rule 10.1 is directed at conflicts of interest. It protects security holders from wealth transfer to parties

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who make the decision on behalf of the entity. Among other things, the discretion in Rule 10.1.5 prevents avoidance through the use of technicalities. ASX will consider the level of protection that is desirable, what security holders should be asked to approve, and what regulatory burden is created by imposing the related party regime. See also Guidance Note 24.

*Rule 10.2*

52 Rule 10.2 allows ASX to aggregate separate transactions for the purposes of the related party listing rules if in ASX's opinion the transactions form part of the same commercial transaction. The rule is an anti-avoidance measure. The factors include those referred to for Rule 10.1.5 and whether the transactions appear to be a part of normal business operations.

*Rule 10.11*

53 Rule 10.11 says an entity must obtain security holder approval if securities are issued to related parties. ASX may deem a person to be one whose relationship with the entity is such that approval should be obtained. The rule is linked to Rule 10.1. It protects security holders from wealth transfer by an issue of securities rather than by a transfer of assets. The factors include those referred to for Rule 10.1.5 and whether the transaction appears to be part of normal capital raising activities.

*Rule 10.14*

54 Rule 10.14 says an entity must obtain security holder approval if securities are issued to related parties under an employee incentive scheme. ASX may deem a person to be one whose relationship with the entity is such that approval should be obtained. The rule is linked to Rule 10.11. The factors include those referred to for Rule 10.1.5 and whether the transaction appears to be part of normal remuneration arrangements.

*Rule 10.16*

55 Rule 10.16 prohibits directors and their associates underwriting a dividend or distribution plan. ASX may deem a person to be one whose relationship with the entity is such that they should not underwrite the plan. This rule has a similar policy objective to Rules 10.1 and 10.11, namely reducing potential conflicts of interest. ASX will consider the level of protection desirable, the relationship of the person to the decision-makers, whether the involvement of the person is an avoidance device, any potential dilution and discount, and the desirability for the entity of a flexible dividend policy.

*Rule 14.8*

56 Rule 14.8 says that, if ASX requires, an entity must appoint a person approved by ASX as scrutineer of votes cast at a meeting. The rule assists with transparency particularly when the issue may be contentious. ASX will consider the corporate governance practices of the entity, the possible level or appearance of influence, and the regulatory burden in terms of cost and administration.

*Rule 14.11*

57 Rule 14.11 says ASX may determine, in relation to a resolution under the Listing Rules, that the votes of a person should be excluded. This discretion ensures that the objectives of the Listing Rules are met. ASX will consider the impact of allowing or disallowing a person to vote on the objective of the rule and the risk to the transaction.

## **Orderly market discretions**

*Rule 2.10*

58 Rule 2.10 gives ASX absolute discretion regarding the timing of quotation of an entity's securities. This is an administrative provision to manage the timing of quotation for fairness to all market participants. It is linked to Rule 2.9. ASX will consider the expectations of the market, the need for certainty and the capabilities of market systems.

*Rule 17.1*

59 Rule 17.1 says ASX may grant a trading halt at the request of an entity. The rule allows ASX to manage trading halts and see that they occur for a proper purpose. See Guidance Note 16 for the factors considered by ASX in exercising its discretion under this rule.

*Rule 17.2*

60 Rule 17.2 says ASX may suspend an entity's securities from quotation at the request of an entity. The policy is similar to that for Rule 17.1. See Guidance Note 16 for the factors considered by ASX in exercising its discretion under this rule.

*Rule 17.3*

61 Rule 17.3.4 permits ASX to suspend an entity's securities from quotation if in ASX's opinion it is appropriate for any reason. This is in addition to the specific grounds for suspension listed in Rules 17.3.1-17.3.3. The rule is linked to Rule 17.12. In exercising its discretion under this rule, ASX will consider the market's need for confidence, accurate information and orderly trading; the consequences of suspension on the entity and the holders of its securities; and what event is likely to result in lifting the suspension.

*Rule 17.7*

62 Rule 17.7 says ASX may at any time reinstate an entity's securities to quotation. The rule articulates ASX's power to lift suspension or a trading halt. The factors include those referred to for imposing a suspension or trading halt, and whether any further suspension or trading halt shortly after trading is reinstated seems likely.

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*Rule 17.12*

- 63 Rule 17.12 permits ASX to remove an entity from the official list if in ASX's opinion it is appropriate for any reason. This is in addition to the other specific grounds for removal from the official list mentioned in that rule. The policy is similar to that for Rule 17.3.