

Australian Securities and Investments Commission Corporate Finance Liaison Meetings, November 2013 Adelaide, Brisbane, Melbourne, Perth, Sydney

Summary of issues

Fundraising

Hybrids - Key findings from ASIC Report 365

In August, ASIC released Report 365 *Hybrid Securities*, which discusses our work and findings in relation to improving prospectus disclosure, monitoring selling methods, and providing investor education for hybrid securities. The key findings outlined in the Report include low levels of personal advice, the extensive use of sales material within broad distribution networks, and the heavy focus on yield by both investors and brokers.

A key focus for ASIC continues to be disclosure in prospectuses and, in particular, encouraging issuers to draft an Investment Overview which explains the key features and risks of the instrument in a way that retail investors can understand.

ASIC will continue to work with issuers and their advisers on their disclosure documents prior to formal lodgement. ASIC is also undertaking further investor education work via ASIC's MoneySmart website and enhanced monitoring of distributors of, and advertising of, hybrid securities.

Emerging market issuers

ASIC has undertaken a limited review of the risks and challenges faced by emerging market issuers. Emerging Market issuers are those entities with significant operations or assets in emerging markets, such as Eastern Europe, Asia and the Pacific (excluding Singapore, Hong Kong, Japan and New Zealand), Africa, South America or the Middle East.

ASIC published the findings of our review in Report 368 *Emerging Market Issuers* in August, in which ASIC identified no systemic or widespread issues in the emerging market issuer population in Australia. The report encourages emerging market issuers to focus on governance and meaningful risk disclosure, and to ensure that any related party transactions and corporate structures are transparent and open to scrutiny by shareholders.

ASIC will continue to monitor emerging market issuers by including a number of these entities in our financial reporting surveillance programs and through reviewing prospectus and other selected disclosure documents lodged with us. ASIC has also published an information sheet on our MoneySmart website '*Emerging Market Companies*' to increase investor education in relation to emerging market issuers.

Forecast financial information in disclosure documents

ASIC's expectation is that issuers will comply with their obligations to ensure that forecast financial information is accurate, complete and not misleading. Our view is that key underlying assumptions should be disclosed to enable investors to assess whether the forecasts are relevant, reliable and reasonable.

In relation to the use of forecast financial information in other information provided to the market, such as continuous disclosure announcements, as with prospectuses, ASIC's view is that key assumptions and details of the methodology used in the forecast should be disclosed in the announcement. ASX Guidance Note 8 also encourages the inclusion of all material assumptions in announcements.

Electronic Disclosure – Review and refresh of class order and guidance

ASIC released Consultation Paper 211 in June 2013 to consult on our proposals to update our existing policy to facilitate the use of the internet and other electronic means for offers of securities. We sought feedback on a number of specific matters including our proposed revocation of Class Order [CO 00/44] and the introduction of 'good practice guidance' principles. Broadly, our updated guidance aims to reflect recent developments in technology and market practices.

We received 4 responses to CP 211 and all respondents were generally very supportive of our proposal to update our guidance and to revoke the existing class order. We expect to publish our report on submissions and final regulatory guide in late 2013 or early 2014.

Unlisted Debenture issuers and charities

ASIC has consulted on reforms of the disclosure regime for unlisted debentures and in mid-2013 we made recommendations for law reform to Treasury. We will continue monitoring the unlisted debenture market and engaging with issuers and trustees.

In May 2013, ASIC released Consultation Paper 207 *Charitable Investment Fundraisers*. ASIC is currently considering whether an exemption given to charities (CO 02/184) to allow them to take in investment funds in the form of debentures or interests in a managed investment scheme should be continued. ASIC is currently discussing its recommended proposals with Treasury and other agencies.

Mining and Exploration Companies – JORC FAQ

Following the release of the revised ASX Listing Rules for mining and oil and gas companies and the updated 2012 JORC Code, JORC, ASX and ASIC have together compiled a suite of Frequently Asked Questions to provide additional clarification on the concepts and policies underpinning the enhanced disclosure regime.

