ASX Guidance Notes changes

15 September 2020
12 min. read
Worthwhile read for: Company directors, CEO, Board members
ASX / ASIC / corporate governance / corporate advisory and governance / trading / trade / guidance

On the 28 August 2020, the Australian Stock Exchange (**ASX**) released updates to the following:

- Guidance Note 3: Co-operatives and Mutuals (**GN 3**);
- Guidance Note 4: Foreign Entities (**GN 4**);
- Guidance Note 12: Significant Changes to Activities (**GN 12**); and
- Guidance Note 19: Performance Securities (formerly Performance Shares) (**GN19**).

Key takeaways

In particular, revisions to GN 12 and GN 19 will be significant to certain entities. Key amendments of note include:

- changes to the '20 cent rule' and minimum spread conditions which may further limit opportunities for entities to list on the ASX without undertaking a conventional initial public offering;
- an updated definition of 'performance securities' to include performance rights and performance options specifically (including a streamlined process for "ordinary course of business remuneration securities";
- a new requirement for entities to obtain an independent expert report in circumstances where the number of shares issued upon achievement of the relevant milestones applicable to performance securities exceeds 10% of the shares on issue; and
- amendments to performance milestones which include a broader definition of inappropriate terms, financial and non-financial measures that don't have 'meaningful' thresholds and expressly excludes adjustment to revenue or profit one-offs.

This article summarises these recent updates and examines the potential implications as a result of these changes.

Heading	What is the change?	Commentary
Guidance Note 3		
Co-operative capital units and mutual capital instruments	The insertion of section 7.6, permits co-operative companies to issue co-operative capital units (**CCU**s) and mutual capital instruments (**MCI**s). These amendments aim to address the 'mutual capital instruments' that mutual entities are now able to issue under Part 2B of the Corporations Act and the similar 'co-operative capital units' that cooperatives are able to issue under Division 2 of Part 3.4 of the Co-operatives National Law.	Where a CCU or MCI has debt-like features, ASX will now be favourably disposed to declaring the CCU or MCI to be a debt security for the purposes of the Listing Rules and admitting the issuer as an ASX Debt Listing rather than an ASX Listing.
Guidance Note 4		
Foreign entities listing	Section 5.2 now classifies Tel Aviv Stock Exchange (**TASE**) as an acceptable listing venue for foreign exempt listings.	This will reflect the relief ASIC has recently granted to US-incorporated listed companies to allow them to prepare and file accounts under section 601CK of the Corporations Act using US GAAP rather than Australian IFRS.
Guidance Note 12		

Minimum spread rule	Amendment made to section 8.5. Where a re-compliance listing involves a material capital raising, ASX has indicated that it may impose a condition of re-admission that a person is only counted for spread if they obtained a holding of the entity's main class of securities with a value of $2,000 as a result of participating in the capital raising related to re-admission (i.e. by applying for securities in accordance with the re-admission prospectus).	These changes limit the application and accessibility of 'back door listing' for certain entities. Amended to reflect standard conditions to be imposed in all re-compliance listings that: • spread must come from subscriptions to the capital raising being conducted by the entity in connection with its re-admission (i.e. pre-existing holdings will not be counted); and • in the case of emerging market issuers, 100% (rather than the current 75%) of spread must come from residents of Australia or other jurisdictions acceptable to ASX.
Additional steps for transaction requiring re-compliance under listing rule 11.1.3	Section 2.10 has been substantially amended to outline a new six step process that an entity must follow before and after announcing a transaction which requires re-compliance with Chapters 1 and 2 of the Listing Rules. The six step process outlined under section 2.10 can be found **here**. Following completion of the six steps and assuming the transaction proceeds, ASX notes that it will only consider reinstating the entity's securities to quotation if it is satisfied that: • the cumulative announcements the entity has made about the proposed transaction contain all of the information referred to in Annexure A of GN 12; • the entity has not in the preceding 12 months announced any other proposed transaction under Listing Rule 11.1 which required re-compliance pursuant to Listing Rule 11.1.3 and which, for any reason, did not proceed to completion; • the entity is in compliance with its obligations under the Listing Rules (including, in particular, its continuous and periodic disclosure obligations in Chapters 3 and 4, and its ongoing obligations in Chapter 12); and • there is no other reason for trading in the entity's securities to remain suspended.	The entity's securities will remain suspended from quotation until the entity has either re-complied with ASX's admission and quotation requirements or the requirement to re-comply has ceased to apply (with the entity's further announcement about the transaction following step six to clearly disclose this).
The 20 cent rule	Section 8.8 outlines a number of key changes to the circumstances in which it will grant relief from the 20 cent rule for re-compliance listings. Entities that have not been subject to a deed of company arrangement or creditors scheme in the two years preceding the proposed back door listing (and which have remained suspended since effectuation) will still be eligible to apply for the two cent waiver. In addition, GN 12 provides that a two cent waiver will not be granted unless: • the price at which the entity's securities traded on ASX over the last 20 trading days on which the entity's securities have actually traded on ASX preceding the date of the announcement of the proposed transaction (or, if the entity was already suspended at the time of the announcement, the last 20 trading days on which the entity's securities have actually traded on ASX prior to its suspension) was not less than the offer price; or • the entity announces at the same time that it announces the proposed transaction that it intends to consolidate its securities at a specified ratio that will be sufficient, based on the lowest price at which the entity's securities trades over the 20 trading days referred to previously, to achieve a market value for its securities of not less than the offer price.	The result of these changes may significantly limit the ability for entities to undertake 'back door listings' and readmissions to ASX.
Announcing a transaction under Listing Rule 11.1	Relates to section 2.6-2.12 ASX's guidance on the steps to take ahead of announcing a proposed significant transaction under Listing Rule 11.1 have been substantially re-worked. In particular, ASX has clarified that entities, by seeking in-principle advice on ASX's potential application of Listing Rules 11.1.2, 11.1.3 or 11.2 to a proposed transaction "before it comes under an obligation to announce the proposed transaction to the market": • can have a high degree of confidence about ASX's position (noting that previous references to "certainty have been replaced); and • will not have to "face the embarrassment of having to correct or retract an announcement about the proposed transaction should ASX's initial view on these matters be an unfavourable one".	Importantly, where ASX exercises its discretion under Listing Rule 11.1.3 to require re-compliance under Chapters 1 and 2 of the Listing Rules, but has nonetheless given in-principle advice that ASX would not refuse re-admission under Listing Rule 1.19, ASX has cautioned that such in-principle advice is not, by itself, an indication that the entity will receive any other Listing Rule waiver or confirmation required or contemplated by the proposed transaction. ASX notes that, if an entity wants comfort in that regard, it will need to apply for specific in-principle advice on ASX's preparedness to grant the waiver or confirmation in question.
Minimum spread	Section 8.5 has been amended to reflect standard conditions to be imposed in all re-compliance listings that: • spread must come from subscriptions to the capital raising being conducted by the entity in connection with its re-admission (i.e. pre-existing holdings will not be counted); and • in the case of emerging market issuers, 100% (rather than the current 75%) of spread must come from residents of Australia or other jurisdictions acceptable to ASX.	Accordingly, pre-existing shareholders (to the extent they don't otherwise participate in the capital raising) will not be counted towards meeting ASX's minimum spread requirements.
Guidance Note 19		

