

# Australian Securities and Investments Commission Corporate Finance Liaison Meetings, May - June 2011 Adelaide, Brisbane, Melbourne, Perth, Sydney

## Summary of issues

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### Fundraising

#### ***Consultation Paper 155: Prospectus disclosure: Improving disclosure for retail investors***

ASIC has published this Consultation Paper (CP) and a draft Regulatory Guide (RG) for the purpose of guiding issuers on how to prepare prospectuses that assist retail investors make informed investment decisions. Our CP and draft RG propose six key ways to help achieve this aim:

1. *Include a single upfront overview that highlights key information*

Research shows that many retail investors do not read a prospectus in its entirety, but rather focus on the beginning of the document. In our experience information is often duplicated in a number of upfront sections within a prospectus. We propose that all key information (including a snapshot of the issuer's business model, key financial information, ratios and key risks) be included in a single investment overview. Cross references and other navigation tools could be used to point investors to more detailed information elsewhere in the document. We propose that this section be balanced, with equal prominence given to both the benefits and significant risks.

2. *Striking the balance between disclosure and marketing*

The Corporations Act requires the lodgement of a prospectus with ASIC where offers are being made to retail investors. The function of the document is to disclose particular information relevant to the issuer and that offer. It is important to strike the right balance between the disclosure and marketing functions of the document. To achieve this, we propose that photographs should only be included after the investment overview, so as not to distract from the disclosure function of a prospectus. In addition we propose that photos that have little relevance to the issuer or the offer should not be included as they have the potential to mislead retail investors.

3. *Explaining the business model*

We are of the view that it is important for retail investors to be able to form a good understanding of an issuer's business model from the prospectus. That is, how will the company make money and generate returns for investors. We expect that disclosing an entity's business model will involve explaining key dependencies, what the company does, its strategy and how it is financed. Importantly we make two points:

- ASIC does not think this will generally involve disclosing any trade secrets. Rather it is more about explaining how the key elements of the company's business fit together; and

- There is no 'confidential information carve-out' from the prospectus disclosure requirements. If information is relevant to a retail investor's decision it should be included.

#### 4. *Improving risk disclosure*

We propose that only risks relevant to the company should be included in a prospectus, that important risks should be disclosed prominently and that the consequences of a risk occurring should be explained (we understand, in some cases, consequences may only be able to be explained at a high level). This is much more helpful for retail investors than a generic shopping list of risks with the important ones buried towards the back.

#### 5. *Information about directors and key management*

We propose that disclosure about directors and key management should be balanced. Disclosure of details of a director's expertise and experience on the one hand, should be balanced against any directorships of insolvent companies, convictions and bankruptcies to the extent relevant to the investment decision of a retail investor. In the case of directorships of insolvent companies, in some cases it may be appropriate to explain or give context to these circumstances.

#### 6. *Making a prospectus 'clear, concise and effective'*

While it is generally agreed a 'clear, concise and effective' document is better for retail investors, what this concept involves is not well understood. To address this, we propose some practical wording and presentation tools.

Issuers should bear in mind 'clear, concise and effective' does not necessarily mean short. While a prospectus should be as short as possible it must include all information important to the investment proposition. A more concise document may be achieved by avoiding unnecessary repetition and using the incorporation by reference provisions.

#### *Finally*

This draft RG does not override our existing regulatory guides on fundraising disclosure, but rather supplements them. It is not our intention that the proposed guidance be adopted as a checklist. Issuers should critically consider our draft RG and how best to apply it given their circumstances.

## **Related Party Transactions**

### ***Release of revised Regulatory Guide 76: Related party transactions***

In March 2011 ASIC published a revised version of RG 76. We received a number of submissions on CP 142 *Related Party Transactions* in 2010 which were generally supportive of the proposals and our underlying objectives. The revised RG was prepared after consideration of these submissions.

#### *Objectives of new guidance*

The RG is aimed at improving the quality of disclosure for related party transactions, providing guidance on when resolutions should be put to members, promoting

consistency in the application of the arm's length exception and encouraging the preparation of independent expert reports in certain situations.

#### *Arm's length exception*

Our guidance sets out five factors to consider when determining whether the arm's length exception may be relied on:

- How the terms of the transaction compare with those of any comparable transactions being conducted on arm's length terms in similar circumstances;
- Nature and content of the bargaining process;
- Impact of the transaction on the entity and non-associated members;
- The existence of any other available options; and
- Expert advice received by the entity with respect of the transaction.

This is not an exhaustive list of factors that should be considered, and not all of these will always be relevant. We encourage entities to determine the appropriate weight of each of the relevant factors in the decision making process.

#### *Seeking member approval*

Our guidance provides that member approval should be sought where it is not clear that a transaction falls within the arm's length exception. The law places the onus on the company seeking to rely on the exception to establish that it does in fact apply.

#### *Use of independent expert's reports*

We have provided guidance on when directors may need to provide an expert's report. In these circumstances the separate 'fair' and 'reasonable' tests should be used. Our guidance provides an independent expert's report may be necessary to provide members with sufficient information where the financial benefit is difficult to value, the transaction is significant to the entity, or non-associated directors do not have relevant expertise or resources.

Our guidance encourages the use of expert's reports for related party transactions, regardless of whether they are required by the Listing Rules.

#### *Going forward*

We will apply our guidance when we review related party materials going forward. Based on our experiences we may consider further surveillance work in respect of the arm's length exception.

## Policy Update

Topic	Issue	Release
Financial Reporting	RG 43: Financial reports and audit relief & RG 58: Reporting requirements - registered foreign companies and Australian companies with foreign company shareholders – published revised guides	27 May 2011
	CP 150: Disclosing financial information other than in accordance with accounting standard – ASIC considering submissions received	28 March 2011
Self Acquisition	CP 137: Indirect self-acquisition by investment funds - further consultation	June / July 2011
Takeovers	CP 159: Acquisitions approved by members: update to RG 74 – consultation paper released	26 May 2011
	RG 71: Downstream acquisitions – consultation paper to be released	2 <sup>nd</sup> half 2011
	Consolidation of existing takeover policy RGs – process continuing	2011/ 2012
Experts Reports	<p>RG 111: Content of expert reports &amp; RG 112: Independence of experts - published revised guides following consultation</p> <p>Subsequent questions arising since publication of guides:</p> <ul style="list-style-type: none"> <li>• Release of expert's conclusions prior to the release of complete IER. ASIC's preference is for release of the entire report, but if this is not possible, ASIC expects disclosure of the assumptions and methodologies e.g. see <i>concise report summary</i> in RG 111</li> <li>• Release of IER prior to completion of ASIC review. If the report is required to be released due to statutory or listing rule obligations before ASIC's review, ASIC expects a qualification to be included that the report is subject to ASIC review and may change as a result.</li> </ul>	30 March 2011
Naming of Debentures	CP 151: Debt securities: Modifying the naming provisions and advertising requirements –ASIC considering submissions received	25 March 2011
Market Competition	Government Approves New Financial Markets Competitor – announcement by Treasury that the Government had granted a licence to Chi-X Australia Pty Ltd (Chi-X)	4 May 2011
	ASIC Market Integrity Rules (Chi-X Australia Market) 2011 – rules published	29 April 2011
PDS Disclosure	CP 154: Infrastructure entities: improving disclosure to retail investors - further consultation – ASIC considering submissions received	8 April 2011
Directors Remuneration	Corporations Amendment (Improving Accountability on Director and Executive Remuneration) 2011 – passed by the House of Representatives with amendments on 12 May 2011	23 Feb 2011