

REVISED ASX GUIDANCE NOTES RELEVANT TO APPLICATIONS FOR ADMISSION AND LISTING OF FOREIGN ENTITIES

On 1 September 2014, the Australian Securities Exchange (ASX) released an updated version of Guidance Note 1 to the ASX Listing Rules (dealing with applications for admission to ASX) and an updated version of Guidance Note 4 to the ASX Listing Rules (dealing with foreign entities listing on ASX). The revised version of Guidance Note 1 can be accessed by clicking [here](#), and the revised version of Guidance Note 4 can be accessed by clicking [here](#).

Guidance Notes to the ASX Listing Rules provide a useful overview of ASX's general approach to certain issues. As such, the revised Guidance Notes are important for entities (including foreign entities) considering applying for admission to ASX. This article sets out a general overview of some of the changes to Guidance Note 1 and Guidance Note 4.

GUIDANCE NOTE 1 - APPLYING FOR ADMISSION - ASX LISTINGS

The purpose of Guidance Note 1 is to assist entities wishing to apply for admission to ASX to prepare their application for listing. Guidance Note 1 provides an overview of the listing process generally, and describes various specific listing requirements in detail.

Included in the recent amendments made to Guidance Note 1 are the following matters:

Appropriate structure and operations

ASX Listing Rule 1.1, Condition 1, requires that for an entity to be admitted to the ASX, it must have a structure and operations that are appropriate for a listed entity.

One of the key changes to Guidance Note 1 is the inclusion of more detail in the list of examples of scenarios in which issues may arise in determining the appropriateness of an entity's structure and operations, including more detail in the context of the following scenarios:

- where the applicant is offering bonus or "loyalty" securities;
- where the applicant's capital structure includes a large number of options, performance shares and/or other convertible securities, relative to the ordinary securities on issue;
- where the applicant's capital structure includes a significant number of options to acquire further options (so called "piggy back" options);
- where the applicant's main assets or business operations are located in an "emerging market" and the applicant holds its interest in those assets or operations through a complex and potentially risky ownership structure; and
- where the applicant's business operations do not appear to have any substance.

Prospectus or PDS requirements

Ordinarily ASX does not stipulate what specific information is to be included in a prospectus or PDS of an entity applying for listing, opting to leave this to the applicant and its professional advisors to decide, based on the ASX Listing Rules, the *Corporations Act 2001* (Cth) and other applicable laws.

However, on the basis of revised Guidance Note 1, there are two instances in which ASX will specifically require that particular information be

included in the prospectus or PDS of an entity applying for an ASX listing:

- where an entity is established outside Australia, in which case ASX expects the prospectus or PDS to include specific information relevant to the entity not being established in Australia (including a concise summary of the rights and obligations of security holders under the law of the entity's jurisdiction of establishment, and a concise summary of how the disclosure of substantial holdings and takeovers are regulated under the law of the entity's jurisdiction of establishment); and
- where an entity proposes to list on the ASX with a free float of less than 10%, in which case ASX expects the prospectus or PDS to outline the entity's plans to increase that percentage to at least 10% and the time frame over which it intends to do so.

Minimum spread

Revised Guidance Note 1 notes that while there is no specific requirement in the ASX Listing Rules for a minimum free float, entities are encouraged to have, at the time of their admission, a reasonable free float to promote liquidity in its securities.

Revised Guidance Note 1 specifically also refers to ASX Listing Rule 1.19, which provides that ASX may admit an entity on any conditions it thinks appropriate.

Revised Guidance Note 1 also contains further guidance on ASX's approach to the provisions of the ASX Listing Rules dealing with spread, as follows:

- Revised Guidance Note 1 provides that security holdings held through a nominee will generally count as a single holding in determining whether spread has been achieved. Revised Guidance Note 1 clarifies that if an applicant requests ASX to look behind the nominee holding, ASX will, at a minimum, require a letter from the nominee setting out particular information in relation to relevant share holdings.
- Revised Guidance Note 1 also adds further examples of methods in which ASX will

consider an entity to be achieving spread by "artificial means" (which would mean that an entity is not satisfying the minimum spread requirements). The revised list now also includes having investors pre-complete transfers of their securities to a third party ahead of listing, and having investors enter into purchase agreements or call options that allow a third party to acquire their securities during a certain period after listing.