Performance securities	GN 19 formerly known as 'performance rights' has been amended to 'performance securities'. As outlined in section 3, performance securities include performance shares, performance options and performance rights, as well as certain contingent consideration agreements and deferred consideration agreements.	Some "contingent consideration agreements" and "deferred consideration agreements" are in substance and effect performance rights and regulated by the ASX under the listing rules accordingly.
Performance securities covered by section 8 to 15 of this GN	Section 7 covers performance securities that do not need to comply with the substantive provisions under GN 19: • cash settled performance rights (as they are not equity securities); • an issue of performance securities pursuant to a takeover bid or a merger by way of scheme management; or • an issue of performance securities: • under an employee incentive scheme; or • as part of remuneration package of a director or employee, where the issue has been made in the ordinary course of business of the entity, not in connection with a new or re-compliance listing and has been approved by shareholders under Listing Rule 10.11 or 10.14 or by the board remuneration committee (if Listing Rules 10.11 or 10.14 do not apply).	Performance securities issued a part of director or employee remuneration packages will generally be exempt from the substantive provisions of GN 19 on the basis that they fall within the requirement for shareholder approval or an exemption.
Applying for in-principle advice about performance securities	Section 8 has been amended to expand information an entity must provide to the ASX when seeking in-principle advice on performance securities. In particular, where performance securities are being issued in connection with an acquisition of another entity or undertaking, ASX will require: • an explanation of why the performance securities are being issued, including the commercial goals the entity is trying to achieve and the risks it is trying to manage by imposing performance milestones; and • details of how the entity determined the number of performance securities to be issued to the vendor and why it considers that number to be appropriate and equitable.	Any entities undertaking a new or re-compliance listing seek in-principle advice that the terms of any performance securities issued (or proposed to be issued) satisfy Listing Rule 1.1 condition 1 as well as Listing Rules 6.1 and 12.5 prior to making any announcements in respect of the performance securities. The key requirement is that the entity will need to explain in each case how the entity determined the number of securities and how that number is considered to be appropriate and equitable.
Appropriate and equitable numbers of performance securities	In its new guidance, the ASX has stated that for the number of performance securities to be considered appropriate and equitable, the number of ordinary shares into which the performance securities will convert if the relevant milestone is achieved must be: • fixed or calculated by reference to a formula that delivers a fixed outcome so that investors and analysts can readily understand, and have reasonable certainty as to, the impact on the entity's capital structure if the milestone is achieved; and • objectively fair and reasonable, both in absolute terms and in relative terms compared to the additional value delivered if the milestone is met. **Section 10 and 11** provides additional guidance on inappropriate terms for performance securities.	ASX has listed a number of examples of performance securities it will likely deem inappropriate, including: • where conversion terms are determined by reference to the market price of the ordinary shares at a future date or over a future period and there is no floor on the conversion price; and • where conversion is triggered by introducing new products, investors, customers or users without meaningful financial thresholds around the benefit to be provided.
Independent expert report	Section 13 includes a new requirement for an independent expert report to be obtained confirming that the issue of performance securities is fair and reasonable to non-participating shareholders in the following circumstances: • where an entity is already listed and the number of ordinary shares that will be issued on conversion (in aggregate) on achievement of the milestone is greater than 10% of the number of ordinary shares the entity has or proposes to have on issue as at the date the performance securities are proposed to be issued (taking into account any ordinary shares that the entity may be issuing in connection with the same transaction); or • where an entity is applying to be listed, it has or proposes to have performance securities on issue at the date of its admission to quotation and the number of ordinary shares that will be issued on conversion (in aggregate) on achievement of the milestone is greater than 10% of the number of ordinary shares the entity proposes to have on issue at the date of its admission to quotation (taking into account any ordinary shares that the entity may be issuing in connection with its listing).	In the case of a listed entity, the independent expert report must be included in a notice of meeting seeking shareholder approval for the terms of the performance securities, while in the case of an entity applying to be listed, the independent expert report must be included in the listing prospectus.

For any assistance relating to this new guidance or any other corporate related matters contact our **Corporate Advisory and Governance** team.

15 September 2020

ASX / ASIC / corporate governance / corporate advisory and governance / trading / trade / guidance
Previous article Next article