The first group of FAQs deal with transactional arrangements. The new ASX Listing Rules and JORC Code will come into effect on 1 December 2013 and early adoption is strongly encouraged. From 1 December, reporting of exploration results, mineral resource and ore reserve estimates is required for 'significant projects' (2012 JORC Code) or 'material mining projects' (ASX Listing Rules). Results and estimates that were reported before 1 December only have to be re-reported under the new Listing Rules if there has been a 'material change'.

Other FAQs provide information about Competent Person Statements as well as exploration and production targets.

Recent issues in pro-rata rights offerings

In relation to disclosure for pro-rata rights offers, ASIC is continuing our focus on ensuring that disclosure is clear, concise and effective. For offers made under the cleansing notice regime, ASIC looks to ensure that the offer is made in a fully informed market and will carefully consider recent ASX announcements in addition to the cleansing notice. For all pro-rata offers, ASIC is focused on clear disclosure to the market about the control effects and underwriting arrangements.

ASIC is also focused on the use of nominees for foreign holders under s615 of the Act in order to rely on the rights offer takeovers exception in s611, which requires that every person has a reasonable opportunity to accept the offer and the terms of all the offers are the same. ASIC has identified some companies attempting to conduct a rights offer without appointing a nominee, even though they have foreign shareholders in jurisdictions where the offer may not comply with local securities laws. In situations where a shareholder or underwriter will seek to rely on the rights offer exception, ASIC generally expects the company to appoint a nominee that is approved by ASIC.

Crowd sourced funding

Crowd sourced equity funding is a relatively new and evolving form of capital raising that broadly refers to schemes through which a business seeks to raise early-stage funding through offering interests in the business to investors online. In June 2013, the Corporations and Markets Advisory Committee (CAMAC) was asked to review whether Australian law appropriately facilitates crowd sourced equity funding.

CAMAC are now publicly consulting on various high level options, with no one preferred option at this point in time. Submissions are due by 29 November and CAMAC will report on its findings by April 2014.

FOFA and stamping fees

The new Future of Financial Advice provisions prohibit the payment of conflicted remuneration and the charging of asset-based fees on borrowed amounts used to acquire financial products by or on behalf of a retail client.

With respect to IPOs, some kinds of stamping fees paid to brokers who are dealing in IPO shares on behalf of retail clients are excluded from these prohibitions. However, a stamping fee may also be paid to the broker where, in addition to the dealing by the broker on behalf of a retail client, the provider has subscribed for the product on its own behalf or the dealing is on behalf of a person who is not a retail client. There is uncertainty as to the extent to which the stamping fee exclusion applies in that scenario.

In September ASIC publicly advised that we will not take action against a person in relation to the payment and receipt of a stamping fee in the circumstances described above. This no-action position also extends to circumstances where the broker, directly or indirectly, gives the benefit to a representative of the broker. Similar to the stamping fee exclusion in the regulations, this no-action position does not apply in circumstances where the capital raising entity is an “investment entity” within the meaning of that exclusion.

At this stage, the no-action positions will apply until 1 July 2014. The no-action positions, which are effective immediately, will be formalised in a revised Regulatory Guide 246 *Conflicted remuneration* (RG 246), which is scheduled to be published in the coming months.

Mergers & Acquisitions

Takeovers Regulatory Guides

In June 2013, ASIC released four new regulatory guides consolidating and updating a large part of our guidance on takeovers, compulsory acquisition and buyouts and substantial holding disclosure. Some of the more technical issues in the guidance relate to the persons to whom notices of an offer variation must be addressed and sent and when a bidder 'makes a bid' within the meaning of s671(B)(1)(c) of the Act.

In October 2013, ASIC also issued new class order relief, including relevant interest relief, which is designed to facilitate the quotation of exchange traded funds via the

AQUA rules on ASX. As a result, we recently published an updated version of RG 5 to incorporate reference to the new relief.

Takeovers Enforcement Issues

ASIC is applying a heightened focus on takeovers issues arising in our surveillance and monitoring of transactions. In particular, we are considering matters that may warrant enforcement action in the rights offers and substantial holding spaces.

In relation to rights offers, ASIC is focused on control issues arising from rights offerings and other fundraising activity where reliance is placed on items 10 or 13 of s611.

