17 April 2015

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Submission to the ASIC Consultation Paper - CP 228 Collective Action by Investors: Update to RG 128

Global Proxy Solicitation (GPS) is pleased to provide a submission in response to the Australian Securities and Investments Commission (ASIC) review of regulatory guidance for investors who want to take collective action to improve the corporate governance of listed entities.

By way of background, GPS is recognised as the Australian leader in shareholder engagement and proxy strategies, discrete institutional and retail investor research and corporate governance consulting.

Our commentary and feedback will primarily relate to corporate governance matters, specifically any influence over shareholder rights resulting from the proposed revision to RG 128 and the implication this may have on investors' capability to effectively engage with one another around shareholder voting matters.

GPS is primarily focused on two concerns that ASIC has highlighted in respect of the draft update to RG 128: appropriately balancing the ability of investors to engage effectively with one another against the takeover provisions pursuant to Chapter 6 of the Australian Corporations Act 2001 (the Act); and appropriately balancing positive investor engagement with concerns around the potential control-seeking behaviour of individual shareholders or groups of shareholders.

ASIC Questions

B1: Do you agree with the approach taken to update RG 128 to provide revised guidance on how the takeovers and substantial shareholding notice provisions apply to collective action by shareholders?

GPS is supportive of the proposed update to RG 128, which based upon the draft disclosure document provides for a significant improvement in clarity and detail around the rationale for the guide, what qualifies as both permissible and prohibited conduct in relation to collective action by investors, and the potential risk to

shareholder rights that may ensue from problematic collective action. Of particular note are the following inclusions in the updated RG 128 document:

- That the benefits of shareholder engagement should be balanced against the risk that control over an entity may be acquired inappropriately (RG 128.3). In other words, that all shareholders are to be treated fairly and equally so as to ensure the interests of some shareholders do not inappropriately impinge on the rights and interests of other shareholders. For example, inappropriate action may take the form of a passing of control whereby those shareholders not involved in the collective action remain uninformed of such action taking place (RG 128.13b).

- That collective action by investors should be encouraged where it can assist in the promotion of corporate governance improvements for the long term benefit of shareholders (RG 128.13a). Such collective action may include, but is not limited to, shareholder voting on: the non-binding resolution to approve a company's remuneration report; resolutions that consider the appointment of either board-endorsed or shareholder-endorsed director nominees; resolutions proposing non-procedural amendments to a company's constitution; and both prospective and retrospective ratifications of new share capital issuances that exceed the provisions under ASX Listing Rule 7.1.

- That the definition of a 'relevant interest' does not simply pertain to ownership but is designed to encompass an individual's capacity to exercise influence over securities (RG 128.25).

  For additional clarity, ASIC may wish to consider disclosing within RG 128 the concept of 'relevant interest' as defined in ss608 and 609 of the Act and how this underpins 'voting power' as determined pursuant to s610 of the Act (RG 128.43). We do acknowledge that further guidance for 'relevant interest' is contained under RG5 (pursuant to RG 128.31) but additional clarity under RG 128 may be useful in determining the thresholds applied under takeover and substantial holding provisions (RG 128.23). This is of particular importance where collective action is captured by the takeover provisions, but where the nature of such action does not pursue an acquisition of a substantial interest or company control. This is most concerning where the takeover provisions may apply to collective action around corporate governance matters (RG 128.29).

  Such detail may be appropriately designated to section C of RG 128 ("Legal Considerations").

B2: Do you think that providing the illustrative examples in Table 1 and Table 2 of draft updated RG128 is useful? Do you agree with the inclusions and analysis in Table 1 and Table 2? Are there any other matters that should be included or deleted?

Examples are provided of what conduct is *unlikely* or *more likely* to result in a relevant agreement between shareholders, or that may trigger an associate relationship (RG 128.44). GPS regards the examples provided to generally encompass the most common forms of engagement between shareholders.

GPS is supportive of the detailed disclosure around potential conduct provided in Table 1 and Table 2, which represents a material improvement to the existing disclosure regime pursuant to RG 128.5 and RG 128.6 of RG 128 amended 8/7/1998. Of particular resonance are the following illustrative examples:

- That an institutional investor recommending that another institutional investor votes in a particular way is unlikely to constitute entering into a relevant agreement, and therefore is unlikely to result in unacceptable circumstances. GPS regards this approach as facilitating shareholder cooperation in the pursuit of effective change over poor corporate governance practices, the outcomes for which are intended to benefit all shareholders collectively and not individual or specific groups of shareholders.

  It appears that a shareholder that recommends to another shareholder to vote in a certain way is unlikely to result in unacceptable circumstances, but when such action is accompanied by representations to the company board around dealings with shares or voting rights, that this carries the potential to result in relevant interests being acquired in each others' shares by relevant agreement. In addition, a recommendation from one shareholder to another to vote in a particular way does not seem to result in the formation of a joint proposal to act or vote in a particular way. Accordingly, it appears to be in shareholders' best interests to refrain from indicating voting intentions to one another or to the company when engaging in collective action around corporate governance matters with listed entities.