- Revised Guidance Note 1 contains a more expansive list of evidence that the ASX may call for in verifying whether an entity has achieved the minimum spread without using artificial means. The expanded list includes statutory declarations from officers of the entity, and reports from independent experts selected by ASX.
- Revised Guidance Note 1 also provides guidance about the consequences of an entity misleading ASX about whether the minimum spread requirements have been achieved. This includes ASX having the discretion to suspend trading in an entity's securities or remove that entity from the ASX, where ASX has concerns over an entity being admitted to the ASX without properly having obtained spread.

Clearing and settlement

Revised Guidance Note 1 provides guidance as to the CHES and issuer sponsored sub registers an entity must establish. Revised Guidance Note 1 provides that unless an entity is established in an overseas jurisdiction whose laws preclude it, the entity must be approved as an issuer under the operating rules of the CHES facility. In addition, revised Guidance Note 1 provides that an entity must also establish its own issuer sponsored sub register.

Where an entity is precluded from using CHES on the basis of legal requirements in its jurisdiction of establishment, it must have CHES Depository Interests (**CDIs**), issued over its ASX quoted securities and must establish a CHES sub register and an issuer sponsored sub register in those CDIs to facilitate clearing and settlement of transactions in its securities by ASX.

GUIDANCE NOTE 4 - FOREIGN ENTITIES LISTING ON ASX

The purpose of Guidance Note 4 is to assist foreign entities (being those established outside Australia) considering a listing on ASX to understand the options available to them. In addition, Guidance Note 4 outlines some common issues faced by foreign entities seeking listing on ASX.

Included in the recent amendments made to Guidance Note 4 are the following matters:

Minimum spread

Similar to the changes made in respect of revised Guidance Note 1, revised Guidance Note 4 notes that while there is no specific requirement in the ASX Listing Rules for a minimum free float, entities are encouraged to have, at the time of their admission, a reasonable free float to promote liquidity in its securities. Again, revised Guidance Note 4 also specifically refers to ASX Listing Rule 1.19, which provides that ASX may admit an entity on any conditions it thinks appropriate.

Financial reporting requirements

Under the ASX Listing Rules, accounts to be provided to the ASX must be prepared based on Australian accounting standards, or on the basis of other standards agreed to by the ASX.

Revised Guidance Note 4 adds Bermuda, Canada, Cayman Islands, New Zealand and South Africa to the list of jurisdictions whose accounting standards will be recognised by the ASX for these purposes.

Registration as a foreign company under the Corporations Act

ASX Listing Rule 1.1, Condition 4(c), requires that for an entity to be admitted to the ASX, it must be registered as a foreign company under the *Corporations Act 2001* (Cth). Revised Guidance Note 4 states that ASX will only entertain an application for a waiver of this requirement if the relevant entity provides a legal opinion from a "reputable Australian law firm which is satisfactory to ASX", which confirms that the applicant will not be carrying on business in Australia. The consequence of this opinion would be that the

entity is not necessarily required to be registered as a foreign company in Australia.

Clearing and settlement

Revised Guidance Note 4 also provides guidance as to the CHES and issuer sponsored sub registers an entity must establish, and contains similar guidance to that provided in revised Guidance Note 1.

CONCLUSION

The revised versions of Guidance Note 1 and Guidance Note 4 provide further clarity on ASX's general approach to applications for admission, and to listing of foreign entities on ASX. In some cases, the amendments to the Guidance Notes impose a more onerous standard that applicants are required to comply with, as compared with previous versions of the Guidance Notes. In other cases, the amendments will provide for an easier listing process for some entities.

However, Guidance Notes to the ASX Listing Rules should not be taken as a definitive statement of how the ASX will apply the ASX Listing Rules in particular cases. Please contact us if you are considering applying for admission to the ASX, and wish to discuss any particular provisions of the ASX Listing Rules.

MORE INFORMATION

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