In relation to substantial holding notifications, ASIC is focused on the quality and timeliness of substantial holding disclosure, in particular, disclosure of the nature of a person's relevant interest in the securities, which is particularly important where a person holds its relevant interests in a number of different capacities. Where this is the case, ASIC considers the disclosure must include a detailed breakdown of each portion of the overall holding by reference to each nature of relevant interest in order to provide meaningful information about the nature and extent of a substantial holder's relevant interests in, and influence over, the securities forming part of the substantial holding.

Independent expert's reports in control transactions – s611 Item 7 transactions

ASIC is continuing to focus on the review of Independent Expert reports seeking member approval for a change of control in reliance on Item 7 of section 611 of the Act and we note that some experts have adopted approaches that are inconsistent with our guidance in RG 111, particularly when assessing if the transaction is 'fair'. ASIC considers the appropriate approach is to view the transaction from the perspective of non-associated shareholders by comparing the fair market value of the company shares pre-transaction on a control basis, assuming 100% ownership of the company, with the fair market value of company shares post-transaction on a minority basis, applying a minority discount.

Recently, ASIC has renewed its focus on our policy in Regulatory Guide 112 Independence of Experts. Experts need to maintain independence throughout an engagement and should be very careful to avoid entering into discussions on the valuation methodology and outcome of a report. Full draft reports should not be provided to commissioning parties as part of the fact checking process. ASIC would be concerned by communications to the expert that attempt to pressure the expert into changing their methodology. ASIC considers that an issuer's advisers have an important role in ensuring that independence is preserved.

Where we have concerns in relation to the independence of experts, we will use our compulsory notice powers to review communications between the expert, an issuer and their advisers.

Corporate Governance and other matters

Employee Share Schemes

On 14 November 2013, ASIC released consultation paper CP 218 *Employee incentive schemes*, which contains our proposals to update our guidance in RG 49 and the existing class order relief in CO 03/184. CP 218 raises key questions for consultation, including whether to:

- (a) expand the class of financial products;
- (b) expand the class of persons who Employee Incentive Scheme (EIS) offers can be made to (e.g. to casuals, contractors and prospective employees);
- (c) exclude non-executive directors from participating in EIS plans;
- (d) widen the scope of trust arrangements that can be used;
- (e) widen the scope for unlisted bodies to offer EIS and to permit the offer of performance rights;
- (f) amend the administrative lodgment requirements from having to provide ASIC with a copy of the offer document; and
- (g) create a determination power, permitting ASIC to prevent a particular issuer from relying on the disclosure relief in the new EIS class order.

The consultation period for CP 218 closes on 31 January 2014.

Analyst briefings and confidential information

ASIC recently commenced a project aimed at broadly considering whether there is a problem with the handling of confidential information in our market.

As part of this project, ASIC conducted a review of communications between listed entities and investment analysts during the most recent financial reporting season. ASIC also attended 17 analyst and investor briefings delivered by 11 entities listed on ASX. We consider that analyst briefings can play an important role in increasing the dissemination of accurate information on companies to the market, which can promote a more efficient market and can enhance market integrity. However, any disclosure at briefings must comply with the laws relating to continuous disclosure and insider trading. Where companies engage in selective briefings, it creates opportunities for insider trading and undermines other investors' confidence in the market as a level playing field.

ASIC is also looking at how listed companies and their advisers handle confidential information. Our work in this space has been primarily focused on the handling of confidential information related to transactions such as rights offers and mergers and acquisitions. ASIC considers this to be an important issue, as leaks can not only have serious ramifications with respect to the continuous disclosure and insider trading provisions, but can also negatively impact the success of a transaction and ultimately the integrity of our markets.

ASIC expects to release public reports on analyst briefings and confidential information in the first half of 2014.

Financial reporting for stapled securities

In October 2013, ASIC released a consultation paper on financial reporting by stapled securities issuers. Consultation Paper CP 217 seeks feedback on proposals for presenting combined financial information covering these stapled entities.

Combined financial statements covering entities in a stapled group provide investors with useful information, particularly where there are interrelationships between the entities. However, ASIC notes that stapled entities may technically be unable to present combined financial statements under the new Australian Accounting Standard AASB 10, which applies for reporting periods beginning on or after 1 January 2013.

As a result, ASIC proposes to issue a class order so that stapled entities can present combined financial statements covering all of the entities whose securities are stapled. Submissions to CP 217 close on 30 November 2013.