

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

## Summary of issues

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### Takeovers

#### *Pre-bid disclosure project and associations*

ASIC is undertaking a project that will focus on issues that may arise shortly after a bid or scheme is announced, but prior to the dispatch of the bidder's statement or explanatory statement. ASIC considers that it is important that the information in the market during this time is as accurate and complete as possible given market participants will be trading on this information. Three main issues we will examine are:

- a) Pre bid disclosure.
- b) Structural concerns raised by a transaction.
- c) Identification of voting power (together with any associations) through substantial holding notices.

We expect to have a heightened focus on these issues in carrying out our reviews of bids and schemes.

#### *Downstream acquisitions (RG 71)*

ASIC has published a Consultation Paper (CP), CP 170 for the purpose of updating our guidance on downstream acquisitions. In particular, the circumstances in which ASIC will exercise its relief powers. The key proposals in our CP and draft Regulatory Guide (RG) include:

- When considering relief applications we will consider policy objectives of item 14 and purposes of Ch 6.
- In deciding whether to grant relief or what conditions will be imposed on relief, ASIC proposes to change from a 'main purpose' test of control to whether control of the downstream company may be regarded as a 'significant purpose' of the upstream acquisition.
- ASIC will only grant unconditional relief in very rare circumstances.
- ASIC will require an entity to make a downstream bid in accordance with RG 71 where we are of the view that control of the downstream entity appears to be a significant purpose, or shares in the downstream entity form a substantial part of the upstream entity's assets, or if the acquirer will obtain effective control of the downstream entity.
- Updated guidance about independent expert valuations for is required to determine fair value in a downstream bid.
- More detailed guidance about potential standstill, voting and other conditions that we may impose as an alternative to a downstream bid condition.

The consultation period for CP 170 ends on 16 January 2012.

## ***Item 7 transactions where contemporaneous member's meetings and bids (RG 74)***

ASIC is finalising updated guidance in RG 74 on the takeovers exception in s611 item 7 for acquisitions approved by members. Since the relevant consultation paper was issued, CP 159, we have seen a few transactions which combined an item 7 placement with an inter-conditional takeover bid.

We have some significant concerns about these transactions. In some situations it is likely that they will be contrary to the spirit of the item 7 voting exclusions and the principles of s602. We are considering providing guidance on these structures in the updated RG 74 and encourage you to contact ASIC if you are contemplating a transaction of this kind.

### ***RG Policy update***

ASIC is continuing its project to update and consolidate our published guidance on takeovers and anticipate we will put this to the market in mid 2012. The project is seeking to rearrange RG 159, RG 171 and 17 other smaller guides into 4 new regulatory guides which will cover:

- relevant interest and substantial holding notices,
- exceptions to s606 prohibition,
- takeovers and
- compulsory acquisition.

## **Fundraising**

### ***Prospectus disclosure guide –update following CP 155***

On 10 November we published Regulatory Guide 228 *Prospectuses: Effective disclosure for retail investors* (RG 228).

There were a few changes following review of the submissions, and further targeted consultation. These matters are addressed in Report 261 *Response to submissions on CP 155 Prospectus disclosure: Improving disclosure for retail investors*. The most significant of these changes is that the guidance is no longer prescriptive about financial ratios.

We encourage you to familiarise yourself with the new RG 228.

### ***Low- doc fundraising project***

ASIC is undertaking a project involving close review of disclosure made in relation to sample of low documentation equity offerings. The purpose is to assess the quality of disclosure in such offers.

### ***Naming of debentures***

Following public consultation under ASIC's Consultation Paper CP151 earlier this year, we have decided to:

- introduce by way of a conditional class a new category of debentures called a 'secured note' for the purposes of section 283BH that will allow some 'unsecured notes' to be described as 'secured notes'; and

- revise our guidance on the risk statements to be included in advertisements offering debentures or interests in mortgage schemes so that such advertisements confirm that "the product is not a bank deposit" and that "there is a risk that you could lose some or all of your money".

We also intend to update the relevant guidance in Regulatory Guides 45, 69 and 156. ASIC's interim no-action position in relation to the naming of debentures will end on 1 February 2012. Issuers will need to fully comply with s283BH as modified by the class order by this date.

## **Further policy update**

### ***Reporting of non-statutory profits - brief update following CP 150***

It is anticipated ASIC will issue regulatory guidance in December on the use of non-IFRS financial information. The guidance will clarify that ASIC is not seeking to prohibit the use of underlying profit figures in all instances but that we consider steps need to be taken to reduce the risk that such information may be misleading.

### ***Director's remuneration***

The government introduced the Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011 - to amend section 250R(5) to allow the chairman to vote undirected proxies in certain circumstances and where there is an express authorisation. The Bill will likely receive assent next year.

ASIC has discretion to grant relief from the voting restrictions and may only exercise that discretion if we are satisfied that there is no unfair prejudice to the interests of any member. A handful of applications to allow key management personnel or closely related parties of these persons to vote their own holdings have been received by ASIC. We have not granted relief for any of this type of application to date, and consider the test to be very high.

### ***Related party transactions***

Since the release of revised RG 76: Related party transactions we have seen an improved level of disclosure in related party notices of meeting and prospectuses of the information set out in Table 2 of RG 76.

We wish to emphasise that the Act requires that the notice of meeting (NOM) lodged with ASIC must be the same in all material respects as that sent to shareholders. If material changes are needed to the NOM lodged with ASIC, a new NOM and abridgement application (if required) must be lodged. A NOM lodged with ASIC under s208 is a public document on ASIC's registers.

## **Additional Matters**

### **Summer School**

ASIC Summer School 2012 will be held at the Hilton Sydney from on Monday 20 and Tuesday 21 February. The theme for the Summer School is "Building resilience in turbulent times". Registrations are now open for external delegates who can register through the ASIC web site at [www.asic.gov.au/summerschool](http://www.asic.gov.au/summerschool)