

# Australian Securities and Investments Commission Corporate Finance Liaison Meetings, June 2010 Adelaide, Brisbane, Melbourne, Perth, Sydney

## Summary of issues

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### Schemes and takeovers

#### *Schemes of arrangement and ASIC's role*

In December 2009, ASIC released a revised Regulatory Guide 60 *Schemes of Arrangement* [RG 60]. While the changes were largely minor and technical in nature, the revised RG 60 updates the circumstances where ASIC will grant a no objection letter under section 411(17) of the Corporations Act and incorporates guidance on our review of explanatory statements. RG 60 supersedes RG 142. ASIC is considering our policy position in relation to the following:

- a) reverse takeovers;
- b) providing no objection letters where there are objectors (submissions received in response to Consultation Paper 127 *Schemes of arrangement: Statements under s411(17)(b)*); and
- c) circumstances in which different shareholders are offered different consideration.

Going forward, ASIC is likely to make more consistent requests for material pertaining to schemes to be provided to the Court.

#### *Truth in takeovers*

Where a last and final statement has been made to the market, and minimal time has elapsed between the fresh bid and the earlier bid, ASIC may view the new bid as effectively an extension and improvement of the earlier bid. ASIC will consider Regulatory Guide 25 *Takeovers: False and misleading statements* and the circumstances specific to the bid. Maintaining investor confidence and upholding an informed market is the paramount consideration and ASIC may determine on the basis of the facts that a party should be bound by their last and final statement.

#### *Proportional takeover bid relief*

ASIC provides standard relief modifying the operation of section 618(2) in relation to a proportional offer, where acceptance would leave shareholders with less than a marketable parcel. The relief limits the operation of s618(2) to parcels in existence at the time the proportional bid is publicly proposed and requires specific disclosures by trustees. It is preferable that the relief be sought prior to the announcement of the bid. Abuse of this provision, such as shareholders splitting their holdings, may give rise to unacceptable circumstances.

## **Fundraising**

### *Regulatory Guide 213 Facilitating debt raising [RG 213]*

RG 213 describes ASIC relief in Class Order 10/321 [CO 10/321] for ‘vanilla’ corporate bonds and Class Order 10/322 [CO 10/322] offers of convertible notes to institutional investors. CO 10/321 provides relief for offers of vanilla bonds to be made with disclosure similar to the level required for a transaction specific prospectus. The minimum offer size is to be \$50 million (for a period of two years and then may lapse) and ongoing disclosure essential. This class order also provides relief to allow the prospectus for vanilla bonds to be made in two parts, the first being more general and the second relating to a specific offer, and extends the life of the *base* (first part) prospectus up to a period of two years. CO 10/322 provides for the on-sale of convertible notes, where a cleansing notice containing prospectus level disclosure is provided when the securities are first issued.

### *Future prospectus guidance*

A consultation paper pertaining to better prospectus disclosure is expected to be released for public comment towards the end of the year. The consultation paper will propose guidance on a number of recurring issues identified by ASIC, and set out ASIC’s approach towards satisfying the ‘clear, concise and effective’ principles.

### *Unlisted, unrated debentures*

ASIC received 22 submissions in response to Consultation Paper 123 *Debentures: Strengthening the disclosure benchmarks*, released in October 2009. The paper sought comment on adjusting the existing disclosure benchmarks, improving the explanation of benchmarks and revisiting naming of debenture products. ASIC is finalising revisions to Regulatory Guide 69 *Debentures: Improving disclosure for retail investors* arising from the consultation process.

### *Forecast financial information*

Regulatory Guide 170 *Prospective financial information* requires that forward looking statements must have a reasonable basis for inclusion, otherwise they risk being misleading to investors. ASIC is of the view that investors require sufficient information to judge the reliability of the forecast information, including assumptions underlying the forecast and if it complies with industry best practice. Where forecasts differ to other published information, ASIC will be seeking disclosure of why the differences have arisen. For mineral exploration entities, ASIC would be concerned if production targets had been disclosed when the company has not commenced mining, or where the company does not have JORC compliant reserves.

## **General disclosure**

### *Form and reasonableness of disclosure*

ASIC is very concerned when companies publish forward-looking statements which are likely to induce investment in continuous disclosure documents, and then omit this information in lodged documents (because the statements have no reasonable basis).

We have recently required corrective disclosure be made on the companies announcement platform to remedy inconsistencies between continuous disclosure and lodged documents.

Low-doc capital raisings are also being reviewed to ensure that the inappropriate disclosure is not being made through the announcement platform in abuse of this regime.

#### *Disclosure of expert fees*

ASIC has identified that routinely experts reports are not complying with Regulatory Guide 112 *Independence of experts* [RG 112] and the Financial Services Guide (FSG) provisions of Part 7.7 of the Corporations Act. ASIC's expectations for fee disclosure are:

- the actual fee be disclosed in the FSG at the front of the expert report; and
- commercial relationships with the commissioning party in last two years be disclosed.

ASIC will require supplementary or replacement disclosure to address these issues if inadequate disclosure is made.

#### *Risk disclosure*

For fundraising, control transactions and continuous disclosure purposes, entities are encouraged to consider making disclosures around any uncertainty arising from the Federal Government's proposed resource super profits tax. Entities must be careful to maintain the integrity of disclosure and be consistent in statements made both to the media and the market. If there is any uncertainty as to the level of disclosure required pertaining to a transaction, contact ASIC for clarification.

#### *Disclosure relief in demergers and reconstructions*

Regulatory Guide 188 *Disclosure in reconstructions* [RG 188] provides relief for reconstructions or capital reductions which constitute an offer regulated by Chapter 6D of the Corporations Act. ASIC has recently observed instances where all material information under section 256C has not been provided to members in accordance with RG 188. ASIC will not approve prospectus relief where we have concerns about the disclosure investors will receive and require draft notice materials to demonstrate adequacy of disclosure.

## **Other matters**

#### *Self acquisition relief*

Consultation Paper Consultation Paper *Indirect self-acquisition by investment funds: Further consultation* [CP 137] was recently released, containing a number of relief proposals that will permit certain indirect self-acquisitions by investment funds. The paper seeks comment on issues such as a 20% limit for controlled trustees, relief to facilitate participation in placements, acquisitions for index arbitrage and ASX reporting conditions.

#### *Form 382 lodgement arrangements*

Audit relief under CO 98/1417 for proprietary companies is changing with Form 382 only requiring to be lodged once, heralding a move to an opt-in, opt-out arrangement. Further information should be released by 30 June 2010.

### *Related party transactions*

In the lead up to meeting season, entities should refer to ASIC Media Releases 04-257 *ASIC cracks down on related party disclosure* and 05-63 *ASIC seeks better disclosure for shareholders in related party transactions* for guidance about the level of related party disclosure that we deem is adequate to meet your legal obligations.

### **General business**

When lodging documents or applications after 1 July 2010, please take note of ASIC's revised fees. Refer to the web address below for details.

<http://www.asic.gov.au/ASIC/asic.nsf/byHeadline/Fee-changes-effective-1-July-2010?opendocument>