- That investors jointly signing with other investors pursuant to s249D of the Act, being to requisition a general meeting of shareholders, is likely to be considered entering into a relevant agreement and will therefore qualify such shareholders as 'associates'. GPS accepts this approach, particularly in the context of collective action around proxy battles for board control and schemes of arrangement proposals.

B3: Do you find the proposed guidance useful? If not, why not?

Yes. The revised RG 128 provides deeper insight into the rationale for the guide, the benefits and potential risks associated with collective shareholder action, and improved definition around what may or may not be regarded as permissible or prohibited conduct and actions that are likely to result in an agreement or associate relationship being struck between shareholders.

B4: Do you find the overview in Section C of the draft updated RG 128 useful?

Somewhat. Of specific interest is the commentary provided around shadow directors and that the liability for directors' duties imposed by the Corporations Act extends to shadow directors, being institutional investors implied as directors through the exertion of board control. This definition or impact may not be commonly recognised amongst the institutional shareholder community. By contrast, the legal definitions around insider trading, the duties of directors, confidential information and misleading or deceptive conduct are more likely to be observed as common knowledge amongst the Australian institutional investor and director community.

It is not sufficiently detailed how, pursuant to RG 128.66, selective engagement with particular institutional investors can lead to perceptions of unfairness. It may be impractical for a company to meet with all its shareholders on a regular basis, and in this sense it is most efficient for a listed entity to prioritise its engagement program with shareholders on the basis of voting influence. If discussions resulting from this approach are restricted to publicly available information and direct investor feedback, such prioritisation should not result in any material disadvantage to shareholders who do not have the benefit of regular and direct engagement with listed entities. In the absence of formal engagement, shareholders should be provided a digital avenue or other routes to voice their concerns to company directors and receive an appropriate and timely response.

B5: Do you think the term 'collective action' is understood in this broad sense by relevant users of this guide, or should terminology that has less of an implication that investors will be acting together for a common purpose be used? If the latter, what would be a better term or phrase to use?

By definition, the statement 'collective action' is intended to reflect the behaviours, actions or steps taken by a group working towards a common goal. It implies that there is a requirement for individual shareholders to come together so as to capitalise on the collective group's resources, knowledge and influence to more effectively achieve the shared objective. This is therefore considered to be an accurate depiction of such action taken by Australian shareholders.

ASIC may wish to consider defining such action as either "cooperative action" or "concerted action", which may even more accurately point to how such groups operate in concert towards a shared, desired outcome. Irrespective of this suggestion, GPS is not concerned with the term 'collective action', and is comfortable with this terminology as defined in the draft update to RG 128.

B6: Do you agree with the proposed revocation of CO 00/455? Have you relied on the class order relief in CO 00/455? Do you agree that institutional investors are reluctant to rely on the class order?

We are agnostic in respect of this proposed revocation. GPS is not aware of any investors that have previously relied on CO 00/455.

Due to the absence of regular engagement between institutional investors and companies at shareholder meetings, and because of the onerous requirement to publicly disclose a voting agreement, GPS believes that there is sufficient disincentive for shareholders to not exercise the relief provided pursuant to class order 00/455. Specifically, shareholders are regarded to be generally reluctant in regularly disclosing their voting intentions, whereby there is a risk that such intentions may become subject to intense public scrutiny.

B7: Do you consider any other ASIC class order relief would be desirable, either similar to CO 00/455 or otherwise?

See B8.

B8: Do you agree with the proposal to indicate that individual relief may be granted where the nature of the conduct is not concerned with the acquisition of a substantial interest in or control over an entity?

Irrespective of our response to B6, and on the basis that there is an intention to remove and not replace class order 00/455, GPS believes that relief may be required for conduct unrelated to changes in control or substantial interests being acquired in a listed entity. Specifically, collective action involving matters in corporate governance, albeit unlikely to result in unacceptable circumstances, may be captured by the takeover and substantial shareholding provisions of the Act. In such circumstances, shareholders should be provided the opportunity to apply for individual relief, irrespective of the burden involved in any required disclosure(s) to obtain such relief. It should be incumbent on shareholders to decide whether they wish to proceed with such a process, which may or may not result in timely or useful relief.

We thank ASIC for the opportunity to provide feedback around the draft revision to RG 128. The revised document is regarded to be more thorough and comprehensive than the preceding RG 128 amended 8/7/1998 and should facilitate a more consistent approach to cooperative action amongst shareholders. GPS regards the ultimate benefit of this revision to be the promotion of more clear and sustainable engagement around corporate governance matters between institutional shareholders and the companies they actively invest in.

Yours Sincerely,

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